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Institute on Statelessness and Inclusion
European Network on Statelessness and
Terre des hommes Foundation**

Joint Submission to the Human Rights Council
at the 28th Session of the
Universal Periodic Review

(Third Cycle, 6-17 November 2017)

Switzerland

30 March 2017

Humanrights.ch, Institute on Statelessness and Inclusion, European Network on Statelessness and Terre des hommes Foundation

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Introduction

1. Humanrights.ch, the Institute on Statelessness and Inclusion, the European Network on Statelessness and Terre des hommes Foundation make this joint submission to the Universal Periodic Review in relation to statelessness, access to nationality and human rights in Switzerland.
2. Humanrights.ch (hr.ch)¹ is a Swiss non-profit organisation established in 1999 with the main aim of gathering and providing information, raising public awareness, monitoring state action and counselling on human rights issues and the human rights situation in Switzerland. Hr.ch has particular expertise in coordinating and publishing reports and opinions on the human rights situation in Switzerland and has contributed to a number of reports to UN and Council of Europe monitoring bodies.
3. The Institute on Statelessness and Inclusion (ISI)² is an independent non-profit organisation committed to an integrated, human rights based response to the injustice of statelessness and exclusion through a combination of research, education, partnerships and advocacy. Established in August 2014, it is the first and only global centre committed to promoting the human rights of stateless persons and ending statelessness. Over the past two years, the Institute has made over 10 country specific UPR submissions on the human rights of stateless persons, and also compiled summaries of the key human rights challenges related to statelessness in all countries under review under the 23rd to the 27th UPR Sessions.³
4. The European Network on Statelessness (ENS)⁴ is a civil society alliance of NGOs, lawyers, academics and other independent experts committed to addressing statelessness in Europe. Based in London, it currently has over 100 members (including 55 organisations) in 39 European countries. ENS organises its work around three pillars – law and policy, communications and capacity-building. The Network provides expert advice and support to a range of stakeholders, including governments.
5. Terre des hommes Foundation (Tdh)⁵ is the leading Swiss organisation for child relief. Founded in 1960, Terre des hommes Foundation helps to build a better future for disadvantaged children and their communities, with an innovative approach and practical, sustainable solutions. Active in more than 30 countries, Tdh develops and implements field projects to allow a better daily life for 3 million children and their close relatives, particularly in the domains of health care, child protection and emergencies. This engagement is financed by individual and institutional support, of which 87% flows directly into the programs of Tdh.

¹ For more information about humanrights.ch, please see the website <http://www.humanrights.ch/>.

² For more information about ISI, please see the website <http://www.institutesi.org/>.

³ For more on the Institute's UPR advocacy, see <http://www.institutesi.org/ourwork/humanrights.php>

⁴ For more information about ENS, please see the website <http://www.statelessness.eu/>.

⁵ For more information about Tdh, please see the website <https://www.tdh.ch/en>.

6. This joint submission focuses on the identification and the human rights protection of stateless persons, children's right to a nationality, access to nationality and the protection of stateless persons from arbitrary detention in Switzerland. It draws on the combined expertise of the submitting organisations both in Switzerland and internationally.

The Universal Periodic Review of Switzerland under the First and Second Cycle (2008 and 2012)

7. Switzerland was subject to the UPR under the first cycle in 2008 and under the second cycle in 2012. During the first cycle of review Canada recommended '*to maintain judiciary recourse in the naturalization process*'.⁶ Switzerland accepted the recommendation arguing that it has already been fulfilled, as judiciary recourse in nationality matters is fully guaranteed.⁷
8. During the second cycle one recommendation directly concerned statelessness, while other recommendations indirectly touched upon the situation and the rights of stateless persons in Switzerland.⁸ Switzerland rejected recommendation no. 123.5 on the ratification of the 1961 Convention on the Reduction of Statelessness, but maintained that it '*will continue to fight resolutely and effectively, within the realms of possibility, to reduce the phenomenon of statelessness and defend the legal rights of stateless persons*'.⁹ However, as this submission illustrates, Switzerland does not have in place, adequate legal safeguards or mechanisms to identify and reduce statelessness and to protect the rights of stateless persons.

Switzerland's International Obligations

9. Switzerland is a party to the 1954 Convention relating to the Status of Stateless Persons as well as to the Convention to Reduce the Number of Cases of Statelessness of 1973. It is also a party to core human rights treaties that have provisions related to statelessness and nationality including the International Covenant on Civil and Political Rights (ICCPR, 1966), the Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention on the Rights of the Child (CRC, 1989) and the Convention on the Rights of Persons with Disabilities (CRPD, 2006).
10. Switzerland has not yet ratified the 1961 Convention on the Reduction of Statelessness. Switzerland is also not party to the European Convention on Nationality of 1997 (ECN) and to the Council of Europe Convention on Statelessness in the Context of State Succession of 2006. The Swiss government has on several occasions confirmed its intention to accede to the 1961 Convention or the European Convention

⁶ UN General Assembly, *Report of the Working Group on the Universal Periodic Review: Switzerland*, A/HRC/8/41, 28 May 2008, para 56.9.

⁷ UN General Assembly, *Report of the Working Group on the Universal Periodic Review: Switzerland, Addendum*, A/HRC/8/41/Add.1, 25 August 2008, para 10.

⁸ See the comments to recommendations 122.11, 122.19, 123.5 and 124.1 in the matrix of previous recommendations made to Switzerland in the 2nd UPR Cycle, annexed to this submission.

⁹ UN General Assembly, *Report of the Working Group on the Universal Periodic Review: Switzerland*, A/HRC/22/11, 7 December 2012, para 123.5.

on Nationality.¹⁰ In 2015, the Swiss parliament rejected a proposal to examine an accession to the 1961 Convention.¹¹ So far, no concrete steps have been undertaken to ratify either of these treaties.

11. Switzerland has additional international and regional obligations to protect the liberty and security of all persons and to protect against arbitrary and unlawful detention. These obligations derive from the ICCPR (Article 9) and the European Convention on Human Rights (ECHR, Article 5) which protect the right to liberty and security of the person and freedom from arbitrary detention. Importantly, Article 26 of the 1954 Convention additionally requires States to permit stateless persons 'lawfully in' their territory to choose their place of residence and move freely within the State.¹² International law requires that where immigration detention is necessary for a legitimate purpose, it must be as brief as possible and must not be indefinite.¹³ 'Routine detention of individuals seeking protection on the grounds of statelessness is arbitrary'.¹⁴ Stateless persons also benefit from the general application of international human rights standards found in the core human rights treaties, such as equality before the law, non-discrimination or adequate standard of living. Being associated to the European Union by means of bilateral agreements, Switzerland is furthermore bound by some of the relevant secondary EU legislation in the field, in particular the Return Directive¹⁵ and the Dublin-Regulation¹⁶ which entail certain standards relating to the detention of migrants pending removal or a Dublin-transfer.

Statelessness in Switzerland

12. Article 1.1 of the 1954 Convention relating to the Status of Stateless Persons defines a stateless person as someone "who is not considered as a national by any state under the operation of its law." According to the numbers provided by the Swiss State Secretariat for Migration (SEM) for 2016, 471 persons were registered as stateless, 184 as 'without nationality' and 784 as 'state unknown'¹⁷ in that year.¹⁸ In 2015 those numbers were slightly lower with 445 persons registered as stateless, 182 as 'without nationality'

¹⁰ Federal Council, Onzième rapport sur la Suisse et les conventions du Conseil de l'Europe, 24 August 2016, p. 6840, available at: <https://www.admin.ch/opc/fr/federal-gazette/2016/6823.pdf>; Postulate Paul Günter, *Adhésion à la Convention sur la réduction des cas d'apatridie* (05.3737), available at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20053737>; Federal Council, *Message concernant la révision totale de la loi fédérale sur l'acquisition et la perte de la nationalité suisse*, 4 March 2011, available at: <https://www.admin.ch/opc/fr/federal-gazette/2011/2639.pdf>, p. 2841; Statement by the Federal Council of 11 May 2015 to parliamentary interpellation Pierre-Alain Fridez, *Apatridie des enfants. Où en est la Suisse?* (16.3126), available at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20163126>.

¹¹ Postulate Nadine Masshardt, *Convention sur la réduction des cas d'apatridie* (15.3269), available at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153269>.

¹² According to UNHCR and as confirmed by the drafting history of the 1954 Convention, persons who have applied for statelessness status and who enter into a statelessness determination procedure in a country are 'lawfully in' that country. UNHCR, *Handbook on Protection of Stateless Persons*, 30 June 2014, para 135. Available at: <http://www.refworld.org/docid/53b676aa4.html>.

¹³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paras 15-21, 34. Available at: <http://www.refworld.org/docid/503489533b8.html>.

¹⁴ UNHCR, *Statelessness Handbook* (note 12), para 112. See also European Network on Statelessness, *Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners*, para 2.2. Available at: http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Detention_Toolkit.pdf.

¹⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98.

¹⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31.

¹⁷ Sometimes the SEM also uses the category 'nationality unknown', e.g. in the statistics on unaccompanied minors in Switzerland, available at: https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/asylstatistik/statistiken_uma/uma-2016-f.pdf.

¹⁸ State Secretariat for Migration, *Statistics* December 2016, available at: <https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/auslaenderstatistik/2016/12/2-10-Best-Tot-Kat-d-2016-12.xlsx>.

and 604 as 'state unknown'.¹⁹ These numbers include stateless persons or persons of unknown origin that have been recognised as refugees and granted asylum.²⁰ The Federal Statistical Office released different statistics for 2015 with 339 persons recognised as stateless and 1'467 as 'no indication'.²¹ According to figures provided by the Federal Council in March 2017, in total 404 persons have been recognised as stateless since 2012. Out of these, 352 persons had previously applied for asylum.²² From 2010 to 2015, 136 children below the age of sixteen were recognised as stateless.²³ There is no data on the number of applications for recognition of statelessness and on the approval rates.

13. The category defined by the SEM²⁴ as 'stateless' covers persons who have officially been recognised as stateless according to the 1954 Convention and have been granted a status as a stateless person. The precise definitions of the categories 'without nationality' and 'state unknown' are not known but both may include stateless persons who have not had their statelessness identified or face barriers in doing so, as well as persons who are at risk of statelessness. The lack of clarity in this regard, is of concern.
14. These differing statistical data provided by different Federal authorities, as well as the vagueness of the categories used, illustrate that the real dimension of statelessness in Switzerland is unclear. UNHCR estimates the actual number of stateless persons or of persons at risk of statelessness to be higher than indicated by the data provided by the Federal authorities.²⁵ Moreover, the statistics only include those persons who are known to the authorities. Stateless persons living in Switzerland irregularly are not reflected in the official statistics.²⁶
15. The identification and protection of stateless persons in Switzerland is further hindered by the very narrow definition of statelessness applied by the SEM and the correspondingly low recognition rate. In addition to the criteria set out in the 1954 Convention, persons are only recognised as stateless if they have lost their nationality through no fault of their own and have no means of reinstating it.²⁷ Moreover,

¹⁹ State Secretariat for Migration, Statistics December 2015, available at:

<https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/auslaenderstatistik/2015/12/2-10-Best-Tot-Kat-d-2015-12.xlsx>.

²⁰ State Secretariat for Migration, Statistics December 2015, available at:

<https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/auslaenderstatistik/2015/12/2-30-Best-Flue-Kat-d-2015-12.xlsx>

and Statistics December 2016 available at:

<https://www.sem.admin.ch/dam/data/sem/publiservice/statistik/auslaenderstatistik/2016/12/2-30-Best-Flue-Kat-d-2016-12.xlsx>.

²¹ Federal Statistical Office, Statistics on Foreign permanent resident population by citizenship, 1981-2015, available at:

<https://www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung/migration-integration/auslaendische-bevoelkerung.assetdetail.299719.html>. The difference can, according to the SEM, be explained by the fact that the two authorities use different sources as well as different definitions.

²² Reply by the Federal Council of 6 March 2017 to parliamentary question Leo Müller, *Statut d'apatridie (17.5081)*, available at:

<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20175081>.

²³ Statement by the Federal Council to interpellation Fridez (note 10). Data on the number of stateless children between sixteen and eighteen are not publicly available.

²⁴ The SEM does not publish the definitions on which the categorizations and the statistics are based. Neither does the Federal Statistical Office.

²⁵ UNHCR, *Prévenir l'apatridie, protéger les apatrides, En Suisse et au Liechtenstein*, December 2016. Available at:

http://www.unhcr.ch/fileadmin/rechtsinfos/staatenlosigkeit/UNHCR_Prevenir_l_apatridie_-_Proteger_les_apatrides.pdf. UNHCR is conducting a comprehensive mapping of statelessness in Switzerland, which will presumably be published in early November 2017.

²⁶ There is no data on the number of stateless persons or persons at risk of statelessness among irregular or undocumented migrants in Switzerland. It must, however, be assumed that there are stateless persons as well as persons at risk of statelessness among the roughly 76'000 irregular migrants in Switzerland. The most recent comprehensive study on sans papiers in Switzerland is silent on the issue of statelessness, see Michael Morlok and others, *Les sans-papiers en Suisse, Étude de B,S,S Volkswirtschaftliche Beratung*, December 2015, available at: https://www.sem.admin.ch/dam/data/sem/internationales/illegale-migration/sans_papiers/ber-sanspapiers-2015-f.pdf.

²⁷ See also the information provided by SEM, available at: <https://www.sem.admin.ch/sem/en/home/asy/staatenlosigkeit.html>.

based a broad application of the exclusion in Article 1(2)(i) in the 1954 Convention, Swiss practice excludes all persons from the definition of statelessness who, allegedly, would have the possibility of receiving protection or assistance from another UN agency.²⁸ A more precise evaluation of the exact scope of statelessness in Switzerland is therefore hampered, on the one hand, by the lack of a separate, formal statelessness determination procedure and, on the other, by the restrictive recognition practice.

16. If a person is recognised as stateless by Switzerland, that person is granted a residence permit in the Canton in which he or she is lawfully residing.²⁹ Normally, a residence permit is valid for five years and can be renewed.³⁰ Stateless persons with a residence permit have the same rights as refugees granted asylum, including the right to work, to family reunification, to welfare and to be granted travel documents.³¹ In case a person recognised as stateless has been sentenced to a long-term custodial sentence or seriously or repeatedly violated or threatened public order and security that person will only be granted temporary admission, which leaves the person with a restricted right to work, to welfare and to family reunification.³² So far, persons recognised as stateless who have lawfully resided in Switzerland for at least five years have the right to be granted a permanent residence permit.³³ Permanent residence permits give more extensive rights. In September 2015 the Swiss Parliament decided, however, to eliminate a current privilege of stateless persons vis-à-vis refugees regarding access to a permanent residence permit.³⁴ Just as refugees, stateless persons shall only be able to apply for a permanent residence permit after ten years of legal residence and without having a legal entitlement to such permit. The new rule will enter into force with the revision of the Federal Act on Foreign Nationals, presumably in 2019.³⁵
17. As this submission further elaborates, the status granted to persons recognised as stateless in Switzerland leaves them vulnerable to discrimination, and exposes them to serious human rights challenges.

The Lack of a Formal Statelessness Determination Procedure

18. Switzerland does not have a specific procedure and no specific legal framework for the determination of statelessness. The identification of stateless persons is presently governed by the general legislative framework for administrative acts, namely the Federal Act on Administrative Procedure, and the relevant practice of the SEM and the Federal courts.³⁶ The asylum department within the SEM is responsible for the determination of statelessness, meaning that the procedure is centralised at federal level.³⁷ The authorities have the possibility to initiate the procedure *ex officio* which is rarely done in practice.³⁸ Normally, the procedure is initiated if a person lodges a written and reasoned application for recognition of statelessness, including evidence. In principle, there is no reduced standard of proof in the general

²⁸ Federal Administrative Court, judgment of 7 July 2011, case C-6841/2008. Based on this interpretation Switzerland argues that Palestinians do not fall under the scope of the Convention and are thus not to be recognized as stateless persons.

²⁹ Article 31(1) Federal Act on Foreign Nationals of 16 December 2005 (FNA; SR 142.20).

³⁰ Article 33 FNA.

³¹ Article 38(2), 44 and 59 FNA.

³² Article 31(2) in conjunction with Article 83 FNA.

³³ Article 31(3) FNA. See also the judgment of the Federal Court of 5 September 2016 in case 2C_21/2016.

³⁴ See parliamentary interpellation Gerhard Pfister, *La législation relative au séjour privilégié-t-elle les apatrides? (15.3249)*, available at <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20153249>.

³⁵ AS 2016 3101, 3127.

³⁶ Federal Act on Administrative Procedure of 20 December 1968 (APA; SR 172.021).

³⁷ Article 14 Organization Ordinance of the Federal Department of Justice and Police of 17 November 1999 (SR 172.213.1).

³⁸ Article 25(1) APA.

administrative procedure. Whereas, UNHCR Guidelines call for a reduced standard of proof in determining statelessness, the practice in statelessness proceedings has been inconsistent. In some cases the courts accepted that a claim substantiated with a reduced standard of proof has been made credible,³⁹ whereas they explicitly rejected a reduced standard of proof in other cases.⁴⁰ The burden of proof is shared between the applicant and the state.

19. UNHCR guidance clearly stipulates that statelessness determination should only be concerned with whether the person has nationality at the time of determination:

*An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention.*⁴¹

However, as alluded to above, Swiss authorities apply a narrow interpretation of the definition of statelessness. It is often assumed that applicants would have the possibility to – in future – acquire the nationality of their country of origin which results in a rejection of the application.⁴² Swiss practice also requires that a person lost their former nationality through no fault of their own, which is in contradiction to the 1954 Convention.⁴³ Furthermore, in order for an application to be considered, the applicant has to demonstrate a legitimate interest in determining his or her statelessness.⁴⁴ The current practice in principle denies a legitimate interest where a person has already been recognised as stateless by another State Party of the 1954 Convention, has a right remain in such a state while not having a particular connection to Switzerland, has, against his or her allegations, a nationality or if the person concerned would not receive more favourable rights by being recognised as stateless.⁴⁵ The decision taken by the SEM can be appealed at the Federal Administrative Court and in second instance to the Federal Court.⁴⁶ The procedure is written in one of the official languages. Parties have the right to be heard and to an interpreter if necessary. The procedure is free of charge. Free legal aid can be granted if a person lacks the necessary means, legal representation is necessary to secure that person's rights and if a request or

³⁹ Federal Administrative Court in case D-1770/2014 of 16 February 2015, D-1912/2014 of 8 April 2015 and F-1672/2015 of 22 September 2016.

⁴⁰ Federal Administrative Court in case E-1658/2013 of 14 April 2015 and E-1708/2015 of 15 April 2015. In one case the Federal Administrative Court referred both to the ordinary standard of proof as well as to the standard of credibility, case F-5127/2014 of 8 September 2016.

⁴¹ UNHCR, Statelessness Handbook (note 12), para 50.

⁴² See e.g. the judgment of the Federal Court in case 2C_763/2008 of 26 March 2009 concerning a person that was born in Iraq but lived most of his life in Lebanon, or of the Federal Administrative Court in case C-1048/2006 of 21 July 2010 concerning a Tibetan refugee who was born in Nepal or in case BVGE 2013/60 of 18 September 2013 concerning a group of Roma from Bosnia and Herzegovina.

⁴³ UNHCR, Statelessness Handbook (note 12), para 51. See e.g. the judgment by the Federal Court in case 2C_1/2008 of 28 February 2008, or the Federal Administrative Court in case C-2139/2013 of 30 September 2014.

⁴⁴ Article 25(2) APA.

⁴⁵ State Secretariat for Migration, *Manuel Asile et retour, F5 – Demande de reconnaissance du statut d'apatridie*, available at <https://www.sem.admin.ch/dam/data/sem/asyl/verfahren/hb/f/hb-f5-f.pdf>, p. 9. See also the judgment of the Federal Administrative Court in case F-1672/2015 of 22 September 2016.

⁴⁶ Federal Act on the Federal Administrative Court of 17 June 2005 (SR 173.32) and Federal Act on the Federal Court of 17 June 2005 (SR 173.110).

appeal is not futile. Finally, there is very little accessible information about the procedure for individuals concerned.⁴⁷

20. The identification of stateless persons is of utmost importance in guaranteeing the rights of stateless persons living in the country. While the 1954 Convention to which Switzerland is a party does not explicitly prescribe how stateless persons should be identified, it implicitly requires states 'to identify stateless persons in order to accord them appropriate standards of treatment under the Convention'.⁴⁸ A formal statelessness determination procedure would offer the most effective means to protect the rights of stateless persons⁴⁹, including rights such as the liberty and security of the person. Such a procedure would also allow the state to gain a better understanding of the extent of statelessness and to better monitor the status and treatment of stateless persons in Switzerland.⁵⁰ The co-submitting organisations therefore recommend that Switzerland put in place a dedicated, formal statelessness determination procedure that meets the standards set out in relevant UNHCR guidance.⁵¹
21. In order to determine statelessness in full accordance with the 1954 Convention, a statelessness determination procedure should, according to the UNHCR Handbook on Protection of Stateless Persons, be simple, accessible to everyone within the Swiss territory, fair and efficient.⁵² The procedure should be formalised in law and observe due process guarantees.⁵³ In compliance with these standards, the Swiss statelessness determination procedure should provide for a shared burden of proof, the standard of proof should be reduced and applicants should be offered an individual interview.⁵⁴ Moreover, information and counselling about the procedure should be widely disseminated in order to facilitate access to the procedure.⁵⁵ Additional procedural and evidentiary safeguards for child applicants should be put in place, including 'priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters as well as the assumption of a greater share of the burden of proof by the State'.⁵⁶ Government officials who may come in contact with stateless persons through their regular work (for example, social services or immigration control) should be trained to identify potential applicants and should refer them to the determination procedure.⁵⁷ Finally, authorities involved in the identification of stateless persons should be provided with training on statelessness and the rights of stateless persons.
22. According to Article 31(1) of the Federal Act on Foreign Nationals (FNA) persons recognised as stateless in Switzerland have the right to be granted a residence permit in the canton in which they are legally residing. So far courts have not decided whether this requirement to reside legally in a canton entails a 'lawful stay' requirement based on which persons recognised as stateless could be refused a residence

⁴⁷ Recently, the SEM published general information about the procedure on its website, available at:

<https://www.sem.admin.ch/sem/en/home/asyl/staatenlosigkeit.html>.

⁴⁸ UNHCR, *Statelessness Handbook* (note 12), para 144.

⁴⁹ UNHCR, *Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons*, 11 July 2016, available at: <http://www.refworld.org/docid/57836cff4.html>, p. 2.

⁵⁰ UNHCR, *Global Action Plan to End Statelessness, Action 6*, 4 November 2014, available at:

<http://www.refworld.org/docid/545b47d64.html>; UNHCR, *Mapping Statelessness in Austria*, January 2017, available at: <http://www.refworld.org/docid/58b6e5b14.html>, para 125.

⁵¹ See also Council of Europe, Parliamentary Assembly (PACE), Resolution 1989 (2014) on access to nationality and the effective implementation of the European Convention on Nationality, 9 April 2014, para 5.2.2; Parliamentary Assembly (PACE), Resolution 2099 (2016) on the need to eradicate statelessness of children, 4 March 2016, para 12.2.3.

⁵² UNHCR, *Statelessness Handbook* (note 12), paras 63, 68 and 69.

⁵³ *Ibid*, para 71.

⁵⁴ *Ibid*, paras 71, 89-93.

⁵⁵ *Ibid*, para 68; UNHCR, *Good Practices Paper – Action 6*, (note 49), p. 5.

⁵⁶ UNHCR, *Statelessness Handbook* (note 12), para 119.

⁵⁷ UNHCR, *Good Practices Paper – Action 6*, (note 49), p. 4.

status if they had no prior right to stay. Legal doctrine and practice have, however, interpreted Article 31(1) FNA as not requiring a person applying for statelessness status to have entered the country legally or to have some form of residence permit.⁵⁸ If a person is recognised as stateless, that person is granted a right to remain and has the right to freedom of movement within the entire Swiss territory. This practice is consistent with UNHCR's interpretation of the 1954 Convention according to which 'there is no basis in the Convention for requiring that applicants for statelessness determination be lawfully within a State'.⁵⁹ If a person is recognised as stateless, that person should be granted a residence permit in order to fulfil the object and purpose of the 1954 Convention.⁶⁰

23. The failure to recognise statelessness as a protection issue and the lack of a dedicated statelessness determination procedure also has the consequence that applicants are not granted a special temporary status during the procedure. This is a gap in the legal framework that exposes stateless persons to particular risks, including the risk of arbitrary detention, destitution and possibly attempted removal during a pending decision on the recognition of statelessness.⁶¹ In order to avoid violations of the rights of stateless persons, applicants should not be removed during a determination procedure and instead be granted a temporary legal status, in compliance with the guidance provided in the UNHCR Handbook.⁶² At a minimum, persons applying for statelessness recognition should be issued an identity paper and be granted assistance to meet basic needs, as well as the right to work, freedom of movement and protection against expulsion and arbitrary detention. Ideally, applicants should be offered the same standard of treatment as asylum-seekers.⁶³

The Right of Every Child to Acquire a Nationality

24. Article 7(1) of the Convention on the Rights of the Child and Article 24(3) of the International Covenant on Civil and Political Rights guarantee that every child has the right to acquire a nationality. Article 7(2) CRC requires that state parties '*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*'. Stateless children are vulnerable to discrimination, in particular with regard to access to education, health and assistance, and face the risk of serious human rights violations.
25. The right of the child to acquire a nationality must be implemented in accordance with the general principles of the CRC, including the right to non-discrimination and the best interest of the child.⁶⁴ Articles 3 and 7 of the CRC require that no child should be left stateless for an extended period of time, but should be granted the right to acquire a nationality at birth or as soon as possible after birth.⁶⁵
26. Swiss nationality law does not protect against statelessness at birth. In accordance with the principle of *ius sanguinis* Swiss citizenship is acquired at birth if the parents are Swiss citizens. If a child is born to

⁵⁸ Karen Hamann, *Statelessness determination: the Swiss experience*, Forced Migration Review 54, February 2017, available at: <http://www.fmreview.org/resettlement/hamann.html>, p. 97.

⁵⁹ UNHCR, *Statelessness Handbook* (note 12), para 69.

⁶⁰ *Ibid*, para 147.

⁶¹ See also Karen Hamann (note 58), p. 98.

⁶² UNHCR, *Statelessness Handbook* (note 12), paras 72, 145 and 146.

⁶³ *Ibid*, paras 145 and 146.

⁶⁴ Articles 2 and 3 Convention on the Rights of the Child of 1989.

⁶⁵ UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, available at: <http://www.refworld.org/docid/50d460c72.html>, para 11. See also PACE Resolution 1989 (2014) (note 51), para 5.2.7; PACE, Resolution 2099 (2016) (note 51), para 12.2.2.

stateless parents or if the parents cannot pass on their nationality to their children, the child is also born stateless. Under Swiss nationality law, a stateless child can only acquire Swiss citizenship by means of a 'simplified' naturalisation if he or she has five years of legal residence, one year of which must be immediately before the application for naturalisation is made.⁶⁶ The requirements for a simplified naturalisation are reduced, but the authorities maintain a certain discretion when deciding whether the child is integrated, respects the Swiss legal order and does not pose a threat to Switzerland's internal or external security.⁶⁷ The legal residence requirement is contrary to Switzerland's international obligations and can have the result that children born stateless in Switzerland are not able to acquire Swiss nationality, simply because their parents are irregular migrants.⁶⁸ The possibility of simplified naturalisation does not require that the child is born in Switzerland, however, it expires once the stateless child turns eighteen. Since the entry into force of the simplified naturalisation procedure in 2006, ten stateless children have been naturalised.⁶⁹ Foundlings acquire Swiss nationality automatically.⁷⁰

27. The acquisition of Swiss citizenship by naturalisation can be declared null if it was acquired fraudulently, even if this results in statelessness.⁷¹ Under the current Citizenship Act the nullification of naturalisation can be extended to all family members, including children, who acquired Swiss citizenship on the same basis.⁷² While the SEM has in the last years refrained from extending the nullification to children if it would result in statelessness, there has been no explicit legal basis for this practice.⁷³ The co-submitting organisations note that the new Swiss Citizenship Act entering into force on 1 January 2018 will improve the situation by explicitly prohibiting the inclusion of children in a decision to nullify the naturalisation of their parents if they would otherwise become stateless.⁷⁴
28. The current Swiss practice with regard to the right of children to a nationality is at variance with its obligations under international law. The Parliamentary Assembly of the Council of Europe has pointed out that the relevant legislation in Switzerland 'contains insufficient or no safeguards against childhood statelessness, in breach of regional and international obligations'.⁷⁵ In its most recent review of Switzerland, the Committee on the Rights of the Child held as follows:

*'the Committee is concerned that children born in the State party, who would otherwise be stateless, are not guaranteed a right to acquire Swiss nationality [...] The Committee also recommends that the State party ensure that all children born in its territory acquire Swiss nationality irrespective of the legal status of their parents, if they would otherwise be stateless.'*⁷⁶

⁶⁶ Article 30 in conjunction with Article 36(1) Federal Act on the Acquisition and Loss of Swiss Citizenship of 29 September 1952 (SCA; SR 141.0).

⁶⁷ The general requirements for a facilitated naturalization are enshrined in Article 26 SCA and have to be fulfilled in case of a simplified naturalization for stateless children.

⁶⁸ CtteeRC, *Concluding observations on the combined second to fourth periodic reports of Switzerland*, 26 February 2015, CRC/C/CHE/CO/2-4, available at: <http://www.refworld.org/docid/566e80214.html>, para 31.

⁶⁹ Statement by the Federal Council to interpellation Fridez (note 10).

⁷⁰ Article 6 SCA.

⁷¹ Article 41 SCA.

⁷² Article 41(3) SCA.

⁷³ State Secretariat for Migration, *Manuel Nationalité, Chapitre 6: Annulation de la naturalisation*, available at: <https://www.sem.admin.ch/dam/data/sem/rechtsgrundlagen/weisungen/buergerrecht/hb-bueg-kap6-f.pdf>. See also judgment by the Federal Administrative Court in case C-5957/2009 of 24 July 2012.

⁷⁴ Article 37(4)(b) Federal Act on Swiss Citizenship of 20 June 2014 (AS 2016 2561), entry into force on 1 January 2018.

⁷⁵ See also PACE, Resolution 2099 (2016) (note 51), para 8.

⁷⁶ CtteeRC, *Concluding observations* (note 68), paras 30 and 31.

Access to Swiss Nationality for Stateless Persons

29. Article 32 of the 1954 Convention requires States to ‘facilitate the assimilation and naturalization of stateless persons’ and ‘in particular [to] make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings’.⁷⁷ While, as set out above, Article 30 of the Swiss Citizenship Act of 1952 provides for a ‘simplified’ naturalisation for stateless children under certain conditions there is no facilitated mode of naturalisation for stateless persons above the age of 18.
30. Adult stateless persons wishing to apply for naturalisation as Swiss citizens will have to fulfil the generally applicable conditions for acquiring citizenship. On federal level, these conditions are set out in Articles 14 and 15 of the Swiss Citizenship Act, and require that a person applying for citizenship:
- is integrated into Swiss society;
 - is familiar with Swiss habits, customs and practices;
 - abides by Swiss law;
 - does not pose a risk to Swiss internal or external security;
 - and has resided in Switzerland for at least twelve years, including three of the last five years before lodging the application (under the new law the residence period will be reduced to ten years, including three during the last five years before application).
31. Because of the federal threefold structure of Swiss citizenship, applicants for naturalisation furthermore have to fulfil the requirements regarding integration and prior residence imposed by cantonal and municipal legislation. The requirements on cantonal and municipal level can even go beyond the requirements set on federal level. Depending on which canton a person resides in, naturalisation can be more difficult. In sum, the process of ordinary naturalisation in Switzerland is lengthy, complicated, burdensome, costly and based on difficult material conditions.⁷⁸ The new Swiss Citizenship Act, which will enter into force on 1 January 2018, will be even more restrictive. Even though the residence requirement will be reduced to ten years, the material naturalisation criteria will be tightened and it will be required that applicants have a permanent residence permit before they can apply for naturalisation. The hurdles for stateless persons to acquire Swiss citizenship – even when they formally fulfil all the conditions set out above – are thus high and will remain so under the new law. This leaves stateless persons in Switzerland without effective access to a nationality within reasonable time.

Risk of Arbitrary Detention

32. It is unclear how many stateless persons are detained in Switzerland during an asylum or statelessness determination procedure or pending removal. Detention of migrants is within the responsibility of the cantons which is why the Federal state does not make data on administrative detention of migrants – and especially on the nationality or origin of persons in administrative detention – publicly available.⁷⁹ There is a risk that stateless persons in detention are not identified as stateless but instead are

⁷⁷ See also PACE Resolution 1989 (2014) (note 51), para 5.2.2.

⁷⁸ See also CtteeERD, Concluding Observations on the combined fourth to sixth periodic reports of Switzerland, 23 September 2008, CERD/C/CHE/CO/6, available at: <http://www.refworld.org/pdfid/48eb24a02.pdf>, para 18.

⁷⁹ See Swiss Center for Expertise in Human Rights, *Mise en œuvre des droits humains en Suisse, Un état des lieux dans le domaine thématique Migration*, 2013, available at https://register.weblaw.ch/bookinfo.php?method=download&book_id=316&download_id=122, para 206; Michael Flynn & Cecilia Cannon, *Immigration Detention in Switzerland, A Global Detention Project Special Report*, October 2011, available at: <http://www.refworld.org/docid/545b356c4.html>, p. 32; AIDA Asylum Information Database, Country Report: Switzerland, 2016 Update, available at: http://www.asylumineurope.org/sites/default/files/report-download/aida_ch_2016update.pdf, p. 77.

categorized as 'persons with unknown nationality'. For these reasons, it is impossible to determine how many stateless persons or persons at risk of statelessness are detained and for how long. Furthermore, as applicants for statelessness determination are not granted a temporary status, there is a risk that they might be detained while their application for statelessness is being considered, in particular if previously a removal order was issued against them. Stateless persons staying on Swiss territory without status might even face a custodial sentence for unlawful stay.⁸⁰ There is, however, no reliable statistical information on whether applicants for statelessness determination have been threatened with removal or with sanctions for unlawful stay. Finally, the risk of repeated detention also remains. For example, when stateless persons or persons at risk of statelessness are released without legal residence status, they face the threat of being detained anew as an irregular migrant.

33. Administrative detention of migrants in Switzerland has the purpose of ensuring that a removal order is enforced.⁸¹ In principle, detention is only allowed as a measure of last resort if no less intrusive means can be used.⁸² In practice, detention can be ordered for a number of reasons and is often routinely imposed.⁸³ Furthermore, the federal system and the discretion of cantonal authorities in implementing enforcement measures and in ordering detention can result in largely differing practices among the cantons.⁸⁴ The intention of the government to increase the number of detention places by 500-700 appears particularly worrisome in that context.⁸⁵ The co-submitting organisations would like to emphasize that Switzerland has the responsibility to fulfil its international obligations to all stateless persons within its jurisdiction, regardless of the federal system.⁸⁶ In particular, the vulnerability of stateless persons has to be assessed and alternatives to detention should be considered in each individual case.

Recommendations

34. The Human Rights Council has stated that '[t]he second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the State under review'.⁸⁷ In light of the fact that statelessness was not focused on under the first and second cycle of review and that Switzerland has not fully accepted and implemented all recommendations that relate to the rights of stateless persons, the co-submitting organisations propose the following recommendations:

- I. Fully promote, respect, protect and fulfil its obligations towards stateless persons under international human rights law.

⁸⁰ Article 115 FNA.

⁸¹ Articles 75 ff. FNA.

⁸² Fundamental Rights Agency, Handbook on European law relating to asylum, borders and immigration, Version adapted to Swiss Law, 2015, available at: https://fra.europa.eu/sites/default/files/fra_uploads/handbook-law-asylum-migration-ch_de.pdf, p. 233.

⁸³ Swiss Center for Expertise in Human Rights (note 79), para 205.

⁸⁴ Swiss Center for Expertise in Human Rights (note 79), para 225.

⁸⁵ Arbeitsgruppe Neustrukturierung, *Gesamtplanung Neustrukturierung des Asylbereichs, Schlussbericht*, 18 February 2014, available at: <https://www.sem.admin.ch/dam/data/sem/aktuell/news/2014/2014-03-28/ber-agna-d.pdf>, p. 14.

⁸⁶ CtteeRC, *General Comment No. 5 (2003), General Measures of Implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at: <http://www.refworld.org/docid/4538834f11.html>, paras 40 and 41; CtteeCPR, *Concluding observations of the Human Rights Committee: Switzerland*, 3 November 2009, CCPR/C/CHE/CO/3, available at: <http://www.refworld.org/docid/4afbd552.html>, para 6; CtteeRC, *Concluding observations* (note 68), paras 12 and 13.

⁸⁷ Human Rights Council, *Resolution 16/21: Review of the work and functioning of the Human Rights Council*, April 2011, A/HRC/RES/16/21, Annex 1, para 6.

- II. Accede to and fully implement the 1961 Convention on the Reduction of Statelessness.
- III. Accede to and fully implement the 1997 European Convention on Nationality.
- IV. Formalise the statelessness determination procedure and ensure that the procedure is fair, effective and accessible to all persons in Switzerland regardless of their legal status. The procedure should comply with international standards of due process and follow the procedural safeguards outlined in UNHCR's Handbook on Protection of Stateless Persons. Switzerland should create a specific temporary status for applicants in line with the relevant recommendations in the UNHCR Handbook.
- V. Ensure that the definition of 'stateless person' is fully consistent with the definition provided in the 1954 Convention and that no stateless persons are excluded from this definition on extraneous criteria.
- VI. Collect and make publicly available reliable, disaggregated data on statelessness, including data on access to and results of existing statelessness determination measures, stateless men, women and children, stateless persons in the asylum procedure and stateless persons in detention.
- VII. Provide regular training and awareness raising on statelessness and the protection of human rights of stateless persons to all relevant state authorities, including staff of the SEM.
- VIII. Put in place safeguards to ensure that all children born in Switzerland who would otherwise be stateless acquire Swiss nationality automatically at birth in accordance with Switzerland's obligations under Article 7 of the Convention of the Rights of the Child.
- IX. Introduce a facilitated naturalisation procedure for all stateless persons in accordance with Switzerland's obligations under Article 32 of the 1954 Convention relating to the Status of Stateless Persons.
- X. Ensure that stateless persons or persons at risk of statelessness are not subjected to arbitrary detention because of their status. Where evidence suggests that a person subject to immigration detention may be stateless or at risk of statelessness that person should be referred to a statelessness determination procedure.