

PART A: ARTICLES

DOES THE RIGHT TO BIRTH REGISTRATION INCLUDE A RIGHT TO A BIRTH CERTIFICATE?

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Abstract

International human rights law has long recognised the right of every child to have their birth registered. However, what is less clear is what this right encompasses. For example, does the normative content of the right to birth registration include a right to a birth certificate? This is a question that has become very relevant to Indigenous Australians many of whom are experiencing difficulties acquiring a birth certificate. This article argues that the right to birth registration, as set out in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, implicitly includes the right to a birth certificate. This conclusion is reached following an analysis of the work of the Human Rights Committee and the Committee on the Rights of the Child.

Keywords: birth certificate; birth registration; Convention on the Rights of the Child; ICCPR; Indigenous; international human rights law; United Nations Human Rights Committee; United Nations Committee on the Rights of the Child

1. INTRODUCTION

Birth registration is widely regarded as gateway to the attainment of other fundamental rights because it facilitates access to essential services such as education and health.¹

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¹ Todres, J., 'Birth Registration: An Essential First Step Toward Ensuring the Rights of All Children', *Human Rights Brief*, Vol. 10, No. 3, 2003, pp. 32–35; Sharp, N., *Universal Birth Registration – A*

Indeed, international human rights law unquestionably recognises a right to birth registration. This right is enshrined in a range of human rights treaties, including the International Covenant of Civil and Political Rights (ICCPR)² and the Convention on the Rights of the Child (CRC).³ In this article, the authors focus on the ICCPR because it is part of the International Bill of Human Rights and, thus, afforded preeminent status in international human rights law.⁴ Likewise, the CRC is also an important human rights instrument that has more ratifications than any other human rights treaty. Moreover, it specifically focuses on the rights of children, which is particularly relevant to the issue of birth registration. Finally, the authors have decided to focus on these two treaties in relation to the issue of birth registration and birth certificates because the UN bodies monitoring these treaties have produced a substantial body of work for analysis.

While a right to birth registration has been clearly recognised, it is less clear whether such a right includes a right to a birth certificate. Without a birth certificate the individual benefits flowing from birth registration are illusory. The importance of this issue has recently been highlighted in Australia, where it has become apparent that a number of Indigenous people are experiencing difficulties obtaining a birth certificate, even if their birth was registered, and this is significantly impeding their ability to realise basic citizenship and human rights.⁵ These hardships lead to the question: does international human rights law require that Australia have in place a system that provides not only universal birth registration, but also ready access to a birth certificate?

This article argues that a right to a birth certificate is an implicit part of the right to birth registration. Whilst registering every birth provides the *State* with valuable data about its population, it does little to protect the *individual* unless a birth certificate is also provided. It is the birth certificate that is the gateway to the enjoyment of all human rights and privileges associated with citizenship. It is the birth certificate that provides the substance to the right to birth registration.

Universal Responsibility, Plan International, Surry Hills, 2005; Doek, J., 'The CRC and legal protection against statelessness and deprivation of/denial of nationality' (Paper presented at the meeting of the Open Society Justice Initiative, Approaches to Combating Statelessness and Arbitrary Deprivation of Nationality, New York, 8–9 May 2006); Heap S. and Cody C., 'The Universal Birth Registration campaign', *Forced Migration Review*, Vol. 32, 2009, pp. 20–22; Ziemele, I., *Commentary on the United Nations Convention on the Rights of the Child: Article 7 The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents*, Martinus Nijhoff Publishers, Leiden, 2007.

² International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, Article 24(2).

³ Convention on the Rights of the Child 1989, 28 ILM 1448, Article 7.

⁴ See Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR commentary*, 2nd Ed, N.P. Engel Publisher, Khel, 2005.

⁵ Orenstein, J., 'The Difficulties Faced by Aboriginal Victorians in Obtaining Identification', *Indigenous Law Bulletin*, Vol 7, No 8, 2008, at pp. 14–17; Orenstein, J., 'Being Nobody – The Difficulties Faced by Aboriginal Victorians in Obtaining Identification' (Paper presented at the National Association of Community Legal Centres Conference, Perth, 14–17 September 2009).

Part 2 of this article exposes the problems that many Indigenous Australians are facing when they attempt to obtain a birth certificate. This case study provides context for the analysis of the right to birth registration that follows. It illustrates how the right to birth registration does little to promote and protect an individual's human rights if it is not accompanied by a birth certificate. Part 3 examines the provenance of the right to birth registration in international law, and reveals that the history of this human right provides no clear guidance on whether it was intended that the right to birth registration include a right to a birth certificate. Therefore further interpretation is required. The interpretive process codified under the Vienna Convention on the Law of Treaties (Vienna Convention)⁶ provides that a broad and practical approach to the interpretation of treaties is permissible, and it is this approach that informs the authors' examination of the work of the Human Rights Committee (HRC) and the Committee on the Rights of the Child (CRC Committee) on the content of the right to birth registration and a right to a birth certificate. This analysis supports the authors' conclusion that a right to a birth certificate is necessarily implied into the right to birth registration. However, the authors suggest that it would be highly desirable for the relevant treaty committees, whose work heavily informs these conclusions, to clearly articulate, with coherent legal analysis, the precise content of the right to birth registration by way of a General Comment.

2. BIRTH CERTIFICATE PROBLEMS EXPERIENCED BY INDIGENOUS AUSTRALIANS

A birth is registered by recording it on a civil register; as such it is an official record of a person's existence. A birth certificate logically follows registration as it certifies the registration and is the 'most visible evidence of a government's legal recognition of the existence of a child as a member of society'.⁷ Therefore it is the birth certificate that acts as the primary documentary evidence that a State acknowledges a responsibility for the child. It also acts as a prerequisite for accessing the range of human and citizenship rights.

Each of Australia's six states and two territories has their own system of birth registration, but in all jurisdictions, the registration of a birth and the issuance of a birth certificate are separate processes, requiring distinct applications. Furthermore, while birth registration is free, there is a fee for obtaining a birth certificate.⁸

⁶ Vienna Convention on the Law of Treaties, 1969, 1115 UNTS 331.

⁷ United Nations Children's Fund, 'Birth Registration: Right From The Start', *Innocenti Digest*, Vol. 9, 2002, pp. 1–32, at p. 2.

⁸ See Victorian Registry of Births, Deaths and Marriage, available at: www.bdm.vic.gov.au/. All websites last accessed on 24 January 2011; see also Gerber, P., 'Making Indigenous Australians "Disappear": Problems arising from our birth registration system', *Alternative Law Journal*, Vol. 34, No. 3, 2009, pp. 158–162, at p. 167; Gerber, P., 'Making Visible the Problem of Invisibility', *Law Institute Journal*, Vol. 83, No. 10, 2009, pp. 52–55.

Anecdotal evidence suggests that Indigenous Australians are encountering difficulties obtaining a birth certificate.⁹ There appear to be two principle causes of this inability to obtain a birth certificate, namely that the birth was never registered, or the birth was registered but the person is unable to subsequently satisfy the bureaucratic requirements that are imposed on applicants seeking to obtain a copy of their birth certificate.¹⁰

Whilst the non-registration itself acts as an impediment to accessing a birth certificate, evidence also indicates that an inability to comply with the bureaucratic requirements to obtain a copy of a birth certificate at a subsequent date is an issue of concern in its own right. This stems from the inflexible administrative requirements of the Births, Deaths and Marriages Registries,¹¹ which appear to have a disproportionate negative impact on Indigenous Australians. In particular, there are stringent requirements regarding proof of identification that some Indigenous Australians struggle to satisfy, and fees are levied that are beyond the reach of those without financial means.

The problems faced by Indigenous Australians endeavouring to obtain a birth certificate have recently received much attention in the state of Victoria, but are also prevalent in other jurisdictions. For example, Tangentyere Council in Alice Springs reported that in the Northern Territory obtaining birth certificates is a systemic problem for Indigenous people, particularly those born in remote locations.¹² In Dubbo, a town in regional New South Wales, an Aboriginal Birth Certificate Registration Project was established to address the problem of young Indigenous Australians not being able to participate in sporting competitions because they could not produce a birth certificate to verify their age.¹³

As noted above, birth registration is not automatic upon the birth of a child, and a birth certificate is not automatically issued upon birth registration. The completion of a further application and the payment of a prescribed fee act as an impediment to many Indigenous parents' obtaining a birth certificate for their child at the time of birth registration.¹⁴ The Registrar of Births, Deaths and Marriages has the discretion

⁹ Gargett, A., Gerber, P. and Castan, M., 'A Right to Birth Registration in the Victorian Charter? Seek and You Shall Not Find!', *Monash University Law Review*, Vol. 36, No 2, 2011 (forthcoming); see also Gerber, Making Indigenous Australians "Disappear", *loc.cit.* note 8; Gerber, Making Visible the Problem of Invisibility, *loc.cit.* note 8; Orenstein, The Difficulties Faced by Aboriginal Victorians in Obtaining Identification, *loc.cit.* note 5; Orenstein, Being Nobody, *loc.cit.* note 5. See also the papers presented at the Castan Centre for Human Rights Law Symposium on Indigenous Birth Registration and Birth Certificates, available at: www.law.monash.edu/castancentre/events/2009/indigenous-birth-registration-symposium.htm.

¹⁰ Gargett et al, *loc.cit.* note 9; Gerber, Making Indigenous Australians "Disappear", *loc.cit.* note 8.

¹¹ The government bodies responsible for the registration of births and the issue of birth certificates.

¹² Klerck, M. email to Orenstein, J. dated 2 July 2009. Copy on file with authors.

¹³ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, 2009, at [11.34].

¹⁴ The fee varies amongst the different states and territories, and ranges from AU\$26.60 to \$42.

to waive the fee, or part of it, in appropriate circumstances,¹⁵ but available evidence indicates that this discretion is rarely exercised in favour of Indigenous applicants.¹⁶

If a person seeks to obtain a birth certificate after the time of registration, the Births, Deaths and Marriages Registrars generally require that three separate documents establishing identity must be produced.¹⁷ This requirement similarly impedes Indigenous Australians from obtaining a birth certificate. Many of the required identification documents (e.g. a driver's licence and passport) can only be obtained by a person who already has a birth certificate. This creates a 'vicious circle' whereby a birth certificate will not be provided because a person cannot produce the requisite identity documents, which themselves required a birth certificate in order to be obtained.¹⁸ Applicants are also required to produce identity documents which include a current address. This can be problematic for persons who do not have a fixed address, which includes some Indigenous Australians. As it currently stands, Births, Deaths and Marriages Registries refuse to accept 'Proof of Aboriginality' documents as proof of identity, yet these documents are the most readily available form of identification for many Indigenous Australians because they are issued by Indigenous organisations rather than government departments.¹⁹

In each Australian state and territory, the principal office of Births, Deaths and Marriages Registries are located in the capital cities of each state and territory. In Victoria, until recently, people living outside of the state capital had to either travel to the capital city or apply for a certificate by mail or online. Additional requirements are imposed on people who do not apply in person at the registry office. In particular, if the application is submitted via mail or online, the identity documents that accompany the application must be certified by a police officer. This requirement negatively impacts on Indigenous Australians, many of whom do not live in capital cities. The relationship between Indigenous Australians and the police is widely recognised as dysfunctional.²⁰ There is no obvious reason why lawyers, or others who are recognised as being fit and proper persons to witness affidavits and other legal instruments, could not also certify the identity documents.²¹

¹⁵ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 49.

¹⁶ Gargett et al, *loc.cit.* note 9.

¹⁷ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 47 confers power on Victorian Registry to maintain written policies for the access of the register including the issue of certificates. It is this policy that prescribes the identification requirements. For the proof identity policy for a birth certificate application see Victorian Registry of Birth Deaths and Marriages, Application for Birth Certificate, available at: www.bdm.vic.gov.au.

¹⁸ Gerber, Making Visible the Problem of Invisibility, *loc.cit.* note 8; Gargett et al, *loc.cit.* note 9.

¹⁹ Proof of Aboriginality documentation is a signed document bearing the seal of an Aboriginal organisation: Orenstein, Being Nobody, *loc.cit.* note 5.

²⁰ Cunneen, C., *Conflict, Politics and Crime: Aboriginal Communities and the Police*, Allen & Unwin, Crows Nest, 2001.

²¹ Gargett et al, *loc.cit.* note 9.

The system outlined above appears to have a disproportionate impact on Indigenous Australians. This may be because:

- (1) Many Indigenous Australians live at or below the poverty line²² and consequently may not have the financial capacity to pay the prescribed fee for a birth certificate;
- (2) Indigenous Australians may not be aware of the significance, importance and benefits of birth registration and birth certificates;
- (3) Indigenous Australians may lack the confidence in dealing with authorities and are often marginalised from mainstream services;
- (4) There may be a general suspicion of authorities by Indigenous Australians regarding the registration of children stemming in part from the 'Stolen Generations';²³
- (5) Cultural and language barriers may be an impediment;²⁴
- (6) Literacy issues²⁵ may create problems completing requisite forms as part of the registration and certificate issuance process; and
- (7) The proof of identity documents must be certified by the police who have historically had a problematic relationship with Indigenous communities.²⁶

²² Carr, S. and Sloan, T., *Poverty and Psychology: From Global Perspective to Local Practice*, Kluwer Academic Publishers, New York, 2003, at p. 253.

²³ The Stolen Generations refers to Indigenous Australians who were forcibly removed from their parents and family. It was official government policy until 1969. In 1997 the Human Rights and Equal Opportunity Commission (now known as Australian Human Rights Commission) tabled the *Bringing the Home Report*, a national inquiry into these removals in federal parliament: Human Rights and Equal Opportunity Commission, *Bringing Them Home*. One of the recommendations of the *Bringing Them Home Report* was that the Federal Parliament issue a national apology to the Stolen Generations. In February 2007, Prime Minister Rudd made the apology: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2008, at p. 171 (The Hon Kevin Rudd MP, Prime Minister).

²⁴ Nationally, 12.1 percent of Indigenous Australians speak an Indigenous language as their primary language. This figure varies across Australia. For example, in the Northern Territory 59.1 percent of Indigenous Australians speak an Indigenous language as their primary language. See Steering Committee for the Review of Government Service Provision, *op cit.* note 13, at [A.34].

²⁵ The most compressive statistics on Indigenous Australians literacy levels is from children in school. In 2008, only 68.3 percent of year 3 Indigenous students met the national minimum standards. This can be compared to 93.5 percent of non-Indigenous students. At year 5 this comparator was 63.4 percent for Indigenous against 92.6 percent for non-Indigenous. At year 7, 71.9 percent for Indigenous against 95.4 for non-Indigenous and for year 9 it was 70.7 percent for Indigenous against 94.2 percent for non Indigenous students: Steering Committee for the Review of Government Service Provision, *op.cit.* note 13, at [4.38].

²⁶ Nationally Indigenous adults are 13 times more likely to be imprisoned than non-Indigenous adults and Indigenous juveniles are 28 times more likely to be imprisoned than non-Indigenous juveniles: Calma, T., Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, Australian Human Rights Commission, Sydney, 2010, at p. 9.

In June 2010, the Victorian Registry of Births, Deaths and Marriages established 12 Regional Service Centres across Victoria.²⁷ Although this is a welcome initiative, it remains unclear whether the establishment of these regional centres alone can address the problem. It may solve some proof of identity requirements, as documents presented in person to these regional centres do not have to be certified by police. However, the establishment of regional centres does not address the problem of fees, and importantly, the registration of births and the issuance of birth certificates remain distinct processes.

The problems that Indigenous Australians face trying to live their lives without a birth certificate are illustrated below. These examples highlight the practical importance of answering the question: does a right to birth registration include a right to a birth certificate?

JW is an Indigenous mother of six children all under the age of 12 living in the Gippsland region of Victoria. The children's births were registered however no certificates were issued. JW's sole income is child support payments. She was notified by the school her children attend that she must supply birth certificates to continue their attendance. The Child Support Agency²⁸ also required JW to provide copies of her children's birth certificates to verify paternity in order to continue to receive child support payments. JW could not afford the money required to pay for the six certificates. While waiting to save or borrow the money, her children could not enrol at school and the child support payments were suspended, making it even more difficult to save enough money to pay for the certificates.²⁹ Thus, JW's children's education was negatively impacted as a direct consequence of her inability to access copies of her children's birth certificates.

AH and TH were 15-year-old Indigenous girls involved in an employment program. Neither had birth certificates which prevented them from obtaining a tax file number (TFN).³⁰ As a consequence, the girls were taxed at the highest tax rate, significantly reducing their take home pay. The administrative process the girls had to undertake to try and obtain birth certificates was lengthy and intimidating. By the time the employment program had expired the girls were still without birth

²⁷ Victorian Registry of Birth Deaths and Marriages, Regional Service Centres, *available at*: www.bdm.vic.gov.au.

²⁸ This is the government body in Australia that is responsible for administering the child support scheme, whereby separated parents make payments for the benefit of their children.

²⁹ Orenstein, The Difficulties Faced by Aboriginal Victorians in Obtaining Identification, *loc.cit.* note 5; Orenstein, J., 'Being Nobody: Difficulties faced by Koori Victorians in obtaining ID' (Paper presented at the Castan Centre for Human Rights Law Symposium on Indigenous Birth Registration and Birth Certificates, 1 December 2009), *available at*: law.monash.edu/castancentre/events/2009/indigenous-birth-registration-symposium.html.

³⁰ Tax file numbers are issued by the Australian Taxation Office to individuals and organisations to assist with the administration of the Australian tax system. Whilst holding a tax file number is not mandatory, individuals that do not have a tax file number will have more tax withheld and may be ineligible to receive some government benefits. See Australian Taxation Office, Tax file number essentials, www.ato.gov.au/individuals/.

certificates and therefore TFNs. The girls withdrew from the program and were left disillusioned with mainstream employment.³¹ Once again, the impact on the girls' educational and employment experience was disproportionate, and directly caused by the lack of documentation.

JD from Maningrida, a remote community in the Northern Territory, was involved in a program to train Indigenous Australians as marathon runners set up by former Australian Olympic marathon runner Robert De Castella. East Timor's inaugural marathon was selected as the first international marathon the Indigenous runners would compete in. De Castella commented that 'Just getting there was something of an achievement. [...] For one thing, how do you get a passport for people who don't have a birth certificate or driver's license? Without the support of the AFP [Australian Federal Police] and NT [Northern Territory] Police, I'm not sure we would have got there'.³²

Beyond these anecdotes, a driver education program in South-Eastern Victoria provides further evidence of the extent of the problem. In 2007, a coalition of community groups established the Gippsland East Aboriginal Driver Education Project. This project was created in an attempt to reduce the contact that Indigenous peoples were having with the criminal justice system.³³ Driver education was earmarked as a way of reducing some of the driving related factors that resulted in Indigenous youths coming into contact with the police, e.g. through unlicensed driving, and driving unroadworthy vehicles.³⁴ One hundred and twenty Indigenous participants enrolled in the program, but it turned out that half did not have, or could not obtain, a birth certificate. The program included the completion of all necessary merit and skill requirements to obtain a driver's licence. However, the 60 participants without birth certificates could not produce the requisite identification, and were, thus, unable to obtain a driver's licence upon completion of the program.³⁵

The above examples of disadvantage suffered by Indigenous Australians who are unable to produce a birth certificate, demonstrates the pivotal role that such a certificate plays in the enjoyment of human rights. Even individuals whose births were registered find that they still cannot obtain a passport that enables them to travel, or a license to drive a car, if they cannot produce the piece of paper that proves their birth was registered. From the perspective of the individual it is the birth *certificate* that is crucial to their full participation in society; birth registration alone achieves little.

By 2009, the problems encountered by Indigenous Australians emerged on the radar of the Victorian Registry of Births Deaths and Marriages. In response, the Registry conducted 16 Aboriginal Community Information Sessions in June and July

³¹ Orenstein, *op.cit.* note 29.

³² Overington, C., 'Deeks talent scouting faces marathon Dili Test', *The Australian*, 19 June 2010.

³³ For discussion on the overrepresentation of Indigenous peoples in the criminal justice system see: Calma, *op.cit.* note 26, chapter 2.

³⁴ Orenstein, *Being Nobody*, *loc.cit.* note 5.

³⁵ *Idem.*

2009 in regional areas throughout Victoria.³⁶ The issue of 312 birth certificates during these sessions provides further indication of the scale of the problem.³⁷ As noted above, in 2010 the Victorian BDM created a number of Regional Service Centres. It is beyond the scope of this article to examine these initiatives in detail, however, the authors note with concern, that these steps appear to have been taken without any genuine consultation with, and participation of, Indigenous peoples.³⁸ This is inconsistent with a human rights based approach to engagement with Indigenous peoples.³⁹ It is also inconsistent with a best practice methodology to ensure Indigenous focused programs are most effective.⁴⁰

As the above examples demonstrate, there is a real problem in Australia with many Indigenous people being unable to obtain a birth certificate, irrespective of whether their birth was registered, and this significantly impedes their ability to function effectively within society, and further marginalises some of Australia's most marginalised people.⁴¹ It is for this reason that the authors were prompted to examine whether the right to birth registration in international human rights law includes a right to a birth certificate.

3. PROVENANCE OF A RIGHT TO BIRTH REGISTRATION IN INTERNATIONAL LAW

Given that a birth certificate operates to certify the registration of a birth, it is logical to examine the right to birth registration when looking for a right to a birth certificate. The starting point when examining the genus of a human right is generally the Universal Declaration of Human Rights (UDHR) which marked the development of the modern day system of international human rights law.⁴² However, with respect to the right to birth registration, the UDHR provides no assistance, as it contains no provision relating to this right. Some 10 years later, the 1959 UN Declaration on the Rights of the Child provided that 'the child shall be entitled from his birth to a name and a nationality', but did not expressly include a right to have his or her birth

³⁶ Gerber, Making Indigenous Australians "Disappear", *loc cit.* note 8.

³⁷ Information provided by Orenstein, J., 29 Sept. 2009, copy of email on file with authors.

³⁸ Gargett et al, *loc.cit.* note 9; Gerber, Making Indigenous Australians "Disappear", *loc.cit.* note 8.

³⁹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/29513 September 2007, UN Doc. A/RES/61/295, Article 19. See also United Nations Development Group, *Guidelines on Indigenous Peoples' Issues* (2008), available at: www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf.

⁴⁰ See Northern Territory Emergency Response Review Board, *Report of the Northern Territory Review Board*, 2008.

⁴¹ See Steering Committee for the Review of Government Service Provision, *op.cit.* note 13.

⁴² Brownlie, I., *Principles of Public International Law*, 7th ed, Oxford University Press, Oxford, 2008.

registered.⁴³ The right to birth registration is a distinct and separate right, whereby the State records and acknowledges the existence and legal personality of a child.⁴⁴ It was only during the drafting of the ICCPR, that the right to birth registration was added to the right to a name.⁴⁵

3.1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The ICCPR, along with the International Covenant on Economic, Social and Cultural Rights,⁴⁶ are the treaties intended to give legal effect to the rights enunciated in the UDHR. These covenants give further content to the UDHR and create legally binding human rights obligations.⁴⁷ Together these three instruments form what is known as the International Bill of Human Rights, represent the ‘core of human rights protection in the world community’, and are the most authoritative universal minimum standards of present international human rights law.⁴⁸ The ICCPR also retains standalone significance, and Joseph, Castan and Schultz suggest that ‘it is probably the most important human rights treaty in the world’ as it is general in nature rather than focusing on a specific issue (like the Torture Convention),⁴⁹ and it applies to all people (unlike the CRC).⁵⁰ Furthermore, significant jurisprudence has been developed on the rights contained in the ICCPR, and it has been incorporated into the domestic law of many countries.

The right to birth registration is enunciated in Article 24(2) of the ICCPR. It states ‘every child shall be registered immediately after birth and shall have a name’. The text is notable for its brevity and does not provide guidance on the content of the right.⁵¹ Importantly, it is silent on whether the provision includes a right to a birth certificate. As a consequence of this silence, it is necessary to further examine the right to see if a right to a birth certificate can be necessarily implied.

The inability to obtain a birth certificate leads to an inability to obtain proof of identity documentation, which in turn creates a problem of legal identity. Without

⁴³ United Nations Declaration on the Rights of the Child, GA Res. 1386 (XIV), 20 November 1959, UN Doc. A/4354, Annex, principle 3.

⁴⁴ United Nations Children’s Fund, *Implementation Handbook for the Convention on the Rights of The Child*, United Nations Children’s Fund, New York, 2002.

⁴⁵ Nowak, *op.cit.* note 4.

⁴⁶ International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3.

⁴⁷ See Nowak, *op.cit.* note 4; Joseph, Schultz, and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed, Oxford University Press, Oxford, 2004.

⁴⁸ Nowak, *op.cit.* note 4, at XIX, XX.

⁴⁹ Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984, A/39/51.

⁵⁰ Joseph et al, *op.cit.* note 47, at [1.01].

⁵¹ Alston has argued Covenant rights are often ‘either too short or too long’: Alston, ‘Making Space for New Human Rights: The Case of the Right to Development’, *Harvard Human Rights Year Book*, Vol 1, 1988, pp. 3–40, at p. 31.

this essential documentation a person may not be recognised as a legal personality. This makes Article 16 of the ICCPR also relevant. It states ‘everyone shall have the right to recognition everywhere as a person before the law’. Nowak suggests:

The right of each newborn child to immediate registration [...] in a state register of births is closely related to the right to his or her identity, which follows from the protection of privacy and the right to recognition before the law guaranteed by article 16. Only by registration is it guaranteed that the existence of a new born child is legally recognized.⁵²

Nowak does not go far enough in his comments, in that it is registration, and a *certificate* of registration, that is needed in order to guarantee a person’s legal recognition. The link between the right to recognition before the law and the right to a birth certificate and identification documents is underdeveloped,⁵³ and as a consequence, the authors do not consider it further here, other than to note that cogent arguments exist that the inability to obtain a birth certificate is potentially a violation of the right to be recognised before the law.⁵⁴

The HRC was established pursuant to Article 28 of the ICCPR to supervise and monitor State Parties’ compliance with the ICCPR. It is comprised of 18 independent human rights experts.⁵⁵ The HRC’s findings and recommendations are not legally binding. Nevertheless, through its decisions on complaints of breaches of Covenant rights, and its publication of General Comments, the HRC provides the most authoritative interpretations of the ICCPR.⁵⁶ A number of factors support this contention. First, treaty bodies operate more as legal than political bodies and the “views” of the Committee[s] in substance involve decisions on issues of law and fact’.⁵⁷ Second, they are the primary interpreters of treaties which are legally binding, and as Joseph, Castan and Schultz suggest, an undue rejection of a HRC communication by a State Party, is indicative of failing to act in good faith towards their treaty obligations.⁵⁸ Third, there is increasing reliance on the work of treaty bodies by domestic courts, for example the President of the New Zealand Court of Appeal, Cooke P referred to the

⁵² Nowak, *op.cit.* note 4, pp. 559–60.

⁵³ Joseph et al, *op.cit.* note 47.

⁵⁴ See Gargett et al, *loc.cit.* note 9.

⁵⁵ Although they are appointed by Governments they serve in their personal capacity. To ensure the standards of impartiality are followed, the HRC has adopted rules of procedure for its members to follow: Human Rights Committee, Rules of Procedure for the Human Rights Committee, UN Doc. CCPR/C/3/Rev.7 (2004). ICCPR, *supra* note 2, Article 28. See Joseph et al, *op.cit.* note 47, at [1.31]-[1.56] for more detailed comment on the HRC’s roles and functions.

⁵⁶ Joseph et al, *op.cit.* note 47, at [1.41]-[1.42]; Nowak, *op.cit.* note 4, pp. 746–750.

⁵⁷ Brownlie, *op.cit.* note 42, at 567; Joseph et al, *op.cit.* note 47; See also Mechlem, K., ‘Treaty Bodies and the Interpretation of Human Rights’, *Vanderbilt Journal of Transnational Law*, Vol. 42(3) 2009, pp. 905–947.

⁵⁸ Joseph et al, *op.cit.* note 47, at [1.51].

HRC as ‘in substance a judicial body of high standing’.⁵⁹ As a result, analysis of the HRC’s work provides valuable assistance in interpreting the content of the right to birth registration, and this is analysed in Part 4 below.

[add a transition to the next section] The provenance of the CRC is now considered in order to ascertain whether it provides any further insight into the normative content of the right to birth registration.

3.2. CONVENTION ON THE RIGHTS OF THE CHILD

The drafting of the CRC took place over a period of ten years before being adopted by the UN General Assembly in 1989. It has the prestige of being the human rights treaty with the most ratifications. Only the United States and Somalia have not ratified the CRC, although both States have taken the initial step of signing the treaty.⁶⁰ Given the child-centric nature of the CRC, it is not surprising that this treaty includes a right to birth registration. Article 7 states, ‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents’. Although less succinct than Article 24(2) of the ICCPR, the content is essentially the same. For the current purposes it does not provide additional guidance on the precise normative content of this right.

The Committee on the Rights of the Child was established pursuant to Article 43 of the CRC to monitor State Parties’ compliance. It functions in much the same way as the HRC in that it is comprised of independent experts, and its work, whilst not legally binding, is regarded as the most authoritative interpretation of the CRC.⁶¹ The chief distinction is that the CRC Committee does not yet have competency to consider individual complaints.⁶² Nevertheless, like the HRC, the work of the CRC Committee is of assistance in the current interpretive process.

⁵⁹ *Tavita v Minister of Immigration* [1994] 2 NZLR 257, at 259. For Australian authority see: *Re Woolley; Ex Parte Applicants M276/2003* (2004) 225 CLR 1, at 42–43 (McHugh J); *Cornwell v The Queen* (2007) 231 CLR 260, at 321–322 (Kirby J). For Canadian authority see: *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, at 348 (Dickson CJ).

⁶⁰ See United Nations Treaty Collection Website, *Convention on the Rights of the Child*, available at: treaties.un.org.

⁶¹ United Nations Children’s Fund, *Implementation Handbook*, *op.cit.* note 44; Detrick, S. A *Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, The Hague 1999.

⁶² However, in 2009 the Human Rights Council established an Open-ended Working Group to explore the possibility of drafting an optional protocol to the CRC which would provide for individual communications to the CRC: UN Human Rights Council, Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure, UN Doc. A/HRC/RES/11/1 (2009).

4. DOES THE RIGHT TO BIRTH REGISTRATION INCLUDE A RIGHT TO A BIRTH CERTIFICATE?

In order to ascertain whether a right to a birth certificate is part of the right to birth registration it is helpful to look at three distinct aspects of the work of the HRC and CRC Committee, namely: (i) General Comments published by these two committees; (ii) opinions of the HRC expressed in response to individual communications; and (iii) concluding observations on State Parties' periodic reports regarding their compliance with the ICCPR and the CRC. The interpretative principles set out in the Vienna Convention enable these resources to be used to assist with the interpretation of human rights treaties.⁶³

4.1. GENERAL COMMENTS

General Comments are published by treaty bodies as a tool to explain and elaborate on the substantive and procedural obligations of a treaty. General Comments are the most appropriate vehicle to elaborate on the legal content of a treaty as they involve the analysis of the normative content of specific treaty provisions. McGoldrick notes that General Comments 'represent the [Committee's] accumulated experience of years of consideration of a particular article [...] they have the potential to be profoundly influential [...] [and] perform a key function of giving some substantive content to the articles concerned'.⁶⁴ However, they are compromise documents because they have to be agreed upon by the entire Committee.⁶⁵ Notwithstanding this, State Party reports indicate that there is a general acceptance of the analysis in General Comments,⁶⁶ and consequently they can arguably be considered as subsequent practice for the interpretative process in accordance with Article 31(3) of the Vienna Convention.

4.1.1. Human Rights Committee

Older HRC General Comments were brief and lacked legal analysis, whereas more recent ones provide detailed analysis.⁶⁷ It is unfortunate that HRC General Comment 17 on the normative content of Article 24, published in 1989, consists of a mere eight paragraphs, and is a stark example of the former practice of the HRC of not including

⁶³ Vienna Convention on the Law of Treaties, *supra* note 7, articles 31–32; Mechlem, *loc.cit.* note 57.

⁶⁴ McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford, 1994, at p. 471.

⁶⁵ Brownlie, *op.cit.* note 42; Office of the High Commissioner for Human Rights, *Civil and Political Rights: The Human Rights Committee Fact Sheet No: 15*, available at: www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf.

⁶⁶ Mechlem, *loc.cit.* note 58; see also, Craven, M., *The International Covenant on Economic Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995.

⁶⁷ Joseph et al, *op.cit.* note 47.

any in-depth analysis of the norm.⁶⁸ This brevity is compounded by the fact that only one paragraph is dedicated to the right to birth registration, despite it constituting one third of Article 24. It would have been appropriate for the discussion on this particular right to constitute close to one third, rather than one eighth, of the General Comment. The sole paragraph dedicated to the right to birth registration states:

Under article 24, paragraph 2, every child has the right to be registered immediately after birth and to have a name. In the Committee's opinion, this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality. Providing for the right to have a name is of special importance in the case of children born out of wedlock. The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant. Reports by States parties should indicate in detail the measures that ensure the immediate registration of children born in their territory.⁶⁹

This indicates that the predominate purpose of the right is to prevent maltreatment of children. It also indicates that the HRC conceives the right to birth registration as a gateway event to the attainment and protection of other rights. This is significant because it focuses on the individual benefits of birth registration (i.e. the protection of rights). Without a certificate to prove the registration how can an individual use birth registration as a gateway to the attainment of other rights? Thus, for an individual, registration without an accompanying certificate does little to facilitate the realisation of other rights. Nevertheless, a right to a birth certificate was not explicitly stated by the HRC, and overall this General Comment fails to provide State Parties with clear guidance on the content and scope of this right.⁷⁰ As such, it is inadequate because it is largely descriptive, lacks substantive analysis and is silent on the role of birth certificates within the right to birth registration.

4.1.2. *Committee on the Rights of the Child*

In light of the general inadequacy of General Comment 17 published by the HRC, it is unfortunate that the CRC Committee has not published its own General Comment on the right to birth registration as set out in Article 7 of the CRC. However, despite the absence of a holistic analysis of the right to birth registration within a General Comment, the CRC Committee has referred to the right sporadically throughout various General Comments relating to other provisions of the CRC.

⁶⁸ Human Rights Committee, General Comment No 17: Rights of the Child (Article 24), UN Doc. HRI/GEN/1/Rev.6, at 144 (1989).

⁶⁹ *Ibidem*, at [7].

⁷⁰ See also Gerber, Making Indigenous Australians "Disappear", *loc cit.* note 8.

In General Comment 9, the CRC Committee elaborated on the rights of children with a disability.⁷¹ The CRC Committee commented on birth registration, acknowledging that non-registration of a child's birth has 'profound impacts' on the attainment of other rights, but was silent on the issue of birth certificates.⁷²

General Comment 10 on Juvenile Justice provides the most insight into the CRC Committee's conception of the right to birth registration and the role that birth certificates play in the realisation of that right. The CRC Committee stated that it:

wishes to emphasize the fact that it is crucial for the full implementation of article 7 [...] that every child shall be registered immediately after birth to set age-limits one way or another, which is the case for all States parties. A child without a provable date of birth is extremely vulnerable to all kinds of abuse and injustice regarding the family, work, education and labour, particularly within the juvenile justice system. *Every child must be provided with a birth certificate free of charge* whenever he/she needs it to prove his/her age.⁷³ (Emphasis added)

In this clear articulation, the CRC Committee stresses that proof of age is an essential component of the right to birth registration and that proof of age is critical to providing adequate protection for children. Furthermore, a birth certificate, which should be provided free of charge, is *the* mechanism for a child to establish proof of age. The CRC Committee explicitly characterised the provision of a birth certificate as both a fundamental component of the right to birth registration as well as the means through which other rights are realised.

In General Comment 11, the CRC Committee considered the application of the CRC to the rights of Indigenous children. In reference to the right to birth registration, the CRC Committee stated:

States parties are obliged to ensure that all children are registered immediately after birth and that they acquire a nationality. Birth registration should be free and universally accessible. The Committee is concerned that indigenous children, to a greater extent than non-indigenous children, remain without birth registration and at a higher risk of being stateless.

Therefore, States parties should take special measures in order to ensure that indigenous children, including those living in remote areas, are duly registered. Such special measures, to be agreed following consultation with the communities concerned, may include mobile

⁷¹ Committee on the Rights of the Child, General Comment No 9: The rights of children with disabilities, UN Doc. CRC/C/GC/9 (2007), at [35]-[36].

⁷² *Idem.* See also Committee on the Rights of the Child, General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (2005), at [3]; Committee on the Rights of the Child, General Comment No 3: HIV/AIDS and the rights of the child, UN Doc. CRC/GC/2003/3 (2003), at [32].

⁷³ Committee on the Rights of the Child, General Comment No 10: Children's rights in juvenile justice, UN Doc. CRC/C/GC/10 (2007), at [39].

units, periodic birth registration campaigns or the designation of birth registration offices within indigenous communities to ensure accessibility.

States parties should ensure that indigenous communities are informed about the importance of birth registration and of the negative implications of its absence on the enjoyment of other rights for non-registered children. States parties should ensure that information to this effect is available to indigenous communities in their own languages and that public awareness campaigns are undertaken in consultation with the communities concerned.⁷⁴

A General Comment focusing specifically on the rights of Indigenous children is welcome, especially considering the direct reference to the global problems of birth registration within Indigenous communities. Unfortunately, however, the CRC Committee was silent on the issue of birth certificates.

General Comments are an ideal vehicle for treaty bodies to elaborate on the normative content of a right. When read in conjunction, the General Comments of the HRC and the CRC Committee that make reference to the right to birth registration, consistently indicate that the right should be interpreted in a broad purposive manner and affirm the right operates as a gateway to the attainment of other rights. Unfortunately, the HRC's General Comment on Article 24 is brief, predominantly descriptive and silent on a right to a birth certificate.⁷⁵ Although General Comment 10 by the CRC Committee explicitly states that a birth certificate must be provided free of charge, the CRC the Committee did not comprehensively address the right to birth registration and the role of birth certifications in the realisation of that right.

Of the four General Comments that touch on birth registration (one from the HRC and three from the CRC Committee), only one refers to a State Party providing the individual with proof of registration (General Comment No. 10 from the CRC Committee), and this assertion was not based on a comprehensive analysis of the relevant CRC provisions. Thus, while the assertion that a birth certificate is a necessary component of the right to birth registration was acknowledged in the CRC Committee's General Comment No. 10, there is still no robust, analytical articulation of the normative content of this right. The General Comments that do touch on this issue are helpful interpretative tools, but fall short of an explicit, in-depth enunciation that the right to birth registration encompasses a right to a readily accessible birth certificate.

⁷⁴ Committee on the Rights of the Child, General Comment No 11: Indigenous children and their rights under the Convention, UN Doc. CRC/C/GC/11 (2009), at [41]-[43].

⁷⁵ Human Rights Committee, General Comment No 17, *op.cit.* note 68.

4.2. INDIVIDUAL COMMUNICATIONS

Pursuant to the First Optional Protocol of the ICCPR,⁷⁶ the HRC has competency to hear communications from individuals alleging breaches of ICCPR by State Parties.⁷⁷ Individual communications are particularly useful because they give the HRC the opportunity to apply the legal content of the ICCPR to a given factual scenario.

The right to birth registration is one of the more neglected areas of individual communication jurisprudence. However, there is one informative communication on Article 24(2), namely *Monaco vs Argentina*.⁷⁸ In the 1970s, Ms. Vicario (then aged nine months) and her parents were taken by the police. The parents were never seen again, and Ms. Vicario was adopted by a nurse. After searching for Ms. Vicario for almost seven years, Mrs. Monaco, the child's grandmother finally located her. The nurse who was raising Ms. Vicario denied that Mrs. Monaco was the grandmother and stated that she had raised the child since birth. Genetic blood tests effectively refuted the nurse's story revealing a 99.82% certainty that Mrs. Monaco was Ms. Vicario's grandmother. Mrs. Monaco spent the next ten years in the domestic legal system of Argentina trying to obtain custody of Ms. Vicario, and to ensure her identity, including a birth certificate that accurately reflected her birth details. Eventually, Mrs. Monaco referred the matter to the HRC which found 'the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant which is designed to promote recognition of the child's legal personality'.⁷⁹ This case is of particular relevance because the HRC found that the failure to issue accurate identity papers, including a birth certificate, constituted a breach of the right to birth registration. The decision recognises that a birth certificate is part of the right to birth registration. Unfortunately, the HRC merely stated that the factual scenario was in violation of the right without further analysis. Although this finding is welcome, it is regrettable that the HRC was not more rigorous in its analysis and that it failed to detail the rationale behind its finding.

4.3. CONCLUDING OBSERVATIONS

Concluding Observations are the final part of the dialogue process of the State Party reporting system. They provide a treaty body with the opportunity to make recommendations to a State Party about how to better implement treaty provisions.⁸⁰ In reference to the HRC, Buergenthal has suggested that Concluding Observations

⁷⁶ Optional Protocol to the International Covenant on Civil and Political Rights, 1966, 999 UNTS 302.

⁷⁷ It is beyond the scope of this article to fully discuss the procedures involved in this individual communications see: Joseph et al, *op.cit.* note 47, at [1.45]-[1.55]; Nowak, *op.cit.* note 4.

⁷⁸ (400/1990), UN Doc. CCPR/C/53/D/400/1990 (1995).

⁷⁹ *Ibidem*, at [10.5].

⁸⁰ Joseph et al, *op.cit.* note 47.

‘must be viewed as authoritative pronouncements on whether a State has or has not complied with its obligations under the Covenant’ and as such, Concluding Observations provide ‘some insights about the manner in which the Committee interprets the Covenant’.⁸¹

4.3.1. Human Rights Committee

The HRC has made infrequent references to the right to birth registration in its Concluding Observations. Since 1998, it has referred to the right in only 13 Concluding Observations.⁸² However, some of these 13 Concluding Observations suggest that the HRC construes a right to a birth certificate as falling within the right to birth registration.⁸³ For example in its Concluding Observations on Bosnia Herzegovina, the HRC voiced its concern:

about the frequent failure of health institutions to issue birth certificates for Roma children whose parents have no health insurance or other means to pay hospital fees, although this documentation is necessary for registering a child with the public authorities and for the child’s access to basic rights such as health insurance and education.⁸⁴

Unfortunately, this observation is overly brief and vague. It does not explicitly state that children have a right to a birth certificate pursuant to the right to birth registration, nor that the failure to issue birth certificates for Roma children constitutes a violation

⁸¹ Buergenthal, T., ‘The Human Rights Committee’, *Max Planck Year Book of United Nations Law*, Vol. 5, 2001, pp. 341–398, at p. 347.

⁸² Human Rights Committee, Concluding Observations regarding Chad, UN Doc. CCPR/C/TCD/CO/1 (2009), at [27]; Human Rights Committee, Concluding Observations regarding Japan, UN Doc. CCPR/C/JPN/CO/5 (2008), at [28]; Human Rights Committee, Concluding Observations regarding Ireland, UN Doc. CCPR/C/IRL/CO/3 (2008), at [8]; Human Rights Committee, Concluding Observations regarding Panama, UN Doc. CCPR/C/PAN/CO/3 (2008), at [19]; Human Rights Committee, Concluding Observations regarding Sudan, UN Doc. CCPR/C/SDN/CO/3 (2007), at [17]; Human Rights Committee, Concluding Observations regarding Honduras, UN Doc. CCPR/C/HND/CO/1 (2006), at [18]; Human Rights Committee, Concluding Observations regarding Bosnia and Herzegovina, UN Doc. CCPR/C/BIH/CO/1 (2006), at [22]; Human Rights Committee, Concluding Observations regarding the Democratic Republic of the Congo, UN Doc. CCPR/C/COD/CO/3 (2006), at [25]; Human Rights Committee, Concluding Observations regarding Paraguay, UN Doc. CCPR/C/PRY/CO/2 (2006), at [22]; Human Rights Committee, Concluding Observations regarding Thailand, UN Doc. CCPR/CO/84/THA (2005), at [22]; Human Rights Committee, Concluding Observations regarding Latvia, UN Doc. CCPR/CO/79/LVA (2003), at [17]; Human Rights Committee, Concluding Observations regarding Ecuador, UN Doc. CCPR/C/79/Add.92 (1998), at [18]; Human Rights Committee, Concluding Observations regarding Uruguay, UN Doc. CCPR/C/79/Add.90 (2008), at [18].

⁸³ Human Rights Committee, Concluding Observations regarding Ireland, *op.cit.* note 82, at [8]; Human Rights Committee, Concluding Observations regarding Bosnia and Herzegovina, *op.cit.* note 82, at [22]; Human Rights Committee, Concluding Observations regarding Thailand, *op.cit.* note 82, at [22].

⁸⁴ Rights Committee, Concluding Observations regarding Bosnia and Herzegovina, *op.cit.* note 82, [22].

of Article 24 of the ICCPR. However, it does reinforce the gateway conception of the right to birth registration. Fortunately, the Concluding Observations of the CRC Committee are far more comprehensive in their attention to the right to birth registration.

4.3.2. *Committee on the Rights of the Child*

In the last ten years, the CRC Committee has issued 200 Concluding Observations. Of these, 139, or 69.5 per cent included a direct reference to the right to birth registration.⁸⁵ This consistent reference to a right to birth registration reflects the extent of non-registration in many countries.⁸⁶ The CRC Committee has repeatedly expressed its concern about the non-registration of vulnerable groups. For example:

Iran (2005) '[the Committee] is also concerned about reports that a large number of children born of non-Iranian parents, and in particular Afgan parents [...] remain unregistered'.⁸⁷

Greece (2002) 'The Committee is concerned that the rights of some children, and particularly child members of some distinct ethnic, religious, linguistic and cultural groups such as the Roma, to birth registration is not respected'.⁸⁸

Cambodia (2000) 'Children of non-Khmer citizens, regardless of their legal status, or refugees, when born in Cambodia, should always be registered at birth even if they are not entitled to Cambodian nationality'.⁸⁹

Special focus is often paid to the non-registration of Indigenous children:

The Philippines (2009) 'the Committee notes with concern that there are 2.6 million unregistered children in the country, most of whom are Muslim and indigenous children living in Mindanao'.⁹⁰

These Observations are tailored to the specific situation of the country in question. This indicates the importance that the CRC Committee places on the realisation of this right, especially in relation to people who are particularly vulnerable or marginalised,

⁸⁵ See Committee on the Rights of the Child, Sessions, *available at*: www2.ohchr.org/english/bodies/crc/sessions.htm.

⁸⁶ See Cody, C., *Count Every Child: The Right to Birth Registration*, Plan International, Woking, 2009.

⁸⁷ Committee on the Rights of the Child, Concluding Observations regarding Iran, UN Doc. CRC/C/15/Add.254 (2005), at [37].

⁸⁸ Committee on the Rights of the Child, Concluding Observations regarding Greece, 1 February 2002 UN Doc. CRC/C/15/Add.170 (2002), at [40].

⁸⁹ Committee on the Rights of the Child, Concluding Observations regarding Cambodia, UN Doc. CRC/C/15/Add.128 (2000), at [30].

⁹⁰ Committee on the Rights of the Child, Concluding Observations regarding the Philippines, UN Doc. CRC/C/PHL/CO/3-4 (2009), at [36]-[37].

such as Indigenous people and minorities. This tailored consideration can be contrasted with Gerber's critique of the treatment of the right to human rights education by the Committee on Economic, Social and Cultural Rights (CESCR).⁹¹ In an examination of ten years of the CESCR's Concluding Observations, Gerber found that its treatment of human rights education was frequently cursory and consisted of generic or verbatim statements.⁹² Gerber argued that this type of response does not provide State Parties with guidance on how to implement the right to human rights education, and suggests that this right is not a priority for the Committee.⁹³ Juxtaposing the CRC Committee's comments on right to birth registration with Gerber's analysis of the CESCR provides further evidence of the seriousness with which the right to birth registration is viewed by the CRC Committee. The importance afforded to the right to birth registration, and the tailored consideration given to various State Parties' birth registration issues provides justification for a broad purposive construction of the right.

The status afforded to the right to birth registration is further manifested in the CRC Committee's focused on the consequences of non-registration and specifically its impact on the realisation of other rights. For example:

Republic of Serbia (2008) 'The Committee is concerned that [the birth registration system] may place Roma and internally displaced children in a vulnerable position as undocumented citizens and consequently excluded from access to basic services'.⁹⁴

Chile (2007) 'The Committee is also concerned that refugee, asylum seeking and migrant children lack adequate access to health services while their applications to the national registry system are being processed'.⁹⁵

These Observations are consistent with the conception of the right to birth registration as facilitating the realisation of other rights as articulated in the General Comments published by the HRC and the CRC Committee.⁹⁶ This is most explicitly acknowledged in the Concluding Observations for the Marshall Islands, where the CRC Committee stated that an 'effective' birth registration system 'ensure[s] all children fully enjoy

⁹¹ As protected under Article 13(1) ICESCR, *supra* note 46.

⁹² Gerber, P., *Understanding Human Rights: Educational Challenges for the Future* (2011, forthcoming), Chapter 3.

⁹³ *Ibidem*.

⁹⁴ Committee on the Rights of the Child, Concluding Observations regarding Serbia, UN Doc. CRC/C/SRB/CO/1 (2008), at [33]-[34].

⁹⁵ Committee on the Rights of the Child, Concluding Observations regarding Chile, UN Doc. CRC/C/CHL/CO/3 (2007), at [63].

⁹⁶ Human Rights Committee, General Comment No 17, *op.cit.* note 68; Committee on the Rights of the Child, General Comment No 9, *op.cit.* note 71; Committee on the Rights of the Child, General Comment No 6, *op.cit.* note 72; Committee on the Rights of the Child, General Comment No 3, *op.cit.* note 72; Committee on the Rights of the Child, General Comment No 10, *op.cit.* note 73.

their fundamental rights'.⁹⁷ This makes it clear that CRC Committee is of the view that the right to birth registration must be given a practical interpretation because the focus is on its practical effects, namely the realisation of other rights. A birth certificate becomes important because it provides the necessary evidence of registration. In this regard, it is the *certificate*, not the registration that actually leads to the realisation of other rights.

The CRC Committee has also frequently referred specifically to birth certificates in its Concluding Observations. Of the 139 Concluding Observations that make direct reference to the right to birth registration, 42 make reference to birth certificates or proof of identity documentation.⁹⁸ It is worth noting that between 2004–2009, 39.8 per cent of the Concluding Observations referred to birth certificates, compared with 16.1 per cent between 2000–2003. This increased attention suggests a more general acceptance by the CRC Committee of the important role that birth certificates play in the realisation of the right to birth registration, or alternatively, an increased awareness of the problem of non-issuance of birth certificates. The CRC's General Comment 10 on Juvenile Justice, explicitly characterised a birth certificate as part of the right to birth registration, was published in 2007, further supporting the conclusion that the CRC Committee has, in recent years, increased its focus on the ability of individuals to obtain a birth certificate.⁹⁹

This quantitative analysis of the Concluding Observations is bolstered by a qualitative analysis of the language used by the CRC Committee. For example, the CRC Committee has made specific reference to State Parties' failure to issue birth certificates, including:

Bolivia (2009) 'The Committee welcomes that article 97 of the Child Code establishes that all children should be inscribed in the civil register, and that the first birth certificate is free [...]. The Committee recommends that the State Party continue to take all necessary measures to ensure registration of all children, especially in rural areas, and that it take steps to identify all children who have not been registered or obtained an identity document'.¹⁰⁰

Romania (2009) 'The Committee is in particular concerned that despite legislation requiring the registration of children within 30 days from ascertaining their abandonment, a very high proportion of abandoned children leave maternity hospitals without a birth certificate [...]. The Committee recommends that the State party raise awareness among

⁹⁷ Committee on the Rights of the Child, Concluding Observations regarding Marshall Island, UN Doc. CRC/C/15/Add.139 (2000), at [33].

⁹⁸ See Committee on the Rights of the Child, *op.cit.* note 85.

⁹⁹ Committee on the Rights of the Child, General Comment No 10, *op.cit.* note 73.

¹⁰⁰ Committee on the Rights of the Child, Concluding Observations regarding Bolivia, UN Doc. CRC/C/BOL/CO/4 (2009), at [34]-[35].

hospital staff, administrators and other health professionals, about their responsibilities to register births and to facilitate the issuing of birth certificates'.¹⁰¹

Importantly, this use of language of responsibilities indicates that the CRC Committee view State Parties as having legal duties relating to the issue of birth certificates. These comments, along with the following extracts from a selection of Concluding Observations, suggest that the CRC Committee conceives the provision of a birth certificate as a fundamental component of the birth registration process:

Djibouti (2008) 'the Committee notes with concern that around 10 percent of children in Djibouti do not have a birth certificate and that the non-provision of birth certificates particularly affects non-Djiboutian children [...]. The Committee recommends that the State party continue and strengthen its efforts to encourage birth registration of all children, including children living in remote areas, children living on the street, children of refugees and other non- Djiboutian children'.¹⁰²

Papua New Guinea (2004) '[the Committee] is also concerned at the lack of a comprehensive decentralized birth registration system and at the fact that parents have to pay fees to get a birth certificate for their children [...]. The Committee urges the State party to increase its efforts to ensure that all children are registered at birth, including through awareness-raising campaigns, and to facilitate procedures of birth registration, notably by suppressing any fees and decentralizing the system'.¹⁰³

In the Observation on Djibouti the CRC Committee expresses concern about the non-provision of birth certificates; however, the actual recommendation refers only to registration, and does not call on the State Party to increase its efforts regarding the issuance of birth certificates. The language used is not ideal, and it would be helpful if the CRC Committee followed up its in-depth observations, with in-depth recommendations, rather than using generic terms like birth registration to apparently also encompass birth certificates. However, when read with other Concluding Observations, and the General Comment on Juvenile Justice, the preferable view is that the CRC Committee conceives of certificates as a necessary component of the registration process. This cogent assertion would benefit from a clear enunciation of such by the CRC Committee.

The CRC Committee has also used its Concluding Observations to specifically acknowledge the role of a birth certificate in the attainment of other rights:

¹⁰¹ Committee on the Rights of the Child, Concluding Observations regarding Romania, UN Doc. CRC/C/ROM/CO/4 (2009), at [35]-[36].

¹⁰² Committee on the Rights of the Child, Concluding Observations regarding Djibouti, UN Doc. CRC/C/DJI/CO/2 (2008), at [33]-[34].

¹⁰³ Committee on the Rights of the Child, Concluding Observations regarding Papua New Guinea, UN Doc. CRC/C/15/Add.229 (2004), at [33]-[34].

Gambia (2001) ‘The Committee is also concerned that children do not easily obtain birth certificates, which are necessary for access to education [...]. The Committee also recommends facilitating the issuance of birth certificates, for example by combining birth registration with the automatic and issuance of a free birth certificate’.¹⁰⁴

This is explicit acknowledgement is markedly similar to the HRC’s Observations on Bosnia Herzegovina. This provides further weight to the assertion that treaty bodies recognise that it is the birth *certificate* – the evidence of the registration – that actually opens the gateway for access to other rights such as education, not registration on its own.

Read in their entirety, the CRC Committee’s Concluding Observations that refer to the right to birth registration, lead to the following conclusions: First, the right to birth registration is viewed as a priority by the CRC Committee. Second, the CRC Committee is especially concerned about non-registration in communities whose rights are vulnerable to abuse. Third, the right is given a practical conception (i.e. as a gateway event for the attainment of other rights), and fourth, a birth certificate is an essential part of an effective system of birth registration so as to ensure the practical aims of birth registration are realised.

These conclusions make it clear that the CRC Committee views a birth certificate as a ‘necessary’ part of the right to birth registration. As already stated, this conclusion would be bolstered by a clear and explicit articulation by the CRC Committee. A contrary conclusion would be illogical and would not be a good faith interpretation of the CRC Committee’s work. This reading gives effect to the teleological approach permitted by the Vienna Convention. Accordingly, the ‘necessary’ substance, namely the right to a birth certificate, is imported to realise the object and purpose of the right.¹⁰⁵

4.4. THE INTERESTING CASE OF YEAN AND BOSICO

The right to birth registration also exists in other human rights instruments including regional treaties.¹⁰⁶ The case of *Yean and Bosico v The Dominican Republic (Yean and Bosico)*,¹⁰⁷ a decision of Inter-American Court of Human Rights (Inter-American

¹⁰⁴ Committee on the Rights of the Child, Concluding Observations regarding Gambia, UN Doc. CRC/C/15/Add.165 (2001), at [30]-[31].

¹⁰⁵ A teleological approach to interpretation requires that the interpretation be guided by the purpose of the instrument being interpreted. Applying this method, the purpose of an instrument or provision is first determined and then ‘any ambiguity of meaning is to be resolved by importing the substance “necessary” to the realisation of the object and purpose’: Clayton, R. and Tomlinson, H., *The Law of Human Rights*, Volume 1, 2nd ed., Oxford University Press, Oxford, 2009, at [6.14].

¹⁰⁶ See, for example, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, 2220 UNTS 3, Article 29; African Charter on the Rights and Welfare of the Child, 1990, CAB/LEG/24.9/49, Article 6(2).

¹⁰⁷ IACtHR, *The Case of Yean and Bosico Children v The Dominican Republic*, Series C 130 (2005).

Court), bolsters the authors' contention that a birth certificate is a necessary component of the right to birth registration. Although this decision is not an interpretation of the relevant provisions of either the ICCPR or the CRC, it is interesting to note that the court did consider the right to a birth certificate in the context of a regional human rights instrument. While this case does not necessarily provide any further legal weight to the arguments outlined in this article, it does add to their persuasiveness.

In 2005, the Inter-American Court handed down the landmark decision of *Yean and Bosico* where it found against the Dominican Republic for denying girls of Haitian descent birth certificates, and therefore Dominican Republic nationality.¹⁰⁸ There is no express right to birth registration in the *American Convention of Human Rights*¹⁰⁹ (the treaty that the Inter-American Court is empowered to enforce and interpret). However the Inter-American Court found that the denial of a birth certificate resulted *inter alia* in a violation of the right to a nationality.¹¹⁰ The Inter-American Court held that the right to nationality was a gateway event to the attainment of other rights.¹¹¹ It ordered the Dominican Republic to adopt an effective system to facilitate access to birth certificates for children of Haitian descent.¹¹²

This case bolsters the notion that birth certificates should be given a broad purposive construction and that they operate as a gateway to the attainment of other rights. This is consistent with the analysis of the work of the HRC and the CRC Committee on birth certificates and registration. Consequently it reinforces the argument that a right to a birth certificate exists in international human rights law.

5. CONCLUSION

Both the HRC and the CRC Committee have indicated that the purpose of the right to birth registration is to ensure an individual can attain other human rights. In light of this, it is logical that the right to a birth certificate is a necessary component of the right to birth registration, because it is the *certificate* that is the essential evidence of birth registration, and therefore opens the gateway to the realisation of other rights. For this reason, the right to birth registration without a birth certificate is hollow, theoretical and illusory.¹¹³

This article has canvassed a significant array of authority that indicates that the HRC and CRC Committee both support this interpretation of the scope of the right to birth registration. Implying a right to a birth certificate as part of the content of the right to birth registration is not just logical, but also principled. Applying a teleological

¹⁰⁸ *Idem*.

¹⁰⁹ 1969, OAS Treaty Series No. 36.

¹¹⁰ *The Case of Yean and Bosico Children v The Dominican Republic*, *supra* note 111, at [125]-[192].

¹¹¹ *Idem*, at [137].

¹¹² *Idem*, at [239]-[241].

¹¹³ *Goodwin v United Kingdom* (2002) 35 EHRR 447, at [73]-[74].

approach to interpretation would suggest that the right to a birth certificate is incorporated into the right to birth registration, in order to realise object and purpose of this norm. Furthermore, the extensive work of the CRC Committee and HRC, canvassed in this article, should inform the context and subsequent practice of the right, as it arguably amounts to subsequent interpretation.

Nevertheless, there is a lack of explicit and unequivocal articulation of the legal justification for the inclusion of a right to a birth certificate as part of the right to birth registration. The sheer weight of authority suggests that the authors' assertion that a right to a birth certificate forms part of the right to birth registration is a sound one. However, the CRC Committee should consider developing a thoroughly analysed General Comment that clearly articulates the precise content of the right to birth registration, as set out in Article 7 of the CRC. Such an enunciation should expressly recognise that the right to a birth certificate is a necessary part of the right to birth registration. Some might argue that the 'reading in' of a right to a birth certificate is inconsistent with the text of Article 24(2) of the ICCPR and Article 7 of the CRC, however, such an interpretation would be theoretical and illusory, and inconsistent with a principled interpretation of the right.

There is precedent for a treaty committee to use a General Comment as a vehicle to elaborate on the normative content of a right. For example, in 2002, the Committee on Economic, Social and Cultural Rights published General Comment 15 determined that a right to water should be read into to Article 11 (right to an adequate standard of living) and Article 12 (right to the highest attainable standard of health) of the International Covenant on Economic, Social and Cultural Rights.¹¹⁴ In General Comment 15 the Committee set out a detailed legal justification for the conclusion that a right to water was 'inextricably related' to the right to adequate food, the highest attainable standard of health and the right to life.¹¹⁵ This is analogous to the inextricable relationship between birth registration and a birth certificate. A similar initiative by the CRC Committee would ensure that the right to birth registration expressly includes the right to a birth certificate.

The express recognition of a right to a birth certificate in international law would assist in redressing the problems faced by many Indigenous Australians as highlighted above. Such recognition would affirm that in order to be consistent with international human rights law Australia's current birth registration systems should be altered to ensure there is ready access to a birth certificate.¹¹⁶

¹¹⁴ Committee on Economic, Social and Cultural Rights, General Comment 15: The right to water (arts 11 and 12), UN Doc. E/C.12/2002/11 (2003).

¹¹⁵ *Idem*, at [3].

¹¹⁶ Unfortunately, neither the HRC nor CRC have addressed this issue when considering Australia's periodic reports, which have all been silent on birth registration and birth certificate issues in Australia. The only recent mention of birth registration by Australia is in the combined Second and Third Report to the CRC Committee in 2003, which simply notes Australia is supporting a sustainable birth registration system in Bangladesh. Australia's Fourth Report to the CRC Committee is due to be examined in 2012. It would be helpful if the difficulties faced by Indigenous

International human rights law provides governments with the normative standards to which they must adhere. The Australian state and territory governments are more likely to re-structure their birth registration systems if it can clearly be demonstrated that their current practices do not comply with international human rights norms. Furthermore, it will help the Registrars of Births, Deaths and Marriages to see their work as impacting on fundamental human rights, rather than being a mere administrative process. Finally, for those Indigenous Australians who have been unable to obtain a birth certificate, the express recognition of a right to a birth certificate, as part of the right to birth registration, empowers them to pursue remedies for breaches of their human rights. Such action may ultimately culminate in them being able to obtain a birth certificate and all the benefits and entitlements that flow from having such a document.

Australians in obtaining a birth certificate were recognised by the CRC Committee in its Concluding Observations, and appropriate recommendations made.