

interpretations developed by the panel,” related paragraphs in the panel report, and the WTO provisions alleged to be wrongly interpreted or applied by the panel.²² Previously, the Appellate Body saw “significant value” in requiring such information as this importantly demarcates the scope of appellate review in each dispute and enables the appellee to fully exercise its rights of defense.²³ If the current Appellate Body crisis persists, notices of appeal lacking any substance may become a “new normal” but worrisome practice of effectively “blocking” panel decisions even without any stated reason(s).

Thus, the present case shows how the ongoing crisis in the Appellate Body has increasingly undermined the entirety of the WTO dispute settlement system by taking it back to the pre-WTO times when the then GATT parties were able to directly veto panel reports. Ironically, it was the WTO that changed the GATT-era approval procedures to move away from this destructive practice. But sadly, the emergent option of “appealing into the void” undercuts this significant achievement by providing a new way of obstructing panel reports.

SHERZOD SHADIKHODJAEV

KDI School of Public Policy and Management,

Sejong City, Republic of Korea

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Human Rights Committee—International Covenant on Civil and Political Rights—child’s right to nationality—statelessness

D.Z. v. NETHERLANDS, UN Doc. CCPR/C/130/D/2918/2016. At <https://undocs.org/CCPR/C/130/D/2918/2016>.

Human Rights Committee, January 20, 2021.

The groundbreaking decision of the UN Human Rights Committee (the Committee) in *D.Z. v. Netherlands* represents the first decision of any UN treaty body to impose positive duties on a state to grant nationality to a child born in its territory who would otherwise be stateless. The decision is, in the words of the concurring opinion of member Hélène Tigroudja, “undoubtedly an important contribution to protection against statelessness” (Annex II, para. 1). While primarily concerned with the parameters of the right of every child to acquire a nationality stipulated in Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR),¹ the decision also notably relied on and explicated the 1961 Convention on the Reduction of Statelessness (1961 Convention), which provides the most robust safeguard in international law against statelessness at birth.² The decision also highlights that a statelessness determination procedure is integral to the realization of

²² Appellate Body – Working Procedures for Appellate Review, Rule 20(2)(d), WTO Doc. WT/AB/WP/6 (Aug. 16, 2010).

²³ Working Procedures for Appellate Review – Communication from the Appellate Body, sec. D, 4–5, WTO Doc. WT/AB/WP/W/11 (July 27, 2010).

¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

² Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 UNTS 175 [hereinafter 1961 Convention].

the right to nationality in certain circumstances. Finally, the decision has consequences for thousands of individuals in the Netherlands and potentially in many other states as well.³ This contribution analyzes the impact of the decision on state discretion in nationality matters, especially in the context of a risk of statelessness.

The complaint before the Committee was brought on behalf of D.Z., born in the Netherlands in 2010 without a recognized nationality. The facts as submitted by the author of the complaint were not disputed by the state party. The record indicated that his mother was born in China, but her birth was not registered in the civil records through the usual process of household registration (para. 2.1). As a consequence, she was unable to obtain proof of Chinese citizenship and did not hold any documentation proving her identity (para. 2.2). At the age of fifteen, D.Z.'s mother was trafficked to the Netherlands. While she managed to escape and claim asylum, her claim for protection was refused and all appeals rejected. At the time of the Committee's decision, both D.Z. and his mother were classified as "illegal alien[s]" by the government (*id.*).

D.Z. was born in Utrecht and his birth was registered in the relevant civil registry with the annotation "unknown nationality" on the basis that his mother had not provided proof of his nationality (para. 2.3). The Committee's decision details the mother's many and wide-ranging attempts to obtain or confirm Chinese nationality for D.Z., including with assistance from the Dutch Council for Refugees and the Red Cross. Ultimately, "despite years of efforts" (para. 2.4), she was unable to obtain any information from Chinese authorities either confirming or denying D.Z.'s Chinese nationality. Moreover, as she had not "proven" that her son was without a state of nationality, she was unable to change D.Z.'s nationality entry from "unknown nationality" to "stateless." Yet attaining the status of "stateless" was a prerequisite to protection as a stateless child in the Netherlands—which included the right to acquire Dutch nationality since that was the state in which he was born (*id.*). D.Z.'s mother submitted requests and appeals in relation to the "unknown nationality" designation but they were rejected at every level. The final such appeal was to the Dutch Council of State which concluded that "neither national nor international law contained any rules regarding procedures for establishing statelessness" and that "it was not up to the authorities to conduct inquiries and determine statelessness status" (para. 2.6).

As a result of their designation as "illegal alien[s]," at the time of the decision, D.Z. and his mother were living in a restricted freedom center for rejected asylum seekers. He had "nearly no contact with Dutch society," and was living "under permanent threat of deportation" (para. 2.9).

D.Z. filed his complaint to the Committee pursuant to the First Optional Protocol to the ICCPR.⁴ He claimed, *inter alia*, that the "lack of a reliable opportunity for him to acquire a

³ A mapping study by the UNHCR in 2011 found that there were ninety thousand people described as having "unknown" nationality in the Netherlands' civil registry, including thirteen thousand children, many of whom had been born in the Netherlands. UNHCR, Mapping Statelessness in The Netherlands, para. 71 (Nov. 2011), available at <https://index.statelessness.eu/sites/default/files/UNHCR%2C%20Mapping%20Statelessness%20in%20the%20Netherlands%20%28Nov%202011%29.pdf>. Legislation has since been introduced into the Dutch Parliament to respond to this decision. European Network on Statelessness, *Netherlands Adopts New Bills on Statelessness* (June 1, 2022), at <https://www.statelessness.eu/updates/news/netherlands-adopts-new-bills-statelessness>.

⁴ First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.

nationality in his childhood” violated his right to acquire a nationality under Article 24(3) of the Covenant. He further submitted that the Netherlands had failed “to give effect to the rights enshrined in” national law, in violation of his rights under Article 24 of the ICCPR, read in conjunction with Article 2(2) (para. 3.2). Finally, he argued that the Netherlands “failed to provide him with an effective remedy” in violation of Article 24(3), read in conjunction with Article 2(3).

The Netherlands’ response was brief. It acknowledged that “the author was currently unable effectively to enjoy his right as a minor to acquire a nationality” (para. 4.1). It also “informed” the Committee that it had prepared bills to make the requisite legislative amendments sought by the author and that it was willing to pay an amount of three thousand Euros in compensation plus costs associated with the complaint. However, it did not accept that the author’s Covenant rights had been violated or undertake any steps to remedy the author’s particular situation (paras. 4.1–4.2, 5.1).

The Committee found that the Netherlands was in violation of Article 24(3), alone and in conjunction with Article 2(3).

The key task for the Committee was to articulate the scope and content of Article 24(3), which provides: “Every child has the right to acquire a nationality.” The Committee had not previously adjudicated this provision in an individual complaint, but it had provided guidance as to its interpretation in its 1989 General Comment No. 17 on Article 24 (Rights of the Child). In *D.Z.*, the Committee acknowledged that General Comment 17 states that Article 24(3) “did not necessarily make it an obligation for States to give their nationality to every child born in their territory” (para. 8.2). However, the Committee emphasized: “States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born” (*id.*).

In order to expand on the requirement to “adopt every appropriate measure,” the Committee considered the 1961 Convention on the Reduction of Statelessness, a Convention to which the Netherlands is a party, and which provides in Article 1 that “[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.”⁵ This treaty obligation is itself open to ambiguity not because determining whether a person was born in a territory is complicated, but because the determination of whether a child “*would otherwise be stateless*” might be contested. Since there is no international body to adjudicate individual complaints under the 1961 Convention, the Committee referred to the United Nations High Commissioner for Refugees (UNHCR)’s Guidelines on Statelessness No. 4 for insight into the meaning of Article 1 of the 1961 Convention.⁶ The Committee derived from these Guidelines three key points. First, “a contracting State must accept that a person is not a national of a particular State if the authorities of that state refuse to recognize that person as a national” (para. 8.3).⁷ Further, and particularly relevant to *D.Z.*’s case, a “refus[al] to recognize that person as a national” may be explicit or may be implied, where the state fails “to respond to inquiries to confirm an individual as a

⁵ Convention on the Reduction of Statelessness, *supra* note 2.

⁶ 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, HCR/GS/12/04 (Dec. 21, 2012) [hereinafter Guidelines No. 4].

⁷ *Id.*, para. 19.

national” (*id.*).⁸ Second, a contracting state must determine as soon as possible whether a child would otherwise be stateless “so as not to prolong a child’s status of undetermined nationality” (*id.*). Third, in making said determination, the burden of proof “must be shared between the claimant and the authorities of the contracting State” (*id.*).

Applying these principles to the present case, the Committee observed that D.Z.’s mother had made many attempts to confirm whether Chinese authorities consider D.Z. a Chinese national. The Dutch authorities “did not outline any further steps” that she could have taken (para. 8.5), nor did they make any “inquiries of their own in order to attempt to confirm the author’s nationality status, or lack thereof” (*id.*). In other words, the Netherlands failed to meet its obligations in relation to the shared burden of proof.

The Committee also relied on the following factors in its reasoning. The Dutch Council of State in its earlier decision in this case had acknowledged that the lack of a stateless determination procedure (SDP) meant that individuals entitled to protection “were falling through a gap in legislation” (*id.*). Further, the Netherlands had accepted that the author is currently unable to “enjoy his right as a minor to acquire a nationality.”

Taking account of all these findings, the Committee concluded that the facts disclose a violation of the author’s rights under Article 24(3). In addition, the failure to provide the author with an effective remedy amounted to a violation under Article 24(3) in conjunction with Article 2(3) (*id.*). Accordingly, the Committee held that the Netherlands was obligated to provide adequate compensation; to review its decision on D.Z.’s application to be registered as stateless and to be recognized as a Dutch citizen, taking into account the Committee’s findings; and to review the author’s living circumstances and residence permit in light of the best interests of the child principle (para. 10). In addition, as the state is under an obligation to “take all steps necessary to avoid similar violations in the future,” the Committee found that the Netherlands must review its legislation to “ensure that a procedure for determining statelessness status is established,” and review its legislation on eligibility for citizenship in order to ensure compliance with Article 24 (*id.*).

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This decision provides a robust reading of Article 24(3) and effectively limits state sovereignty with respect to the conferral of nationality. The determination of the rules of acquisition and loss of nationality have long been considered an essential part of the state’s *domaine réservé*. The default position in international law is that “[i]t is for each State to determine under its own law who are its nationals.”⁹ This has been tempered by developments in international human rights law over the years. Yet an endemic tension persists between the human right of an individual to a nationality and the state’s own sovereign prerogative to determine who is entitled to its nationality.

The Universal Declaration of Human Rights (UDHR) proclaims in Article 15(1) that “[e]veryone has the right to a nationality,” but it is not in itself binding and has not attained the status of custom.¹⁰ Moreover it does not specify which state has the obligation to fulfill

⁸ *Id.*, para. 20.

⁹ Convention on Certain Questions Relating to the Conflict of Nationality Law, Art. 1, Apr. 13, 1930, 179 LNTS 89.

¹⁰ Universal Declaration of Human Rights, GA Res. 217A (III) (Dec. 10, 1948).

any particular individual's right to a nationality. When Article 15 of the UDHR provision was transposed to Article 24(3) of the ICCPR, it was narrowed to apply only to children. The presence of even this narrower right to a nationality in the ICCPR¹¹ is still meaningful, given that acquisition of nationality at birth is the most effective safeguard against statelessness. Yet the extent to which Article 24(3) imposes positive obligations on any particular state has been open to debate since its inception.

As outlined above, the previous guidance from the Committee in General Comment 17 indicated that Article 24(3) does not necessarily require a state to grant nationality at birth in every instance. However, the Committee's view has long been that states nonetheless have positive obligations, namely, to adopt "*every appropriate measure*" to ensure that every child has a nationality at birth.¹² The Committee had not previously articulated the basis for or the content of the positive obligation to take appropriate measures. In interpreting Article 24(3) in this case, the Committee was presented with the opportunity to provide a clear and convincing basis for its robust reading of Article 24(3). The Committee's reasoning could have been further developed in three ways.

First, the Committee considered Article 24(3) in its context, emphasizing in particular the preceding Article 24(1), which provides that every child shall have "the right to such measures of protection as are required by his status as a minor." The Committee noted in *D.Z.* that this means that "the child's best interests shall be a primary consideration in all decisions affecting her or him" (para. 8.2). This is important, but the Committee might also have considered Article 24(2), which provides that "[e]very child shall be registered immediately after birth and shall have a name." The requirement to register birth self-evidently must take place in the country of birth and is therefore a positive obligation on the state in which the child is born. In my view, the right to acquire a nationality which immediately follows must be given meaning in the light of *both* of these preceding paragraphs.

Second, one could argue that Article 24(3) must be interpreted so as to ensure its effectiveness,¹³ and a state party to the ICCPR must implement and interpret its obligations in good faith.¹⁴ While not obligated to confer nationality on *every* child born in the territory, the converse position, namely that Article 24(3) imposes *no* obligations on the state of birth, might be thought to render Article 24(3) meaningless. Such a position would also be incompatible with the well-established doctrine that the legal obligation under ICCPR Article 2, paragraph 1 "is both negative and positive in nature"; thus, Article 2 "requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."¹⁵ Accordingly, where a child is born in the territory or jurisdiction of a state, it stands to reason that the state must adopt *some* measures to ensure that the child may acquire a nationality. This may take the form of facilitating access to the nationality of

¹¹ The ICCPR has 173 state parties. International Covenant on Civil and Political Rights, *Status*, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-4&chapter=4&clang=en.

¹² Human Rights Committee, General Comment 17, cited in *DZ* at paragraph 8.2.

¹³ The International Court of Justice has described "the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness." *Territorial Dispute (Libya /Chad)*, Merits, Judgment, 1994 ICJ Rep. 6, para. 51 (Feb. 3).

¹⁴ Vienna Convention on the Law of Treaties, Arts. 26, 31(1), May 23, 1969, 1155 UNTS 331.

¹⁵ Human Rights Committee, General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, paras. 6–7, UN Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

another state (under *jus sanguinis* laws for example), but where access to another nationality is not available, such that the child would otherwise be stateless, then appropriate measures might reasonably include measures that facilitate the acquisition of nationality in the state in which the child is born. In this way, Article 24(3) has a unique role to play in the context of statelessness.

Third, the Committee should have clarified the relationship between the 1961 Convention and Article 24(3)—in particular, whether the reasoning in *D.Z.* applies to a state that has *not* ratified the 1961 Convention. The cognate protection in Article 7 of the Convention on the Rights of the Child (CRC) explicitly draws in states' other obligations to prevent statelessness in providing in Article 7(2) that states shall “ensure the implementation of the rights . . . in accordance with its national law and [their] obligations under the relevant international instruments in this field” in particular where the child would otherwise be stateless.¹⁶ This directs the Committee on the Rights of the Child to consider other relevant obligations of states when assessing compliance with Article 7 of the CRC. However, such a provision is not found in the ICCPR. This is not merely an abstract question of treaty interpretation. Rather it matters because the 1961 Convention imposes the only explicit obligation in international law on states to grant nationality at birth where a child would otherwise be stateless. However, while ratifications have increased significantly in recent years, it remains the case that it has attracted significantly fewer states party than the ICCPR.¹⁷ If the reasoning of the Committee in *D.Z.* applies to *all* states party to the ICCPR, which one would assume is the case, then it has the potential to provide significant protection against statelessness at birth. Yet because this move may well be contentious, precisely because of the low ratification of the 1961 Convention, clarity on this point was warranted. The Committee could, for example, have drawn on the emerging view that arbitrary deprivation of nationality and the avoidance of statelessness are fundamental rights that have attained the status of custom.¹⁸

A close reading of the Committee's decision in *D.Z.* indeed suggests that the purpose of referring to the 1961 Convention was *not* to determine the Netherlands' compliance with that Convention (after all the Committee did not have the jurisdiction to do so), but rather to assist the Committee to elaborate the meaning of “appropriate measure[s]” required to be taken by states to ensure that every child has the right to acquire a nationality pursuant to the ICCPR.

In this case, the Netherlands had established a system whereby it placed the onus entirely on an individual claiming protection to prove a negative, that is, to provide “conclusive proof” of lack of nationality. The state did not have any role in the determination of statelessness. And, as acknowledged by the Council of State, so long as statelessness was undetermined, a person could not claim protection as a stateless person under international law or seek to

¹⁶ Convention on the Rights of the Child, Art. 7(2), Nov. 20, 1989, 1577 UNTS 3.

¹⁷ The 1961 Convention currently has seventy-eight states parties compared to the 173 states parties to the ICCPR.

¹⁸ See UNHRC, Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General, paras. 19–22, UN Doc. A/HRC/13/34 (Dec. 14, 2009). The Human Rights Council has repeatedly described the right to a nationality as a fundamental human right: HRC Res. 7/10 (Mar. 27, 2008); HRC Res. 10/13 (Mar. 26, 2009); HRC Res. 13/2 (Apr. 14, 2010); HRC Res. 20/4 (July 16, 2012); HRC Res. 20/5 (July 16, 2012); HRC Res. 26/14 (July 11, 2014); HRC Res. 32/5 (July 15, 2016); and HRC Res. 32/7 (July 18, 2016). For recent scholarship on point, see William Thomas Worster, *Customary International Law Requiring States to Grant Nationality to Stateless Children Born in Their Territory*, 4 STATELESSNESS & CITIZENSHIP REV. 113 (2022).

“acquire” the nationality of the Netherlands. Neither the 1954 Convention relating to the Status of Stateless Persons¹⁹ (which defines a “stateless person” in international law) nor the 1961 Convention explicitly requires a state to establish a procedure to determine if a person is stateless. Yet both instruments would be nugatory (as would other specialized human rights treaties such as the Refugee Convention) if a state could simply avoid its obligations by refusing to determine whether a person qualifies in the beneficiary class identified as entitled to rights and protection.

The Committee’s insistence that the state establish an adequate procedure gives content to the obligation of the state under Article 24(3) to fulfill every child’s right to acquire a nationality. Further, it may in time be seen as contributing to the development of a general principle that entitlement to nationality or to protection as a stateless person under international law contains inherent procedural guarantees.²⁰

In addition to the Committee’s judgment, two individual members issued separate concurring opinions. Committee member Yadh Ben Achour “fully” agreed with the Committee’s finding of a violation of Article 24 (3). H el ene Tigroudja’s opinion also “fully” agreed with the majority in relation to Article 24(3) but intriguingly went further in expressing “regret” that the majority did not elaborate on other breaches of the Covenant in this case, namely, Article 16 (recognition of legal personality) and Article 7 (prohibition on inhuman treatment), which in her view were “implicitly raised” (Annex II, para. 2). The author had requested the Committee to “recognize the links between the right to acquire a nationality and an individual’s enjoyment of juridical personality and respect for human dignity” but this was directed to the interpretation of Article 24(3) and not to independent claims based on Articles 7 or 16. Nonetheless, Member Tigroudja found that Articles 7 and 16 “should have been thoroughly and carefully considered by the majority of the Committee” (Annex II, para. 3).

To date, no international court or supervisory body appears to have recognized statelessness per se and/or the act of depriving arbitrarily someone of their nationality as a form of inhuman or degrading treatment.²¹ Yet scholars have been calling for human rights bodies to consider this very question. Indeed, I have argued elsewhere, with H el ene Lambert, that in relation to the notion of inhuman or degrading treatment,

there is scope for legal arguments to be put forward by representatives of stateless persons relating to the consequences of being stateless (i.e. pointing to tangible detriment), particularly in cases where there is nowhere else to go for the applicant and he or she would otherwise live in a state of limbo.²²

This appears precisely to have been the case in the present situation, as Member Tigroudja accepted (Annex II, paras. 4–5). Perhaps this paves the way for future claims to more

¹⁹ Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 UNTS 117.

²⁰ As James Crawford observes, while general principles “normally enter judicial reasoning without formal reference or label,” “the most frequent and successful use of domestic law analogies has been in the field of evidence, procedure, and jurisdiction.” James Crawford, *The Sources of International Law*, in BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, at 36 (James Crawford ed., 8th ed. 2019).

²¹ MICHELLE FOSTER & H EL ENE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS 216–17 (2019).

²² *Id.* at 217–21.

comprehensively examine the consequences of state action that deprives a person of such a “fundamental aspect of the dignity of the human person.”²³

MICHELLE FOSTER
Melbourne Law School
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²³ *Penessis v. United Republic of Tanzania*, App. No. 013/2015, Judgment, para. 87 (Afr. Ct. Hum. & Peoples’ Rts. Nov. 28, 2019), *cited* by Member Tigroudja at Annex II, para. 4.