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on Statelessness in Africa



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Chief Editor's Note

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This *Special Issue* on Statelessness brings together a selection of critical research contributions from scholars who offer knowledge and bridge the scholarship gap on Statelessness in Africa. It also provides a venue for further research on emerging areas, highlights important issues and describes new cross-disciplinary applications.

We are confident that this *Special Issue* provides a significant resource for researchers, practitioners, and students to support scholarship that offers new ways of thinking about the interaction between human mobility and statelessness, as well as promoting the critical roles of knowledge. Given our commitment to interdisciplinary work we believe that it will be helpful to our readership to be aware of how some of the complex socio-economic, political, legislative, and developmental aspects of statelessness in Africa are being addressed from a wide range of perspectives.

This *Special Issue* would not have been possible without the professionalism and hard work of the Guest Editors. We are grateful to Professor Benyam Dawit Mezmur, Eleanor Roosevelt Fellow at the Harvard Law School, Human Rights Program and Professor of Law at the University of the Western Cape, and Dr Charissa Fawole, Lecturer in the Department of Public Law, University of Johannesburg, for convening and Guest Editing this *Special Issue*.

We acknowledge all the support of Professor Fatima Khan, Director of the Refugee Rights Unit, University of Cape Town and extend our sincere appreciation to all reviewers for their thoughtful, insightful, and scholarly evaluation of manuscripts.

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Editorial

From the Margins to the Mainstream?: Bridging the Scholarship Gap on Statelessness in Africa

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I. INTRODUCTION

As has been the case in a number of other major global sporting events, the 2022 international football tournament — the FIFA World Cup — has attracted attention to the issue of nationality. The *New York Times* published an article titled ‘At This World Cup, Nationality Is a Fluid Concept’, in which it underscored that ‘[m]ore than 130 players at the World Cup represent a country other than that of their birth’. Qatar, the host country, for example, has a diverse team of whom a reported 38 per cent are not native-born Qataris.¹ Such fluidity is also underscored in a BBC piece titled ‘Ghana at World Cup: How to dribble around nationality issues’ where the country’s relatively strict nationality laws ‘do not extend to the country’s football team’.² A fair dose of debate around the nationality of players has also unfolded too on social media, including questions around the fact the son of the President of Liberia (and soccer superstar), Timothy Weah, is playing for the United States instead of Liberia.

These and other similar discussions on nationality matters are interesting, but (hopefully, less arguably) they are neither the most important nor pressing debates. Rather, the issue of stateless persons — by definition ‘a person who is not considered as a national by any State under the operation of its law’ — is a more crucial aspect of the topic as it often has serious implications for human rights, security, and

¹ Stephen Osserman & Youyou Zhou ‘How migration has shaped the World Cup’ (08 December 2022), available at <https://www.vox.com/c/world/2022/12/8/23471181/how-migration-has-shaped-the-world-cup>

² British Broadcasting Corporation (BBC) ‘Ghana at World Cup: How to dribble around nationality issues’ (1 December 2022), available at <https://www.bbc.com/news/world-africa-63795721>

development.³

The number of stateless persons globally is not known with any exactitude; however, it is reasonable to estimate that it extends into the millions.⁴ These estimates can vary widely — for example, at mid-2022 the United Nations High Commissioner for Refugees (UNHCR) reported a total of 4.3 million stateless people worldwide,⁵ while the Institute on Statelessness and Inclusion (ISI) put the number at around 15 million stateless persons globally.⁶

Be that as it may be, it is no exaggeration to assert that the presence of millions of stateless persons in a world with close to 200 states is an indictment of the international community's failure to address the issue head-on. This assertion gains even more weight when one is confronted with the estimation that 'more than 75 per cent of the world's known stateless populations are members of minority groups.'⁷ Indeed, while the reasons that lead to statelessness are manifold, discrimination based on, for example, race, religion, minority status, and gender, is commonly cited as the major cause.⁸

The issue of statelessness is of significant importance for the African continent. It has its own historical anchors — including colonialism and the subsequent creation of superficial borders. As a result, trans-border migration in the continent has a significant synergy with statelessness. Statelessness also has direct links with some conflicts in the continent. While gaps in and between the nationality laws and practices of states have contributed to the creation of stateless populations on the continent, there is no denying that systematic marginalisation of minorities - in which children and women are disproportionately affected, takes the lion's share of the blame. While Côte d'Ivoire reportedly has the largest stateless population in Africa (around 955,000 in 2019),⁹ at the end of 2015, more than a million persons were estimated to be under the UNHCR's statelessness mandate in Africa.¹⁰

II. GLOBAL AND REGIONAL RESPONSES

Fortunately, in the last decades, statelessness has come out of the shadows,¹¹ both in respect of law and practice. There are multiple initiatives at the global as well as regional levels to address the issue. For example, since the launch of the #IBelong Campaign to End Statelessness by 2024 in 2014, the extent of ratification of the two

³ United Nations Convention Relating to the Status of Stateless Persons 1954, Article 1.

⁴ United Nations High Commissioner for Refugees (UNHCR) 'Refugee data finder, available at <https://www.unhcr.org/refugee-statistics/insights/explainers/forcibly-displaced-pocs.html>

⁵ Ibid.

⁶ Institute on Statelessness and Inclusion (ISI) 'Statelessness in numbers: 2020 An overview and analysis of global statistics' (2020), available at https://files.institutetsi.org/ISI_statistics_analysis_2020.pdf

⁷ Office of the United Nations Commissioner for Human Rights (OHCHR) 'Minorities, discrimination and statelessness, available at <https://www.ohchr.org/en/minorities/minorities-discrimination-and-statelessness>

⁸ UNHCR 'I am here, I belong: The urgent need to end childhood statelessness' (2015).

⁹ UNHCR 'Global trends: Forced displacement in 2019', available at <https://www.unhcr.org/5ee200e37.pdf>

¹⁰ UNHCR 'Global trends: Forced displacement in 2015', available at <https://www.unhcr.org/576408cd7.pdf>

¹¹ For a detailed and historical account of some of the reasons why statelessness did not get enough attention in the four decades between 1950–1990, see UNHCR 'The state of the world's refugees: A humanitarian agenda' (1997/98), available at <http://www.unhcr.org/3eb7ba7d4.pdf>

statelessness Conventions has increased achieved significantly. The Convention relating to the Status of Stateless Persons,¹² has a total of 94 ratifications — almost one third of which were made in the last decade.¹³ The ratio of recent ratifications is even higher for the Convention on the Reduction of Statelessness,¹⁴ as more than half of its 75 ratifications came in the last decade.¹⁵

African countries have made their fair share of contributions to this positive development. Since 2014, Togo (July 2021), Angola (October 2019), Guinea (September 2016), Mali (May 2016), Sierra Leone (May 2016), Mozambique (October 2014), and the Gambia (July 2014) have ratified both Conventions.¹⁶ Moreover, since 2014, Burkina Faso ratified the 1961 Convention (August 2017) and Niger ratified the 1954 Convention.¹⁷

The notion of ‘African solutions to African problems’ seems to have an increasing resonance within the continent and the African Union (AU). This is still the case despite the fact that AU human rights bodies that play an important role, for instance, in monitoring adherence to individuals’ right to acquire a nationality, face numerous challenges in discharging their duties.¹⁸

This recognition seems to be one of the main reasons why the African Commission on Human and Peoples’ Rights initiated the process of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (Draft Protocol).¹⁹ The Draft Protocol has a number of objectives in regard to these issues. They include providing legal solutions to practical problems linked to the recognition and the exercise of the right to a nationality; seeking to eradicate statelessness; and, identifying the principles that should govern relations between individuals and states.²⁰

The Draft Protocol has already introduced at least two notable additions that appear to be informed by the reality on the continent, and which aim to provide more protection for stateless persons in Africa. The first relates to the very definition of a ‘stateless person’. According to the Draft Protocol, a ‘stateless person’ is defined as someone ‘who is not considered as a national by any State under the operation of its

¹² United Nations Convention Relating to the Status of Stateless Persons 1954 — adopted on 28 September 1954 and came into force in 1960.

¹³ More than 20 states ratified the Convention since 2010. See https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=en

¹⁴ More than 30 states ratified the Convention since 2008. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en

¹⁵ United Nations Convention on the Reduction of Statelessness 1961 — adopted on 30 August 1961.

¹⁶ See <https://www.refworld.org/statelessness.html> for more details.

¹⁷ Ibid.

¹⁸ See, for example, Amnesty International ‘The state of African regional human rights bodies and mechanisms 2019–2020’ (21 October 2020), available at <https://reliefweb.int/sites/reliefweb.int/files/resources/AFR0130892020ENGLISH.PDF>

¹⁹ See African Union ‘Draft Protocol to the African Charter on Human and Peoples’ Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa: Explanatory Memorandum’ (Draft revised June 2018), available at https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa-22527_e_original_explanatory_memorandum.pdf

²⁰ Ibid.

law, including a person whose nationality cannot be established.²¹ The second part of the definition is a new addition that has not found its way into the 1954 Convention, and appears to acknowledge the complexity of establishing whether an individual is not considered as a national under the operation of its law.²²

Secondly, the Draft Protocol has embraced the concept of ‘appropriate connection’ instead of ‘genuine link’ for the purpose of determining one’s nationality or statelessness. The concept of ‘appropriate connection’ is broad and can therefore assist in the prevention of statelessness, and is defined as:

[a] connection by personal or family life to a State, including a connection by one or more of the following attributes: birth in the relevant State, descent from or adoption or kafala (fostering) by a national of the State, habitual residence in the State, marriage to a national of the State, birth of a person’s parent, child or spouse in the State’s territory, the State being the location of the person’s family life, or, in the context of succession of States, a legal bond to a territorial unit of a predecessor State which has become territory of the successor State.²³

There are also positive initiatives at the sub-regional levels within the continent. One such example is the Abidjan Declaration by the Heads of State of the Economic Community of West African States (ECOWAS), which displays some level of political will to eradicate statelessness.

These efforts point in one direction — that statelessness is receiving more attention. With political will, and evidence-based interventions, such efforts will probably continue to grow. Their impact, however, in preventing and addressing statelessness warrants closer scrutiny.

III. WHAT IS IN THE *SPECIAL ISSUE*?

There are very few continent-wide studies on statelessness in Africa. One example is the study by the African Commission on Human and Peoples’ Rights, entitled: ‘The right to nationality in Africa.’²⁴ A few other examples written by Bronwen Manby include ‘Struggles for Citizenship in Africa’;²⁵ ‘Citizenship and Statelessness in Africa: The Law and Politics of Belonging’;²⁶ ‘Citizenship and Statelessness in Africa: The Law and Politics of Belonging’;²⁷ and ‘Citizenship in Africa: The Law of Belonging.’²⁸

This *Special Issue* contains articles that focus on statelessness in Africa. The authors approached the problem of statelessness from various perspectives and

²¹ Ibid.

²² See UNHCR op cit note 3 paras 16 and 17, available at <https://www.refworld.org/docid/4f4371b82.html>

²³ African Union Draft Protocol op cit note 19, Article 1.

²⁴ Study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, pursuant to Resolution 234 of April 2013 and approved by the Commission at its 55th Ordinary Session (May 2014), available at <https://www.refworld.org/docid/54cb3c8f4.html>

²⁵ Bronwen Manby *Struggles for Citizenship in Africa* (2009).

²⁶ Bronwen Manby *Citizenship and Statelessness in Africa: The Law and Politics of Belonging* (2015).

²⁷ Bronwen Manby *Citizenship Law in Africa: A Comparative Study* (2016).

²⁸ Bronwen Manby *Citizenship in Africa: The Law of Belonging* (2018).

engaged with topics such as gender, the generational impacts of statelessness, legal protections, the application of immigration laws and detention, mental health, and climate change. Some of the articles in this issue examine situations of statelessness broadly on the continent, with a focus on Southern Africa. Other articles analyse aspects of statelessness in specific states. While it is correct to view the problem of statelessness mostly as a failure of law and policy as well as a result of discrimination, the articles also broach the possibilities of “solutions from below” whereby stateless persons themselves can shape the improvement of their situations.

Unfortunately, globally, close to 20 countries continue to have legislation that does not allow women to pass their nationality to their children on the same basis as men.²⁹ There is also a possibility that women may be discriminated against in their ability to confer a nationality to a spouse, or to acquire, change, and retain their nationality. It is hence no surprise that gender-based discrimination is ‘a leading cause of statelessness worldwide’, which the article by Beninger and Manjoo firmly underscores with an anchor on Africa. Their article, richly substantiated, makes a strong case for the challenges that stateless persons, especially women, face in ‘exercising a range of internationally protected civil, political, social, and economic rights.’

As such, the authors do not shy away from locating the gender gaps in international laws on statelessness. As the article zooms on Southern Africa, the relevant regional and sub-regional instruments (including the Draft Protocol on Nationality) benefit from a gender-lens exposé; indeed, it might come as a surprise to learn that ‘even the Maputo Protocol provides an exception allowing states to retain gender discriminatory laws with respect to passing nationality to children.’ The authors’ overall assessment is that there is progress in some areas of the law (both international and national), especially in reforming gender-discriminatory laws; at the same time, the article details ongoing challenges in bridging the gap of statelessness due to gender discrimination gap.

Warria and Chikadzi contribute a psychosocial approach to a predominantly legal examination of statelessness in Africa. This approach draws attention to the stress and trauma experienced by stateless persons as individuals. Thus, it also underscores the humanity and personhood of a stateless person - something which is often underrepresented in discussions of stateless persons as a group. Statelessness affects the ability of individuals to meet their basic needs, access services such as education and healthcare and realise their human rights. The authors demonstrate the difference between big ‘T’ trauma and little ‘t’ trauma by emphasising how day-to-day traumas (little ‘t’ traumas) negatively affect stateless persons. The article uses a case study of a young man in South Africa to illustrate the cumulative effects of little ‘t’ traumas. Acknowledging the stress and trauma as a result of statelessness should be part not only of understanding the problem, but of pursuing solutions to it. In this regard, the authors advocate for a holistic and collaborative approach among policy-

²⁹ See Equal Nationality Rights ‘The problem’ (2019), available at <https://equalnationalityrights.org/the-issue/the-problem>

makers, activists, and mental-health practitioners to mitigate the factors that lead to the trauma of stateless persons.

While a great deal of attention - deservedly so - is given to the nexus between human rights and statelessness, it is not common to link sustainable development and statelessness. Badewa's article broaches this particular nexus, which he describes as 'poorly investigated'. The main thrust of the article is that there is a strong case to be made for the inclusion of statelessness in the post-2030 development agenda. While the significant potential that the Sustainable Development Goals (SDGs) have for addressing statelessness is acknowledged, the lack of coherence in the implementation of multilateral development programmes and national policies is decried as one factor that increases the marginalisation of stateless persons and communities. Pursuing the SDGs, with attention to detail on equity and vulnerable groups, can help stakeholders appreciate that stateless persons are not a homogenous group, and also contribute to enhancing the resilience of stateless persons. Badewa's article tells a cautionary tale, and offers a well-nuanced narrative on the interconnected risks of exclusion that implementation of the SDGs' Target on legal identities could involve. It argues that mitigating factors include: embracing the principle of 'nothing about us without us' in regard to stateless persons and communities in the context of development; developing a collaborative strategy on statelessness that is tailored to local (national) and regional contexts and political realities; and accelerating the reform of discriminatory and exclusive legal and societal structures.

It is said that 'citizenship' in pre-colonial Africa was characterised by multi-ethnic and multicultural societies where individuals had multiple, overlapping and alternative collective identities.³⁰ The same could hardly be said of colonial Africa or its legacy, which continues to affect laws, policies, and practices with a bearing on statelessness in Africa. Mbiyozo's article - which in part can be described as taking the stance of 'looking back to look ahead' -, interrogates the linkages between statelessness in Southern Africa and 'colonial histories, border changes, migration, gender, and ethnic and religious discrimination', as well as poor civil registry systems. The article laments that several Southern African countries have drawn inspiration from colonial-era laws, thereby exacerbating the politics of *othering* in nationality legislation. As a result, xenophobia and nationalism are rearing their ugly heads, and are being weaponised to promote exclusionary politics, which in turn hampers or even reverses the fight against statelessness. Efforts to instrumentalise statelessness as a migration management tool are ill-advised, and are neither human-rights compliant nor a lasting policy choice.

Conflict and violence are key triggers of both internal and external forced migration across the continent.³¹ While it is not necessarily a new phenomenon, climate change is recognised as a contributing factor to situations of forced migration.

³⁰ Bruce J Berman 'Ethnicity, patronage and the African state: The politics of uncivil nationalism' 97 (1998) *African Affairs* at 310.

³¹ Internal Displacement Monitoring Centre (IDMC) 'Global report on internal displacement' (2022); UNHCR 'Global trends: Forced displacements in 2021'.

However, the majority of displacements attributable — at least in part — to climate change, are internal.³² In Africa, persons who are internally displaced due to climate change have access to legal protections pursuant to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).³³ However, persons who are displaced externally due to the effects of climate change do not have access to the same protections as them.

In light of this gap in the law, Ndimurwimo and Jahning engage in their contribution with challenges to the legal protection of stateless persons externally displaced due to the effects of climate change. The authors draw on case studies from South Africa, Mozambique, and Tanzania to provide context to their analysis. The case studies are used to assess current legal frameworks inasmuch these apply to persons who are rendered stateless due to the effects of climate change and highlight where protection is lacking or absent. Based on this analysis, the authors make recommendations for ameliorating these frameworks so as to provide more comprehensive legal protections.

The need for stateless persons to have access to adequate legal protections is evidenced by the many articles in this *Special Issue*, which highlight that the human rights of stateless persons are routinely violated. One such violation is arbitrary detention.³⁴ Unable to demonstrate that they have a legal right to remain within the state, stateless persons are vulnerable to arbitrary detention. Khan critically analyses the practice of immigration detention in South Africa as it is applied to stateless persons. She explains the disconnect between the purpose of immigration detention — namely, deportation — and the reality that it is unlikely for stateless persons to be deported to a state where they will obtain citizenship. The author finds that stateless persons are summarily detained as they are unable to confirm their legal status - essentially, they do not have legal protection from immigration detention in South Africa. The treatment of stateless persons, as demonstrated by the author, stands in stark contrast with the values and rights of the South African Constitution. In response to this problem, Khan advocates for solutions that would provide stateless persons with legal protection from detention, among these being to apply the Immigration Act in a manner that considers their specific challenges.

Last but not least, the article by Muchindu is focused on an equally important aspect - protracted refugee situations- by definition situations where at least 25,000 refugees from the same country have been living in exile and find themselves in a long-lasting and intractable state of limbo.³⁵ and their implications for statelessness.

³² J McAdam 'Building international approaches to climate change, disasters and displacement' (2016) 33 *Windsor Yearbook of Access to Justice* at 1, 2.

³³ United Nations Treaty Series (UNTS) 3014 'African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)'. Adopted on 23 October 2009, entered into force on 6 December 2012.

³⁴ United Nations Treaty Series (UNTS) 171 'International Covenant on Civil and Political Rights 999' Article 9(1). Adopted on 16 December 1966, entered into force on 23 March 1976; United Nations Treaty Series (UNTS) 217 African Charter on Human and Peoples' Rights 1520' Article 6. Adopted on 27 June 1981, entered into force on 21 October 1986

³⁵ See, UNHCR, "Protracted Refugee Situations Explained" (2020) available at <https://www.unrefugees.org/news/protracted-refugee-situations-explained/>

The article demonstrates aptly why academicians and practitioners should ‘think about statelessness as one of the threats/ risks associated with protracted refugee situations’ and give more attention to the link between the risk of statelessness and local integration as a solution to protracted refugee situations. The cases of Rwandan and Angolan refugees seeking to regularize their stay in Zambia are deployed to highlight the risks of statelessness in protracted refugee situations. Issues such as the risks of cumbersome requirements (for example, the need to have national identity documents) that refugees have to meet in order to become locally integrated in a host country especially when their refugee status ceases, the risks of intergenerational transmission of statelessness to children because their parents have a weak bond with their country of origin and because Zambia operates on the basis of *jus sanguinis* and therefore does not grant citizenship by birth, as well some potential policy solutions are proffered. While the focus of the article are Rwandese and Angolan refugees in Zambia, and some comparison with other countries in the Southern African Development Community (SADC) region on how they have resolved protracted refugee situations through naturalisation is undertaken, the findings have significant resonance to other refugees on the continent such as South Sudanese refugees in Uganda and Congolese refugees in Rwanda.

As can be gleaned from the above, all the articles tackle important and contemporary issues pertaining to statelessness in Africa. A good number of them offer a combination of theoretical as well as practical insights. Some also underscore that part of accountability in upholding the rights of stateless persons should entail not just taking action, but taking action with a sense of urgency. The articles contained in this *Special Issue* are refreshing and do not skimp on depth or detail, but leave no doubt that much more remains to be done. As a result, one golden thread that runs through most of the articles is the need for more focused research on statelessness in Africa- a topic to which this *Editorial* now turns.

IV. GRAPPLING WITH SOME OLD DEBATES AND A FEW EMERGING THEMES

Scholarship around statelessness in Africa still needs to grapple with existing debates. These include: the impact of membership requirements (such as race, ethnicity, religion) contained in nationality laws on statelessness; prolonged residency requirements for naturalisation; the disproportionate risks of statelessness and accompanying protection gaps faced by children³⁶ and women; the links between

³⁶ See, for example, Yoana Kuzmova and Thomas McGee, ‘Comment on the Zhao Case: Can A “Victory for Human Rights” in the Netherlands Benefit Children at Risk of Statelessness in the Middle East and North Africa?’ (2022) 4(1) *Statelessness & Citizenship Review* 145; Mihloti Basil Sherinda and Jonathan Klaaren “The South African Constitutional Court Decides Against Statelessness and in Favour of Children: *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20 (2022) 4(1) *Statelessness & Citizenship Review* 170; Benyam Dawit Mezmur, ‘Making Their Days Count: The 1961 Convention on the Reduction of Statelessness and the Convention on the Rights of the Child’ (2022) 4(1) *Statelessness & Citizenship Review* 198; and Jacqueline Bhabha “Editorial” (2022) 4(1) *Statelessness & Citizenship Review* 1..

statelessness, on the one hand, and forced migration, mass migration, trafficking, and similar phenomena, on the other; and legitimate as well as arbitrary grounds for deprivation of nationality. Moreover, the role of stakeholders such as the judiciary and the question of how to include the voices of affected communities in the development and implementation of laws, policies, and programmes that impact on statelessness remain examples of ongoing areas of research interest.

At the same time, many newly emerging issues related to statelessness in Africa should also be interrogated. These are not necessarily unique to Africa, but their interactions with the continent's social, economic, cultural, historical, legal, developmental, and other aspects of African realities could call for a more focused or context-specific response with a view to preventing and addressing statelessness. A few key areas — namely, the SDGs, COVID-19, counter-terrorism measures, and climate change — and their interactions with stateless persons are highlighted below.

First, the implementation of actions directed towards achieving the SDGs has significant implications for preventing and addressing statelessness. This is demonstrated, for example, by Badewa's article. Target 16.9 — 'Achieve universal legal identity and birth registration by 2030'³⁷ — is the most obvious candidate for interrogation in respect of statelessness in Africa, including how 'legal identity' is understood and what it could entail for stateless persons.³⁸ Meanwhile, other SDGs goals such as Goals 3 (on health) and Goal 4 (on education) are also important. Another worthy focus, is understanding the impact on statelessness of Goal 10, which aims to '[r]educe inequality within and among countries,' and its corresponding Target 10.7 on migration, which aims to '[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.' Since the SDGs are complemented by the continent-wide Agenda 2063 of the AU, the impact of the implementation of the latter on statelessness has mostly escaped scrutiny to date.

Secondly, the COVID-19 pandemic sheds light on the disproportionate impact of health emergency measures on stateless persons. Sharon Kane aptly conveys this in describing how the initial mantra that 'we are all in the same boat' changed to 'we are all in the same storm, but in different boats,' with stateless persons being in effect 'boatless.'³⁹ For example, restrictions on the right to freedom of movement had disproportionate impacts on stateless persons in Africa. The mostly inward-looking measures a number of states took to protect their own citizens reveal how easily refugees and stateless persons can be excluded from humanitarian and other

³⁷ United Nations Sustainable Development Goals (SDGs) (2015). Goal 16 aims to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.'

³⁸ See, for example, Bronwen Manby "'Legal identity for all" and statelessness: Opportunity and threat at the junction of public and private international law' (2021) *World Development* at 270, for reflections on the advantages as well as risks posed by the conceptualisation and implementation of measures around Target 16.9.

³⁹ Sharon Kane 'Caught in the storm without a boat: The impact of COVID-19 pandemic on stateless persons' (24 January 2022) Refugee Law Initiative Blog on Refugee Law and Forced Migration, available at <https://rli.blogs.sas.ac.uk/2022/01/24/caught-in-the-storm-without-a-boat-the-impact-of-the-covid-19-pandemic-on-stateless-persons/>

critical services.⁴⁰ There is also evidence showing that the impact of the pandemic has forced stateless women to resort to negative coping mechanisms such as the ‘forced commodification of their sexuality’.⁴¹ As the direct health impacts of the COVID-19 pandemic subside, its long-term effects, including the exacerbated economic inequities that most stateless persons inevitably face in Africa, the issue should not escape the gaze of researchers.

Thirdly, like most parts of the world, the African continent has seen a flurry of anti-terrorism legislation in the last decade, some of which does not pass the scrutiny of human rights standards. While laws that propagate for the deprivation of nationality as a counter-terrorism (national security) measure appear to be concentrated in Europe,⁴² it is also worth monitoring and interrogating developments on the African continent.⁴³ For example, have the African countries whose citizens joined the Islamic State (ISIS) considered such legislative measures? Do continent-wide and sub-regional frameworks on counter-terrorism measures contain elements that are aimed at preventing or addressing statelessness?

Lastly, the climate emergency that the world faces has been called ‘the biggest issue of our time.’ The African continent is severely affected by climate change, and climate-induced migration is taking place throughout the continent, and is disproportionately affecting children and women.⁴⁴ Challenges around data collection; the lack of consistent understanding of terminology such as the term ‘climate change-induced migration’; the need for international law (including the relevant AU law) to adapt to changing circumstances in the context of climate change; and efforts to ensure that the interpretation and application of domestic laws and policies are ‘fit for purpose’ to prevent and address statelessness in Africa. These are some of the many themes that could benefit from a more rigorous inquiry.

V. BEYOND A THEMATIC FOCUS: MAKING THE CIRCLE BIGGER

There is no doubt that the issue of statelessness is receiving increasing academic interest. The operative word here is ‘increasing’; in respect of academic scholarship on statelessness within the African continent, what exists is far from adequate, and it appears to be dominated by a few voices and disciplines.

Notably, legal scholarship on statelessness is predominant amongst the contributing disciplines. This is somehow understandable, since the very state of ‘being stateless’ is primarily a legal concept. The other ‘usual suspects’ such as political science, sociology, and history have contributed their share – although one is

⁴⁰ See, for example, Roshni Chakraborty & Jacqueline Bhabha ‘Gender, and COVID-19 in South Asia’ (2021) 23(1) *Health and Human Rights Journal* at 237–50.

⁴¹ *Ibid.*

⁴² For example in Austria, the Netherlands, United Kingdom, France, and Belgium.

⁴³ For more details on the issue, see UN Human Rights Council ‘Human rights and arbitrary deprivation of nationality: Report of the Secretary-General’ A/HRC/25/28 9 (2014).

⁴⁴ See, for example, United Nations Children’s Fund (UNICEF) ‘Children’s climate risk index’ (2021); UNICEF ‘The challenges of climate change: Children on the frontline’ (2015); Mo Ibrahim Foundation ‘The road to COP 27: Making Africa’s case in the global climate debate’ (July 2022).

reluctant even so to call it ‘their fair share’. However, the scholarship on statelessness still needs to make meaningful headway in fields such as economics, philosophy, and anthropology. Moreover, the role that psychology could play in helping us to understand the implications of statelessness both at the individual and communal levels is yet to be taken up in earnest. It is also not off the mark to inquire if there are elements of traditional, customary, or religious law and practice that could help inform the scholarship on statelessness in Africa.

Almost a decade ago, Mark Manly (the former head of the Statelessness Unit at the UNHCR) and Laura van Waas noted the existence of an adequate amount of academic activity on statelessness and concluded that ‘statelessness has “arrived” as a recognised focus of both academic and policy-oriented study’.⁴⁵ Five years down the line, in 2019, in an article entitled ‘The arrival of “Statelessness Studies”?’ David C. Baluarte further consolidated these arguments. Although he acknowledging that this area of study is neither fully defined nor has one specific field to claim it, Baluarte asserted ‘that the study of statelessness has emerged as a multi-disciplinary field’⁴⁶ and went on to ‘urge that we institutionalise it as such’.⁴⁷

It is worth exploring if researchers and academic institutions are paying adequate attention to these developments. For example, it is not clear whether any universities in Africa have engaged in activities such as curriculum development with a focus on statelessness, and if they have, what the depth and breadth of their courses are.

In moving forward, we should also ask critical questions such as the following: How do we increase academic engagement around the issue of statelessness on the African continent? What are some of the ‘dos and don’ts’ that we can learn from other regions of the world? For example, is there room for African organisations to organise themselves along the lines of the European Network on Statelessness (a ‘coordinating body and expert resource for organisations and individuals working to promote the right to a nationality in Europe’),⁴⁸ with membership spanning 41 European countries, for the purpose of expanding scholarship on statelessness in Africa? How do we bring the next generation of African researchers into the fold to contribute to the debate?

Part of expanding and deepening statelessness scholarship in Africa should also involve paying close attention to the role of language. For example, how do we capture the research being undertaken on the topic in languages other than English? How should research findings on statelessness be communicated using local languages?

It would also be remiss to overlook the role of donors in influencing the scholarship around statelessness in Africa. A large number of projects around legal

⁴⁵ Mark Manly & Laura van Waas ‘The state of statelessness research: A human rights imperative’ (2014) 19(1–2) *Tilburg Law Review* at 3, 4.

⁴⁶ David C Baluarte ‘The arrival of “statelessness studies”?’ (2019) *Statelessness & Citizenship Review* at 156.

⁴⁷ *Ibid.*

⁴⁸ European Network on Statelessness (ENS), available at <https://www.statelessness.eu/about>

identity (including on birth registration, national identity cards, and digitisation) on the African continent are supported by bilateral and multilateral organisations as well as other non-state actors. There is more room for such organisations to use their resources and leverage to support work aimed at identifying (including data collection), documenting, and generally understanding and improving the lived reality of stateless persons in Africa.⁴⁹

VI. CLOSING REMARKS

There is no doubt that African scholarship on the topic at hand – statelessness in the African context – is still in short supply. The discussions in this *Special Issue* attempt to make a modest contribution to these developing debates from the perspective of a few African scholars. We encourage all stakeholders to actively engage with the challenges, gaps, responses, and solutions proposed in the articles of this *Special Issue* and consider their role in responding to statelessness in Africa. After all, ‘leaving no one behind’ deserves no less.

⁴⁹ See, for example, Sneha Raghavan & Alan Gelb ‘10 million stateless and growing: How donors can help’ (17 November 2014), available at <https://www.cgdev.org/blog/10-million-stateless-and-growing-how-donors-can-help>

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The Impact of Gender Discrimination on Statelessness: Causes, Consequences and Legal Responses

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Abstract

Gender discrimination, both direct and indirect, is a leading cause of statelessness worldwide. Most often, direct discrimination is reflected in patriarchal nationality laws that restrict women's ability to acquire, retain, and pass on their nationality to their children and their spouses. There are also many indirect forms of discrimination owing to women's often subordinate status that can impact women's (and their children's) vulnerability to statelessness. Overall, women are subject to a range of elevated and compounded risks of statelessness linked to patriarchal norms and deeply rooted gender inequalities. Despite the substantial impact of gender discrimination on statelessness, this issue is an understudied topic in the literature. This article discusses how gender discrimination impacts statelessness broadly and analyses how relevant international and selected Southern African and domestic law and policy frameworks have responded to this issue. First, the article briefly discusses some of the leading causes of statelessness arising from direct and indirect gender discrimination, and some of the key consequences of statelessness for women. Secondly, the article provides a critical gender analysis of the international legal framework on statelessness. It discusses how relevant international human rights legal and policy frameworks offer a robust protection of women's nationality rights and gender equality. Thirdly, the article analyses selected regional and national law and policy developments related to gender and statelessness in Southern Africa. Overall, while the analysis indicates progress in some areas, there remain ongoing challenges in bridging the statelessness gender discrimination gap and a need for further research in this area.

Keywords: statelessness, women, discrimination, international law, Southern Africa

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I. INTRODUCTION

Statelessness is a significant issue impacting human rights globally and in Southern Africa. The latter region hosts some of the largest stateless populations on the African continent, including in South Africa and Zimbabwe.¹ While there is a lack of clear data on the exact numbers of stateless or potentially stateless people in the region,² the World Bank estimates indicate that more than 130 million people in Southern Africa lack identity and nationality identification.³ For many, this can render them at high risk of statelessness, since many Southern African governments require identification documents to confirm nationality. Denied the right to a nationality, stateless people often face a range of barriers in accessing their fundamental human rights. As Arendt famously observed, nationality is ‘the right to have rights.’⁴ When nationality rights are denied, the impacts often include a lack of legal status and protection, and the denial in practice of a wide range of human rights, including the right to work, to health and to education.⁵ While statelessness has profound consequences for the human rights of both men and women, there is growing evidence that women are both more vulnerable to becoming stateless, and more vulnerable when stateless.⁶ Worldwide, women in general face deep-rooted structural discrimination in public, in the home, and in the workplace, owing to gender inequality and patriarchal norms.⁷ Pervasive gender inequalities are further compounded for women who face discrimination on multiple and intersecting grounds, including race or ethnicity, and those who are displaced, refugees, or stateless.⁸ However, as various scholars who have brought attention to the links between gender and statelessness have noted, there is a gap in the literature regarding the many gender dimensions of statelessness.⁹ In fact, as Brennan contends, gender perspectives, and particularly feminist analysis, have been

¹ Aimée-Noël Mbiyozo ‘Statelessness in Southern Africa: Time to end it, not promote it’ (2019) Institute for Security Studies, available at <https://issafrica.s3.amazonaws.com/site/uploads/sar32.pdf>, accessed on 12 May 2022.

² Emmanuelle Mitte ‘“Foreigners everywhere, nationals nowhere”: Southern Africa’s changing response to UN campaign on statelessness’ (2021), available at <https://africanlii.org/article/20211103/%E2%80%98foreigners-everywhere-nationals-nowhere%E2%80%99-southern-africa%E2%80%99s-changing-response-un>, accessed on 12 May 2022.

³ World Bank ‘Identification for Development (ID4D) Global Dataset’ (2021), available at <https://datacatalog.worldbank.org/search/dataset/0040787>, accessed on 12 May 2022.

⁴ Hannah Arendt *The Origins of Totalitarianism* (1951).

⁵ David Weissbrodt & Clay Collins ‘The human rights of stateless persons’ (2006) 28 *Human Rights Quarterly* 245 at 265

⁶ Committee on the Elimination of Discrimination against Women (CEDAW Committee) ‘General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (5 November 2014) CEDAW/C/GC/32 at para 51 (CEDAW GR 32).

⁷ UN Women ‘Progress of the world’s women: In pursuit of justice’ (2011) at 8, available at www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice, accessed on 12 May 2022. References to ‘women’ in this Article are inclusive of both women and girls of all ages.

⁸ UN Human Rights Council (HRC) ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo’ (6 June 2011) A/HRC/17/26.

⁹ See, for example: Deirdre Brennan ‘Statelessness and the feminist toolbox: Another man-made problem with a feminist solution?’ (2019) 24(2) *Tilburg Law Review* 170; Elizabeth Hooker *Here, We Are Walking on a Clothesline: Statelessness and Human (In)Security Among Burmese Women Political Exiles Living in Thailand* (MSc thesis, University of Portland, 2013) at 118; Melissa George ‘Comment: The effects of statelessness on gender rights’ (2014) 4 *Righting Wrongs: A Journal of Human Rights* 1; TL Lee *Statelessness, Human Rights and Gender: Irregular Migrant Workers from Burma in Thailand* (2005).

¹⁰ *Ibid* Brennan at 179.

‘strikingly absent’ in statelessness literature and research.¹⁰

This gender gap in the literature is concerning given that gender discrimination is a leading cause of statelessness worldwide and includes both direct and indirect manifestations. Most often, direct discrimination is reflected in nationality laws that discriminate against women, and includes limitations on their ability to acquire, retain, and pass on their nationality to their children and their spouses. This is a major contributor to statelessness experienced by women and children.¹¹ Such laws reflect an entrenched patriarchal view, reinforced through colonial practices, that women’s nationality should be dependent on the male line. While less often discussed in existing literature, there are also many indirect forms of discrimination, occurring even where laws and practice are in theory gender neutral, owing to women’s often subordinate status in society that can impact women’s (and their children’s) vulnerability to statelessness, or render them effectively stateless, unable to prove their identities and nationalities.¹²

Recognising this understudied area in the literature, this article discusses how gender discrimination impacts statelessness, globally and with specific focus on Southern Africa, and analyses how relevant international and selected regional and domestic law and policy frameworks have responded to this issue. The article seeks to contribute to the literature in this area in two ways: first, by analysing the current literature and highlighting the need for further research on issues of gender discrimination, both direct and indirect, related to statelessness; and, secondly, by adding to the existing literature through analysis of current law and policy developments in a specific context where statelessness is a growing issue of concern, viz. Southern Africa. The region of Southern Africa, understood broadly for the purposes of this article as comprising the sixteen Southern African Development Community (SADC) members,¹³ is selected as the geographic focus of this article for the following reasons. As noted above, statelessness, and the risk of statelessness, is identified as a major human rights issue in this region. Further, while there is limited but growing literature on statelessness generally in this region, there are several relevant law and policy developments of interest in this area. Finally, there is limited attention to gender issues in existing statelessness literature in the region, a gap to which this article seeks to contribute.

The next section discusses some of the leading causes of statelessness, arising

¹¹ See, for example, Laura van Waas Zahra Al-Barazi & Deirdre Brennan ‘Gender discrimination in nationality laws: Human rights pathways to gender neutrality’ in Niamh Reilly (ed) *International Human Rights of Women* (2019); UNHCR ‘Background Note on gender equality, nationality laws and statelessness’ (2022), available at <https://www.refworld.org/docid/6221ec1a4.html>, accessed on 14 November 2022.

¹² See Allison J. Petrozziello ‘(Re)producing statelessness via indirect gender discrimination: Descendants of Haitian migrants in the Dominican Republic’ (2019) 57(1) *International Migration* 213 at 214; Betsy L. Fisher ‘Gender discrimination and statelessness in the Gulf Cooperation Council states’ (2016) 23 *Michigan Journal of Gender and Law* 269.

¹³ While there is some debate over how the region of Southern Africa is defined, the SADC member states comprise Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe. SADC ‘Member States’, available at <https://www.sadc.int/member-states#:~:text=The%20Southern%20African%20Development%20Community,Republic%20Tanzania%2C%20Zambia%20and%20Zimbabwe>, accessed on 11 November 2022.

both from direct and indirect gender discrimination, as well as some of the key consequences of statelessness for women. The third section provides a critical gender analysis of the relevant international legal frameworks on statelessness, highlighting concerns about inadequate gender responsiveness in the existing instruments. However, analysis of the relevant international human rights legal and policy frameworks — binding in the Southern African region — demonstrates a comprehensive foundation for women's nationality rights and gender equality. The fourth section addresses relevant regional and sub-regional laws, policy developments, and jurisprudence. While not exhaustive, the analysis in this section indicates that there is growing attention to gender discrimination in statelessness law and policy in Southern Africa, and notable progress in some areas, such as the reform of gender discriminatory nationality laws. However, there remain ongoing challenges in bridging the statelessness gender gap that results in compounded vulnerabilities and consequences for women.

II. GENDERED CAUSES AND CONSEQUENCES OF STATELESSNESS

(a) Conceptualising statelessness

To clarify and frame the key concepts used in this article, the section begins with a brief discussion on conceptualising statelessness. Under international law, as per the 1954 Convention relating to the Status of Stateless Persons (1954 Convention), a stateless person is defined as someone 'who is not considered as a national by any State under operation of its law'.¹⁴ This definition has historically been understood as limited to cases of statelessness *de jure* (in law), which occurs due to various reasons, including by operation of the nationality laws of a country, or due to state succession and changes to national borders.¹⁵ However, critiques in the literature have pointed to the shortcomings of this legally formalistic definition, proposing that the real test should be one of 'effective nationality', that is, whether there is effective national protection of an individual's nationality rights.¹⁶ Thus, the term 'de facto (in practice) statelessness' developed, pointing to the many ways in which people are not able to exercise their nationality rights in practice, for example, due to displacement from conflict or instability or migration, lack of birth registration, bureaucratic and administrative difficulties in obtaining identification documents, or as a consequence of human trafficking.¹⁷ As discussed below, women are often more likely to face particular vulnerabilities to *de facto* statelessness owing to indirect gender discrimination.

However, as van Waas and de Chickera note, absent a binding definition under international law, the meaning of the concept of *de facto* statelessness has long

¹⁴ Convention Relating to the Status of Stateless Persons 1954, 360 UNTS 117 art 1(1).

¹⁵ Weissbrodt & Collins *op cit* note 5 at 251.

¹⁶ Carol A. Batchelor 'Stateless persons: Some gaps in international protection' (1996) 7(2) *International Journal of Refugee Law* 232 at 233.

¹⁷ *Ibid.*

been debated in the literature.¹⁸ According to discussions facilitated by the United Nations High Commissioner for Refugees (UNHCR) in 2010 known as the Prato conclusions, 'de facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.¹⁹ Ultimately, van Waas and de Chickera contend, this distinction around what de facto statelessness entails is less relevant now, given that the UNHCR has endorsed a broader understanding of what statelessness entails, and in light of modern human rights legal protections.²⁰ The 2014 UNHCR Handbook on the Protection of Stateless Persons provides very detailed guidance clarifying how the 1954 Convention definition of a stateless person should be interpreted, considering not only the relevant law of a state, but how it is implemented in practice, recognising that states may not follow, or even ignore, laws in practice.²¹ This broader interpretation of the definition of a stateless person recognises that regardless of a state's nationality laws, persons can be rendered stateless in practice and in fact, even if not in law. This approach arguably reflects a more substantive interpretation of what nationality is and what it entails in practice, especially from a gendered perspective, given the many compounded risks of statelessness (direct and indirect) that women tend to face, as is discussed in the following sections.

(b) Direct gender discrimination in nationality laws

Gender discriminatory nationality laws are a leading cause of statelessness globally.²² Much of the advocacy work and literature around gender and statelessness has focused on gender-discriminatory nationality laws and the significant impacts they have on risks of *de jure* statelessness.²³ For example, the UNHCR Global Action Plan to End Statelessness includes a goal (Action 3) to remove gender discrimination from nationality laws by 2024, and there has been notable progress on this at the global level.²⁴ Such laws are based on the concept of 'dependent nationality', which is strongly rooted in patriarchal ideas about the dominance of the male as 'head of the family' through which familial nationality should flow.²⁵ During the colonial era, nationality laws of colonial powers, including the United Kingdom and France, enshrined dependent nationality along the male line, causing it to be replicated in domestic laws

¹⁸ Laura van Waas & Amal de Chickera, 'Unpacking statelessness' in Tendayi Bloom Katherine Tonkiss & Phillip Cole (eds) *Understanding Statelessness* (2017).

¹⁹ UNHCR 'Expert meeting – The concept of stateless persons under international law (Prato Conclusions)' Section II (2010), available at <http://www.refworld.org/docid/4ca1ae002.html>, accessed on 12 November 2022.

²⁰ Van Waas & de Chickera op cit note 18.

²¹ UNHCR 'Expert meeting – The concept of stateless persons under international law (Prato Conclusions)' Section II (2010), available at <http://www.refworld.org/docid/4ca1ae002.html>, accessed on 12 November 2022.

²² UNHCR 'Global Action Plan to end Statelessness: 2014-2024' at 12, available at www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html, accessed on 12 May 2022.

²³ See for example, the Global Campaign for Equal Nationality Rights, available at <https://equalnationalityrights.org/>, accessed on 12 May 2022; Zahra Albarazi & Laura van Waas, 'Towards the abolition of gender discrimination in nationality laws' (2014) 46 *Forced Migration Review* 49.

²⁴ UNHCR Global Action Plan op cit note 22 at 12.

²⁵ International Law Association 'Committee on feminism and international law: Final report on women's equality and nationality in international law' (London Conference, 2000) at 17, 25.

of colonised countries around the world, as occurred in many countries throughout Africa.²⁶ Consequently, this discriminatory approach was prevalent in nationality laws around the world until recent decades, although it is less common now.

There are two main legal consequences arising from the dependent nationality approach that result in gender discrimination. First, women can be required to automatically give up their own nationality upon marriage to a foreign national and acquire their husband's.²⁷ Conversely, some laws also restrict women from passing their nationality to their foreign husbands upon marriage on an equal basis with men's right to pass nationality to their wives. This restriction is a concern where the male spouse is stateless or at risk of statelessness. As recognised by the UN Human Rights Committee (HRC) in a case concerning Mauritius in 1981, this restriction impedes the right to family and is discriminatory on the basis of sex.²⁸ Secondly, due to the preference for following the male lineage, nationality of children passes through the man, barring women from passing their nationality to their children.²⁹ As such, many countries enacted laws that require women to lose their nationality upon marriage and restrict women from passing nationality to their children. No such restrictions apply to men who married foreign nationals or became a parent. The consequences can be severe. For example, children who cannot acquire nationality from their father can become stateless if their father dies, abandons the family, becomes stateless, or cannot prove his nationality.³⁰ Women married to foreign nationals risk losing their acquired nationality and becoming stateless if their status changes, such as through divorce or death or abandonment by the husband.³¹

As of 2022, more than 50 countries worldwide have laws restricting women's equal rights to acquire, retain, or change their own nationality.³² A total of 25 countries still have laws that restrict women from passing their nationality to their children.³³ For example, in Eswatini, the Constitution states that children can only acquire nationality from their fathers.³⁴ There is an exception if the child is born out of wedlock and not legally or customarily recognised by the father, which is the only circumstance where a Swazi mother can pass her nationality to her child. There are still many countries worldwide, including Malawi and Lesotho, that restrict a woman from passing her nationality to her non-citizen spouse, although no such restriction applies to men.³⁵ Overall, there has been significant progress in the Southern African region to reform gender discriminatory nationality laws. As one of the last remaining countries in the region to include gender discrimination in

²⁶ Ibid.

²⁷ Ibid at 16.

²⁸ *Aumeeruddy-Cziffra v Mauritius* (35/1978), Views, CCPR/C/12/D/35/1978.

²⁹ International Law Association op cit note 25 at 18.

³⁰ CEDAW GR 32 op cit note 6 para 61.

³¹ Ibid para 60.

³² UNHCR 'Background Note' op cit note 11 at 2.

³³ Ibid at 2.

³⁴ Constitution of the Kingdom of Eswatini, 2005, Article 43. This provision applies to children born after 2005. According to the 1992 Citizenship Act the same provisions apply to children born after 1992.

³⁵ Bronwen Manby 'Statelessness in Southern Africa' (2012) Briefing paper for the UNHCR at 9.

its nationality laws, Eswatini has pledged to reform its nationality laws to eliminate gender discrimination by 2024.³⁶

In addition, nationality laws that discriminate against a group of people, on the basis of race, ethnicity, or religion, can directly cause statelessness through the mass denial of nationality rights. Women from these groups are likely to face compounded discrimination on intersecting grounds owing to their gender, and thus, greater vulnerabilities. For example, in Madagascar, the Karana community, a predominantly Muslim minority group of Indo-Pakistani descent, faces entrenched discrimination and deprivation of nationality rights, despite living in the country for generations, perpetuating a multi-generational cycle of statelessness.³⁷

(c) Indirect gender discrimination

Indirect gender discrimination also plays a significant role as a cause of statelessness. Indirect discrimination refers to the gender discriminatory impact of laws, policies, and practices that may appear gender neutral, but in practice have a disproportionate and negative impact on women.³⁸ As Petrozziello discusses, the impact of indirect discrimination against women in statelessness is an understudied area in the literature.³⁹ There are a number of ways in which indirect gender discrimination contributes to statelessness of women, and children. The UN Committee for the Elimination of Discrimination against Women (CEDAW Committee) discusses the impacts of indirect discrimination as a cause of statelessness in detail in its General Recommendation No. 32.⁴⁰ The consequences of indirect discrimination resulting in increased risks of statelessness include indirect discrimination arising from gender-neutral laws and practices, challenges in attaining birth registration, and difficulties in accessing and retaining identity documents, often due to displacement, conflict, or human trafficking.

As the CEDAW Committee outlines, even nationality laws that appear gender neutral can be discriminatory in practice and lead to greater risks of statelessness. Generally, women are more likely than men to change their nationality to that of their foreign spouse and are therefore more vulnerable to statelessness if there is a gap between renouncing one nationality and acquiring another.⁴¹ For women who marry a foreign husband and relocate to his country, indirect discrimination may also result because women face more barriers and challenges in acquiring new nationality. For example, women are generally less likely to acquire adequate language skills in a new country, due to reduced access to education and the public sphere.⁴² They may also

³⁶ UNHCR 'Background Note' op cit note 11 at 6.

³⁷ Mbiyozo op cit note 1 at 15-16.

³⁸ CEDAW GR 32 op cit note 6 para 54.

³⁹ Petrozziello op cit note 12 at 214.

⁴⁰ CEDAW GR 32 op cit note 6 para 51.

⁴¹ Ibid para 54.

⁴² Ibid para 55.

⁴³ Ibid.

have difficulty in proving property ownership or economic self-sufficiency.⁴³ Some countries require the spouse to sponsor nationality acquisition. This practice can leave women vulnerable to control by their spouse, which could have serious consequences in situations involving domestic violence.⁴⁴ If there is a gap in nationality status, women, and potentially their children, may be left in a situation where no state considers them to be nationals and therefore become temporarily stateless, resulting in restrictions on movement, as well as barriers in accessing services and legal protection.⁴⁵ Moreover, 'situations of statelessness following marriage to a foreigner and naturalization requirements ... can lead to women being dependent on men economically, socially, culturally and linguistically and, in turn, expose women to an increased risk of exploitation.'⁴⁶ Thus, it appears likely that women who are caught in-between nationalities due to marriage and relocation are increasingly vulnerable to abuse and intimate partner violence.⁴⁷

A major barrier to proving nationality, for both women and their children, is the global challenge in ensuring birth certificate registration. Both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) recognise a child's right to have their birth registered as a basic human right.⁴⁸ The UN's Sustainable Development Goals (SDGs), under Target 16.9, recognise the importance of ensuring legal identity for everyone, including birth registration.⁴⁹ Without birth certificates, individuals cannot prove their identity and their nationality, leaving them vulnerable to statelessness.⁵⁰ This is a major cause of vulnerability to statelessness in Southern Africa, where less than 50% of births are registered.⁵¹ In some countries, it is much lower; such as in Zambia, where only 10% of births are registered.⁵² To varying degrees in different countries, there are many barriers to accessing birth registration and obtaining a birth certificate. Barriers include bureaucratic and procedural obstacles, lack of knowledge about or access to services, high costs, and discrimination against certain groups, including women. Some countries do not permit women to register the births of their children. For example, in Eswatini, the relevant law requires the father to register the birth of a child.⁵³ Only if he is dead, absent, or unable to register the birth is another person, such as the mother, permitted to register the birth. In other countries, such as Zambia, gender discrimination in administrative and customary procedures can

⁴⁴ Alice Edwards 'Displacement, statelessness, and questions of gender equality and the Convention on the Elimination of All Forms of Discrimination against Women' Legal and Protection Policy Research Series No. 14 UNHCR (2009) at 61.

⁴⁵ CEDAW GR 32 op cit note 6 para 57.

⁴⁶ Ibid.

⁴⁷ Edwards op cit note 44 at 61.

⁴⁸ Convention on the Rights of the Child (CRC), 1989 1577 UNTS 3, Article 7; African Charter on the Rights and Welfare of the Child (ACRWC), OAU Doc. CAB/LEG/24.9/49 (1990), Article 6(2).

⁴⁹ UN 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015), available at www.sustainabledevelopment.un.org/post2015/transformingourworld, accessed on 12 May 2022.

⁵⁰ Laura van Waas *Nationality Matters: Statelessness in International Law* 2 ed (2008) at 155.

⁵¹ UNHCR 'Statelessness Update: Southern Africa' (September, 2020) at 5.

⁵² Ibid.

⁵³ Eswatini Births, Deaths and Marriages Act 18 of 1983.

⁵⁴ Mitte op cit note 2.

mean that women are limited from registering children's births in practice.⁵⁴ Some women face compounded challenges in accessing birth registration on the basis of both gender and racial discrimination, as Petrozziello's research in the Dominican Republic demonstrates, contributing to risks of statelessness for women and their children.⁵⁵

Practical challenges in obtaining identity documentation are also a major barrier to proving nationality in the Southern African region.⁵⁶ Gender-discriminatory norms and practices contribute to barriers to women obtaining documentation, as women tend to face greater challenges than men in securing and retaining their own identity documents.⁵⁷ Additionally, some women experience compounded discrimination in obtaining identity and citizenship documentation, such as due to their socio-economic status, and additional barriers due to lack of access to information, resources, and legal assistance.⁵⁸ Thus, while women in these circumstances may have nationality rights in law, they can be denied their effective protection in practice.

Violence against women (VAW) can also have consequences for women's ability to access documentation and prove their identity and nationality. In cases of violence, abuse, or trafficking, women's identity documentation may be seized or destroyed as a means of control.⁵⁹ For example, women and girls comprise more than 70 per cent of all victims of trafficking,⁶⁰ many of whom have their identity documents, such as passports, seized by traffickers or pimps.⁶¹ They are thus left without any way to prove their identity and nationality.⁶² As such, the UNHCR notes '... victims of trafficking, many of whom, especially women and children, are rendered effectively stateless due to an inability to establish such status.'⁶² Owing to the widespread epidemic of VAW around the world, women are also more likely than men to face situations of gender-based violence, abuse, and exploitation. In South Africa, there is evidence to suggest that women who lack identification documents to prove their nationality, and are consequently at risk of statelessness in practice, are at greater risk of VAW. In such cases, women who do not have identity documents are often reluctant to seek help from authorities, or face barriers in seeking assistance and services.⁶⁴

The above discussion seeks to highlight some of the leading direct and indirect

⁵⁵ Petrozziello op cit note 12.

⁵⁶ Bronwen Manby *Citizenship in Africa: The Law of Belonging* (2018).

⁵⁷ CEDAW GR 32 op cit note 6 para 57.

⁵⁸ Trisha Sabhapandit & Padmini Baruah 'Untrustworthy and unbelievable: Women and the quest for citizenship in Assam' 2021 3(1) *Statelessness & Citizenship Review* at 236.

⁵⁹ UN Human Rights Council (HRC) 'Report on discrimination against women on nationality related matters, including the impact on children' (2013) UN Doc. A/HRC/23/23 at para 24.

⁶⁰ UN Office on Drugs and Crime (UNODC) 'Global report on trafficking in persons 2018' (December 2018) at 25, 28, available at www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP_2018_BOOK_web_small.pdf, accessed on 12 May 2022.

⁶¹ UNHCR 'Activities in the field of statelessness: Progress report' (2002) EC/51/SC/CRP.13 at para 18.

⁶² Edwards op cit note 44 at 61

causes of statelessness for women and their children, that are rooted in or exacerbated by gender discrimination. While not an exhaustive analysis, and certainly there is further research required on this issue, it demonstrates that women are vulnerable to a range of elevated and compounded risks of statelessness linked to patriarchal norms and deeply rooted gender inequalities. These risks are not only limited to the discrimination *de jure* of gender discriminatory nationality laws, but also arise from indirect gender discrimination, especially as reflected in bureaucratic and administrative practices. For women who may also suffer discrimination on other grounds, such as race, ethnicity, religion, or socio-economic status, these effects are further compounded.

(d) Key consequences of statelessness for women

Despite the many serious consequences of being stateless, there is limited existing research into the gender-specific impacts of statelessness on women and their lived experiences. This is a significant gap, as Manjoo's discussion of a feminist approach to citizenship highlights. She argues that there is a need for 'a situated understanding of citizenship for women' informed by women's lived experiences.⁶⁵ Also, as George notes, 'limited existing research largely ignores the impacts that statelessness specifically has on women, including the extent to which statelessness creates vulnerabilities for abuse.'⁶⁶ As a starting point, it is very difficult to quantify how many women actually experience statelessness, given that the limited global data that does exist is not gender-disaggregated.⁶⁷ While there is a dearth of research in this area, some key overarching concerns often affecting stateless women are identifiable. As Rijken et al observe, 'in a number of areas, stateless women are more affected by the consequences of statelessness and find themselves in a more vulnerable position than men.'⁶⁸ The COVID-19 pandemic, and accompanying lockdowns and reduced access to services, as well as its severe socio-economic impacts, have heightened this vulnerability for stateless women even further.⁶⁹ Emerging research suggests that women who are stateless are especially vulnerable to VAW, including trafficking and sexual exploitation, as well as domestic violence and intimate partner violence.⁷⁰

⁶³ UNHCR 'Statelessness: Prevention and reduction of statelessness and protection of stateless persons' (14 February 2006) EC/57/SC/CRP.6 at para 7(d).

⁶⁴ Pumla Rulashe 'Without documents, women at high risk of gender-based violence' UNHCR (15 December 2021), available at <https://www.unhcr.org/news/stories/2021/12/61b9c3104/documents-women-high-risk-gender-based-violence.html>, accessed on 12 May 2022.

⁶⁵ Rashida Manjoo 'Special guest contribution: Violence against women as a barrier to the realisation of human rights and the effective exercise of citizenship' (2016) 112 *Feminist Review* 11 at 14.

⁶⁶ George op cit note 9 at 1.

⁶⁷ UNHCR 'Global trends: Forced displacement in 2018' (2019) at 51. The report notes that fewer than half of countries have official statistics on stateless people, and it does not include any gender-disaggregated data on statelessness.

⁶⁸ Conny Rijken Laura van Waas Martin Gramatikov & Deirdre Brennan *The Nexus Between Statelessness and Human Trafficking in Thailand* (2015) 106.

⁶⁹ UNHCR 'Displaced and stateless women and girls at heightened risk of gender-based violence in the coronavirus pandemic' (20 April 2020), available at <https://www.unhcr.org/news/press/2020/4/5e998aca4/displaced-stateless-women-girls-heightened-risk-gender-based-violence-coronavirus.html>, accessed on 12 May 2022.

⁷⁰ UNHCR op cit note 59 para 53.

The CEDAW Committee further observes that ‘stateless women and girls are often marginalised’ and deprived of a host of rights, including the right to political participation, access to social benefits, and access to justice, as well as their human rights to education, health care, property, and employment.⁷¹ In addition, many stateless people face barriers in mobility, right to travel, and right to legally form a family through marriage. While all stateless people are likely to face challenges in accessing key services and rights, there is evidence to suggest that women face compounded challenges in accessing such services owing to gender inequalities, discrimination, and patriarchal norms.⁷² The consequences are significant, as empirical research shows that stateless people tend to have lower income levels, lower education levels, and poorer health outcomes.⁷³ As women are usually paid less than men, and have less access to education than men, while shouldering greater home and childcare responsibilities, the gendered impacts are compounded.⁷⁴

In general, restrictions on access to health services can arise because stateless people are formally excluded, or because of differential fees for non-nationals, or the lack of identity documentation, or immigration status.⁷⁵ Restrictions on access to health care ‘... disproportionately affect women who may be unable to receive proper sexual and reproductive health care, including maternal and neonatal care.’⁷⁶ Lack of access to services can be life threatening, when women cannot obtain health care or seek legal assistance, such as in cases of VAW. Statelessness also severely impacts mobility and the ability to travel, a situation often heightened for women, who tend to face greater barriers to moving around and travelling.⁷⁷ There is also some evidence that statelessness negatively impacts the right to form a family, to marry and to have children, as the legal process of marriage typically requires identity documents.⁷⁸ While there is a clear need for further research into the gendered impacts of statelessness as experienced by women themselves, the foregoing outlines key areas of concern and demonstrates that gender discrimination certainly impacts the harms, restrictions, and vulnerabilities commonly experienced by women who are stateless.

III. RELEVANT INTERNATIONAL LEGAL FRAMEWORKS

(a) International human rights law: Protecting the right to a nationality, gender equality, and non-discrimination

⁷¹ CEDAW GR 32 op cit note 6 para 53.

⁷² Women’s Refugee Commission ‘Our motherland, our country: Gender discrimination and statelessness in the Middle East and North Africa’ (2013) at 3, available at www.womensrefugeecommission.org/research-resources/our-motherland-our-country-gender-discrimination-and-statelessness-in-the-middle-east-and-north-africa/, accessed on 12 May 2022.

⁷³ D Blitz S Balaton-Chrimes R Lakshman & M Lynch ‘The cost of statelessness: A livelihoods analysis’ Bureau of Population, Refugees and Migration, United States Department of State (2011).

⁷⁴ Rijken et al op cit note 68 at 19, 60.

⁷⁵ UN HRC op cit note 59 para 50.

⁷⁶ Ibid at 70.

⁷⁷ Rijken et al op cit note 68 at 58.

⁷⁸ Ibid at 70.

International human rights law provides a robust, and widely subscribed, framework for the protection of a right to nationality, gender equality, and non-discrimination. The right to a nationality is recognised and protected in a number of international human rights law instruments that are widely ratified in the Southern African region. The Universal Declaration of Human Rights (UDHR) provides under article 15 that ‘everyone has the right to a nationality’, and that ‘no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’.⁷⁹ The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) also recognises the general right to a nationality.⁸⁰ The International Covenant on Civil and Political Rights (ICCPR)⁸¹ and the UN Convention on the Rights of the Child (CRC),⁸² specifically protect the rights of children to nationality. As all SADC member states have acceded to the core international human rights treaties, including the ICCPR, ICERD, the CRC, and the International Covenant on Economic, Social and Cultural Rights (the ICESCR),⁸³ these international legal protections are binding in each country in the region.⁸⁴

As noted above, stateless persons who cannot prove their nationality are typically barred from exercising a range of internationally protected civil, political, social, and economic rights. For example, a stateless person is not allowed to vote or stand for public office — rights protected under the ICCPR.⁸⁵ They are denied freedom of movement, including travel outside national borders.⁸⁶ The ICESCR protects a range of rights, including the right to work, to education, to health, and to housing. In practice, a stateless person would typically be barred from all of these ‘official’ areas of life.⁸⁷ Yet, as Weissbrodt & Collins discuss, human rights apply simply because we are human, thus nationality should be irrelevant.⁸⁸ For example, under article 2, the ICCPR applies ‘to all individuals within [a state’s] territory and subject to its jurisdiction’.⁸⁹ The UN Human Rights Committee has confirmed that the rights in the ICCPR apply to everyone, ‘irrespective of his or her nationality or statelessness’.⁹⁰

International human rights law also recognises some gendered dimensions of statelessness. This tends to focus on recognition that statelessness is often caused

⁷⁹ Universal Declaration of Human Rights (UDHR) 1948, Article 15(1), (2).

⁸⁰ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, 660 UNTS 195, Article 5(c)(iii).

⁸¹ International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171 (ICCPR), Article 24(3).

⁸² CRC op cit note 48, Article 7.

⁸³ International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, 993 UNTS 3.

⁸⁴ All sixteen SADC member states have ratified each of the noted treaties: United Nations Treaty Database, available at https://tbineternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en, accessed on 11 November 2022.

⁸⁵ ICCPR op cit note 81, Article 25.

⁸⁶ Freedom of movement is protected under Ibid ICCPR, Article 12.

⁸⁷ CEDAW GR 32 op cit note 6 para 52.

⁸⁸ Weissbrodt & Collins op cit note 5 at 249.

⁸⁹ ICCPR op cit note 81, Article 2.

⁹⁰ Human Rights Committee ‘General Comment No. 15: The position of aliens under the Covenant’ (11 April 1986) HRI/GEN/1/Rev.9 (Vol. I) at para 1.

by gender discriminatory nationality laws. First, equality and non-discrimination are fundamental overarching principles enshrined in all international human rights treaties. For example, the UDHR and the ICCPR prohibit discrimination on numerous grounds, including sex.⁹¹ The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) specifically prohibits all forms of discrimination against women and seeks to ensure gender equality.⁹² CEDAW further requires states to reform laws and processes and abolish practices that discriminate against women (whether directly or indirectly).⁹³ The CEDAW Committee, the expert treaty body charged with overseeing implementation of the treaty, confirms that formal equality between men and women in law is not sufficient, rather states must ensure 'substantive equality'.⁹⁴ Substantive equality recognises the impacts of gendered power imbalances and underrepresentation of women, and seeks to ensure 'equality of results'.⁹⁵ With regard to nationality issues, CEDAW expressly protects women's 'equal rights with men to acquire, change or retain their nationality'.⁹⁶ CEDAW recognises the prevalent state practices of restricting women's rights to retain their nationality upon marriage and to pass their nationality to their children. As such, CEDAW article 9(1) states that '... neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'. Article 9(2) affirms that women have equal rights with men regarding the nationality of their children.

CEDAW's express recognition of women's equal nationality rights, both in respect to marriage and children, is significant given that the treaty is widely ratified globally, including by all states in the SADC region.⁹⁷ The CEDAW Committee has also drawn attention to gender and nationality issues in the region, notably pointing both to direct and indirect forms of discrimination impacting nationality rights and risks of statelessness. For example, in its 2022 concluding observations on Namibia, the Committee noted various nationality concerns, calling on the state to ratify the Statelessness Conventions, and warning that birth registration remains low, especially impacting undocumented women.⁹⁸ In its concluding observations on Eswatini, referring to discriminatory nationality laws, the Committee stated that 'the Committee is concerned that both the Constitution and the Citizenship Act

⁹¹ ICCPR op cit note 81, Article 26.

⁹² Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979, 1249 UNTS 13, Article 2.

⁹³ Ibid.

⁹⁴ CEDAW 'General Recommendation No. 25. Article 4, paragraph 1, of the Convention (temporary special measures)' (2004) at para 8.

⁹⁵ Ibid para 9.

⁹⁶ CEDAW op cit note 93, Article 9(1).

contain provisions depriving children born to Swazi women and foreign husbands of nationality, hence increasing their risk of statelessness.⁹⁹ These examples indicate that there are ongoing concerns with gendered dimensions of statelessness in the region.

Several 'soft law' normative developments in international human rights law also reflect greater attention to the unique gender implications of statelessness, again with focus on discriminatory nationality laws. This shift is reflected in international jurisprudence that has ruled against gender-discriminatory nationality laws.¹⁰⁰ Likewise, highlighting the impact of gender-discriminatory nationality laws, the UN Human Rights Council issued a Resolution on the right to a nationality for women and children in 2012.¹⁰¹ The Resolution calls for states to refrain from enacting gender discriminatory nationality legislation. It also calls on states to reform any discriminatory legislation to ensure women's equal rights to confer nationality on their children and to retain their own nationality status in marriage.¹⁰² With a similar focus, the UNHCR's Global Action Plan to End Statelessness, launched in 2014, includes a specific goal to remove gender-discriminatory nationality laws (Action 3).¹⁰³ However, the Action Plan does not refer to any other aspects of gender related to statelessness. In contrast, the CEDAW Committee has focused more broadly on this issue in its jurisprudence. Significantly, the CEDAW Committee's approach includes a more comprehensive focus on indirect discrimination and gendered impacts on stateless women, specifically in its General Recommendation 32.¹⁰⁴

In conclusion, there is a robust body of international human rights law, binding in the Southern African region, with direct application to statelessness issues, enshrining the right to nationality, gender equality and non-discrimination. Further, the gendered implications of gender-discriminatory nationality laws are recognised by CEDAW and various normative developments. Attention to other aspects of gender-based discrimination, especially the impacts of indirect discrimination, have received limited attention, although the CEDAW Committee points to the impacts of this issue. However, as discussed in the preceding section, there continues to be a significant gap between these legal protections and practice.

(b) Locating the gender gaps in international laws on statelessness

⁹⁷ All sixteen SADC member states have ratified CEDAW: United Nations Treaty Collection 'Ratification Status for CEDAW' available at https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en, accessed on 11 November 2022.

⁹⁸ CEDAW Committee 'Concluding observations on the sixth periodic report of Namibia' (2022) UN Doc CEDAW/C/NAM/CO/6 at para 36.

⁹⁹ CEDAW Committee 'Concluding observations on the combined initial and second periodic reports of Swaziland' (2014) UN Doc CEDAW/C/SWZ/CO/1-2 at para 28.

¹⁰⁰ See, for example, OC-4/84 Advisory opinion on proposed amendments to the naturalization provision of the Constitution of Costa Rica IACtHR Series A 4 (1984); *Genovese v Malta* Application No 53124/09 Judgment 11 October 2011.

¹⁰¹ Human Rights Council 'Resolution 20/4, The right to a nationality: Women and children' (16 July 2012) A/HRC/20/L.8.

¹⁰² *Ibid* paras 3–6.

¹⁰³ UNHCR Global Action Plan *op cit* note 22 at 12.

¹⁰⁴ CEDAW GR 32 *op cit* note 6.

¹⁰⁵ 1954 Convention *op cit* note 14.

There are two international UN treaties specifically focused on statelessness, namely the 1954 Convention¹⁰⁵ and the 1961 Convention on the Reduction of Statelessness¹⁰⁶ (1961 Convention) (collectively, the Statelessness Conventions). While the 1954 Convention obligates states parties to take steps to facilitate stateless persons to acquire nationality, the 1961 Convention focuses primarily on prevention and reduction of statelessness occurring in various scenarios, through reform of national legislation. The 1954 Convention focuses on protection and obligates states parties to ensure stateless people have basic rights. These treaties recognise the general principle that while states have the right to determine their own nationality laws,¹⁰⁷ they must do so in line with international norms.¹⁰⁸ Under international law, nationality (used interchangeably here with citizenship) refers to the legal bond between an individual and the state.¹⁰⁹ Nationality is typically obtained at birth either through the nationality of one's parents (*jus sanguinis*) or based on the country in which one is born (*jus soli*), and can also be obtained, or lost, subsequently through various changes to personal status, including residency changes or marriage. Overall, the Conventions are relatively undersubscribed, with limited international reach. Although most Southern African states are party to the 1954 Convention, including Angola, Botswana, Eswatini, Lesotho, Madagascar, Malawi, Mozambique, Zambia, and Zimbabwe, several are not, specifically South Africa and Namibia.¹¹⁰ South Africa, for example, has so far resisted calls to accede to the Conventions, despite stating it would do so in 2011, claiming that its existing laws are adequate to protect against statelessness.¹¹¹ Only four countries in the region, Angola, Eswatini, Lesotho, and Mozambique, have acceded to the 1961 Convention.¹¹² While states' reasons for declining to accede to the Conventions may vary, Bloom notes that statelessness is contentious and often viewed as politically problematic, especially given states' interests with preserving their sovereignty over citizenship issues as compared to the 'strong positive requirements' of the Conventions.¹¹³

While the Statelessness Conventions offer a targeted and technical focus on addressing the legal causes and consequences of statelessness, they have obvious normative gender gaps. The language of the 1961 Convention uses only the male pronoun ('he', 'his', 'himself'), signalling the invisibility of women during the Convention's drafting, perhaps unsurprising given the era. The 1954 Convention does not recognise gender or sex as a ground of discrimination.¹¹⁴ In fact, most

¹⁰⁶ Convention on the Reduction of Statelessness 1961, 989 UNTS 175.

¹⁰⁷ *Nottebohm Case (Liechtenstein v Guatemala)* Second Phase, ICJ Reports 1955, 4.

¹⁰⁸ Hague Convention on Certain Questions Relating to the Conflict of Nationality Law 1930, 179 LNTS 89.

¹⁰⁹ *Nottebohm* op cit note 107.

¹¹⁰ United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdspg=no-V-3&chapter=5&Temp=mtdspg2&clang=en>, accessed on 12 May 2022.

¹¹¹ Fatima Khan 'Exploring childhood statelessness in South Africa' PER / PELJ 2020 (23) at 19.

¹¹² United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdspg=no-V-4&chapter=5&clang=en>, accessed on 12 May 2022

¹¹³ Tendayi Bloom 'United Nations University-GCM Policy Report 02/01: Problematising the Conventions on Statelessness' (2013) at 14.

¹¹⁴ For example, Article 3 of the 1954 Convention provides: 'the Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.'

countries had discriminatory nationality laws in effect during this time that denied women equal rights to retain their nationality upon marriage (to a foreign national), or to pass their nationality to their children.¹¹⁵ While the 1961 Convention recognises these situations, it gives states wide latitude to retain gender discriminatory laws. For example, in cases where nationality is lost due to marriage (or related change to personal status) the 1961 Convention does not prohibit such outcomes. Instead, article 5 of the 1961 Convention states that ‘such loss shall be conditional upon possession or acquisition of another nationality’. In cases where the mother is barred from passing her nationality to her children, the 1961 Convention provides nationality must be granted to the child. However, under article 3 this protection only applies if the child would otherwise be stateless, and it further stipulates this applies in cases of wedlock only. Thus, the Statelessness Conventions do not challenge the direct gender discrimination rooted in nationality laws that subsume women’s nationality rights under their husbands’. Notably, the 1957 Convention on the Nationality of Married Women (1957 Convention) did directly address the issue of nationality loss due to marriage. The 1957 Convention, articles 1 and 2, states that a woman’s nationality should not be automatically affected by marriage to a foreign national, and acquisition or renunciation of a nationality by a husband must not prevent the wife’s retention of her nationality.¹¹⁶ As noted above, these protections were further expanded and strengthened in article 9 of the widely ratified CEDAW treaty, expressly protecting women’s equal nationality rights both in marriage and in relation to any children.¹¹⁷

The consequences of a gender-blind international legal framework on refugees and statelessness are significant. As Edwards contends with reference to the 1951 Refugee Convention, failing to include sex and gender in the treaty ‘... established the masculine experience as the norm ... and relegated women and women’s experiences to second-class status.’¹¹⁸ It is suggested here that the same assessment can be applied to the Statelessness Conventions. Undoubtedly, international human rights law, and the principle of gender equality, have advanced significantly since the Statelessness Conventions were enacted. The UNHCR confirms that the treaties ‘must be read and interpreted in light of developments in international law, in particular international human rights law.’¹¹⁹ Further, the principle of gender equality, as reflected in widely ratified international human rights treaties, must be taken into account.¹²⁰ However, the fact remains that the Statelessness Conventions are, on their face, inadequate from a gender perspective. As Brennan cautions while noting the exclusion of gender in the Statelessness Conventions, ‘to uncritically celebrate the existence of these treaties

¹¹⁵ International Law Association op cit note 25 at 17, 25.

¹¹⁶ Convention of the Nationality of Married Women 1957, 309 UNTS 65, Articles 1–2.

¹¹⁷ See CEDAW, section III(a) at 15.

¹¹⁸ Alice Edwards ‘Transitioning gender: Feminist engagement with international refugee law and policy 1950–2010’ (2010) 29(2) *Refugee Survey Quarterly* 21 at 23.

¹¹⁹ UNHCR ‘Guidelines on statelessness No. 4: Ensuring every child’s right to acquire a nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness’ (21 December 2012) HCR/GS/12/04 at para 8.

¹²⁰ *Ibid* para 13.

is to celebrate a continued compartmentalization [of] gender issues that instead ought to be treated as structural and all-pervasive.¹²¹ From a feminist perspective, it is important that these gender-based normative shortcomings are recognised and their impact on ongoing statelessness advocacy, policy, and research considered.

IV. CURRENT DEVELOPMENTS ON GENDER AND STATELESSNESS IN SOUTHERN AFRICA

(a) Selected African regional human rights law and policy developments

There are no laws that are binding on all member states of the African Union (AU) that expressly address statelessness or statelessness through the lens of gender. Core instruments in the regional human rights system in Africa do include protections for nationality rights, gender equality, and non-discrimination on the basis of sex. While it guarantees non-discrimination on the basis of sex, the African Charter on Human and Peoples' Rights (ACHPR)¹²² does not specifically refer to the right to a nationality. However, in practice, in its jurisprudence the African Commission has linked the right to a nationality to other rights protected under the Charter, including the prohibition of discrimination (article 2) and equality before the law (article 3).¹²³ The African Charter on the Rights and Welfare of the Child (ACRWC), article 6(3), affirms the right of all children to acquire a nationality, as well as non-discrimination on the basis of sex.¹²⁴

Also importantly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), aims to ensure the protection and realisation of the rights of women 'in order to enable them to enjoy fully all their human rights.'¹²⁵ Article 2(1), states that 'States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures'. Article 6 of the Maputo Protocol highlights the issue of equality between men and women in the context of marriage, and addresses the issue of nationality, and this consequently raises the issue of statelessness. Article 6(g) expressly states that women have the right to retain their nationality or acquire that of their husband. The Maputo Protocol also affirms that women and men have equal rights with respect to nationality of their children, although this protection is limited in cases 'where this is contrary to a provision in national legislation or is contrary to national security interests' (article 6(h)). Unfortunately, this caveat essentially allows

¹²¹ Brennan op cit note 9 at 175.

¹²² African Charter on Human and Peoples' Rights (ACHPR) 'OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58' (1982).

¹²³ LH Muller 'Legal identity for all – ending statelessness' in Goal 16 of the sustainable development goals, Perspectives from judges and lawyers in Southern Africa on promoting rule of law and equal access to justice, (1 December 2016) at 141, available at www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf, accessed on 12 May 2022.

¹²⁴ ACRWC op cit note 48.

¹²⁵ ACHPR 'Protocol to the Charter on the Rights of Women in Africa 2003, Assembly/AU/Dec 14(II) (Maputo Protocol); Article 6(g).

states parties to maintain laws that limit women's rights to pass their nationality to their children.

In terms of future legal developments, discussion continues on a Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (AU Draft Protocol on Nationality).¹²⁶ It was prepared by the African Commission on Human and Peoples' Rights (ACHPR) following the adoption of two resolutions — Resolution 234 on the Right to Nationality¹²⁷ and Resolution 277 on the Drafting of a Protocol on the Right to Nationality in Africa.¹²⁸ The Preamble to Resolution 234 provides that the African Commission notes, among other things, the provisions of articles 2 and 6(h) and 6(g) of the Maputo Protocol that establish the equal right of men and women to acquire their partner's nationality, and article 15 of the Universal Declaration of Human Rights (UDHR) which provides that everyone has the right to a nationality. Concern is expressed at 'the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states', especially as a result of discrimination on various grounds, including sex.¹²⁹ States are encouraged to adopt constitutional and other legislative provisions to prevent and reduce statelessness, in line with fundamental principles of international law. The Preamble to Resolution 277 stresses 'the need to take new decisive steps towards identifying, preventing and reducing statelessness and protecting the right to nationality', including through the preparation of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa.¹³⁰ This latter task was assigned to the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa,¹³¹ and the mandate holder has continued to raise the issue of statelessness in different meetings and conferences.

(b) The AU Draft Protocol on Nationality

This growing focus on statelessness issues in Africa culminated in the AU Draft Protocol on Nationality, formally submitted to the Commission for the African Union in May 2017. It aims to 'facilitate the inclusion of individuals within African states, by providing legal solutions for the resolution of the practical problems linked to the recognition and exercise of the right to a nationality, to eradicate statelessness ...'¹³² Among other provisions, in its Preamble, the AU Draft Protocol on Nationality

¹²⁶ ACHPR 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa' (2015), available at https://www.achpr.org/public/Document/file/English/draft_citizenship_protocol_en_sept2015_achpr.pdf, accessed on 12 May 2022.

¹²⁷ ACHPR 'Resolution 234 on the Right to Nationality' ACHPR/Res.234 (LIII) 2013.

¹²⁸ ACHPR 'Resolution 277 on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa' ACHPR/Res.277 (LV) 2014.

¹²⁹ ACHPR 'Resolution 234' op cit note 127 at 130.

¹³⁰ ACHPR 'Resolution 277' op cit note 128 at 131.

¹³¹ Ibid.

¹³² African Union (AU) 'Draft Protocol, Explanatory Memorandum' (2018) at para 1, available at https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_originalexplanatory_memorandum.pdf, accessed on 12 May 2022.

¹³³ ACHPR 'Draft Protocol' op cit note 126 at preamble.

recognises that 'the right to a nationality is a fundamental condition for the protection and effective exercise of the full range of other human rights'; affirms that statelessness violates 'the right to human dignity and to legal status enshrined in article 5 of the African Charter on Human and Peoples' Rights'; and articulates the political will to eradicate statelessness in Africa through ensuring that all residents of African states have a nationality, through the harmonisation of nationality laws and the prohibition of arbitrary deprivation or denial of nationality.¹³³

Article 3 of the AU Draft Protocol on Nationality affirms general principles including that 'every person has the right to a nationality'; that 'no one shall be arbitrarily deprived or denied recognition of his or her nationality nor denied the right to change his or her nationality'; and that 'States have the obligation to act, both alone and in cooperation with each other, to eradicate statelessness'. Article 4(1) of the AU Draft Protocol on Nationality regarding non-discrimination provides for a prohibition on the inclusion of distinctions, exclusions, restrictions, or provisions promoting differential treatment, which are based on a number of grounds including race, ethnic group, colour, and sex. Article 4(2) provides that states parties 'shall grant women and men equal rights to acquire, change or retain their nationality and with respect to the nationality of their children'. However, there is an exception to the non-discrimination prohibition in article 4(3) that allows for a state party to reserve the right to make distinctions among its nationals, if at the time of signature, ratification or accession it reserves its retention of such right.

Article 6 provides for the possibility of the acquisition of a nationality, including the acquisition of nationality by the spouse of a national, consequently making it possible for women to acquire the nationality of their husbands, or vice versa. Article 9 on marriage provides further protection to spouses regarding their right to nationality in the context of marriage or upon the dissolution of such marriage. It states that a state party shall provide in law that 'a marriage or the dissolution of a marriage between a national and a non-national shall not automatically change the nationality of either spouse nor affect the capacity of the national to transmit his or her nationality to his or her children', and also, that 'the change of nationality of one spouse during marriage shall not automatically affect the nationality of the other spouse or of the children'. Importantly, from an equality and non-discrimination perspective, article 13 of the AU Draft Protocol on Nationality provides for every person's right to documentation that proves their nationality, with women and men having equal rights to obtain such documents and having the right to have them issued in their own names. Overall, the AU Draft Protocol on Nationality addresses some of the key gender discrimination issues impacting women's nationality rights. As recognised in international human rights instruments discussed above, it prohibits direct discrimination by affirming women's and men's equal rights to nationality and to that of their children, and equal rights to retain or pass nationality to a spouse upon marriage. Importantly, given the impact of statelessness concerns arising from

¹³⁴ See also discussion by Muller *op cit* note 123 at 143–144.

documentation challenges, it affirms women's equal rights to identity documents.

(c) Developments in the Southern African Development Community (SADC)

There are no laws that are binding on all member states of the SADC that expressly address statelessness, or statelessness through the lens of gender. However, various legal and policy developments in the region have considered this issue.¹³⁴ For example, the SADC legal framework does, however, include a legal instrument that addresses a cause of statelessness. The Southern African Development Community Protocol on Gender and Development (SADC Protocol) was adopted in 2008, and aims to provide for the empowerment of women, and to eliminate discrimination and achieve gender equality.¹³⁵ While the SADC Protocol does not directly address the issue of statelessness, article 8(5) addresses a common cause of statelessness, namely, the absence of gender equality in the laws that govern the acquisition and transfer of nationality within the context of marriage. It obligates states parties to ensure that men and women have equal rights to either retain or change nationality upon marriage.

From a policy perspective, the SADC Parliamentary Forum Plenary Assembly held its 40th Plenary Assembly Session in 2016 in Zimbabwe, on the theme of 'Statelessness in the SADC Region'. This Forum adopted a Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC Region (SADCPF Resolution on Statelessness).¹³⁶ Paragraphs (iii) and (iv) of the SADCPF Resolution on Statelessness address the link between gender discrimination and the occurrence of statelessness. It calls upon states to 'initiate legislative reforms that address any identified gaps or challenges, including any discrimination on the basis of race, ethnicity, religion, or gender, thereby helping to prevent statelessness'; and 'to ensure gender equality as regards the equal right of men and women to pass on their nationality to their children and spouses, and to change or retain their nationality'.¹³⁷ In another policy level statement issued in 2016, the Migration Dialogue for Southern Africa, comprising representatives from governments in the region, adopted Recommendation 2.3 in respect of the issue of statelessness.¹³⁸ This statement addresses, albeit briefly, the issue of gender inequality in the laws that govern nationality within the SADC member states, affirming the need to ensure equality between men and women to pass on their nationality to their spouse and children. Thus, at both the legal and policy level in the SADC region there is recognition of the need to affirm and protect the equal nationality rights of

¹³⁴ Southern African Development Community (SADC) 'Protocol on Gender and Development' (2008), available at https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf, accessed on 12 May 2022.

¹³⁶ SADC 'Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC Region' (2016).

¹³⁷ *Ibid* paras iii and iv.

¹³⁸ Migration Dialogue for Southern Africa 'Addressing mixed migration in Southern Africa: Linking protection, immigration, border management and labour migration' (2016).

men and women.

(d) *National level developments*

Over recent decades, many countries, including in the Southern Africa region, have moved away from the dependent nationality approach and recognised that denying women their nationality simply due to marriage, or from sharing their nationality with their children, was clear gender discrimination in nationality laws. Ground-breaking litigation and advocacy initiatives have sometimes driven law reform at the domestic level, although progress has been slow. For example, the landmark Botswana case *Dow v. Attorney-General*¹³⁹ demonstrates both the consequences of gender discriminatory laws and the impact of advocacy in forcing law reform. Unity Dow, a female human rights lawyer and judge, married an American foreign national and they had three children.¹⁴⁰ Botswana's Citizenship Act 1984 provided that children born in Botswana are citizens of Botswana only if (1) the father is a citizen, or (2) if the child is born out of wedlock, the mother is a citizen.¹⁴¹ Thus the law prohibited women, like Dow, who are married to foreign nationals, from passing their Botswana nationality to their children. Consequently, her children could not share her nationality and would require residence permits to remain in the country, and they would also be denied access to social, health, and educational benefits.¹⁴² Dow claimed that this provision of the Citizenship Act was a violation of the Constitution's equality protections because it discriminated against women on the basis of sex.¹⁴³ Botswana's High Court and Court of Appeal agreed, and ruled that this provision of the nationality law was unconstitutional due to discrimination on the basis of sex.¹⁴⁴ The Botswana Citizenship Act was subsequently amended to confirm that any person born in Botswana is a national of Botswana, if either the mother or father is a national.¹⁴⁵

Other countries in the region, such as Zambia and Zimbabwe, have taken steps to reform their nationality laws through their Constitutions to ensure compliance with gender equality rights.¹⁴⁶ More recently, in 2017, Madagascar amended its nationality laws to give women equal rights to transmit nationality to their children.¹⁴⁷ In addition, there has been progress towards reforming administrative laws and procedures that discriminate against women. For example, in 2004 Mozambique reformed its Civil Registration Code to allow either parent to register the birth of a

¹³⁹ *Dow v Attorney-General* 991 BLR 233 (High Court of Botswana), affirmed on appeal *Attorney-General v Dow* 1992 BLR 119 (Botswana Court of Appeal).

¹⁴⁰ *Ibid* at 235–236.

¹⁴¹ *Ibid* at 236–237.

¹⁴² *Ibid* at 242–243.

¹⁴³ *Ibid* at 243.

¹⁴⁴ *Ibid* at 247.

¹⁴⁵ Botswana Citizenship Act (Cap 01-01) (Act No 8 of 1998), Article 4(1).

¹⁴⁶ Constitution of Zambia Act No1 of 1991; Constitution of Zimbabwe Amendment Act No 14 of 1996.

¹⁴⁷ Madagascar Law No 2016-038 of 25 January 2017, Article 9.

¹⁴⁸ Mozambique Law No 12 on the Civil Registration Code 2004 (as amended by law 12/2018), Article 149; and Mozambique Family Law, 2004 (amended by law 22/2019), Article 238(1).

child and request a birth certificate, while single mothers can register their children directly.¹⁴⁸

(e) The gap between law and practice

The developments discussed in this section focus primarily on legal reforms and developments at the regional level and national levels to address gender discriminatory nationality laws. However, as the African Commission on Human and Peoples' Rights concludes, in reference to nationality-related protections in relevant regional human rights treaties,

... these new provisions have only had a very limited impact on the continent, notably due to the fact that the treaties are not systematically transposed into the national legal systems of the States parties and are not often invoked in national or regional courts by individuals whose rights to nationality are contested or denied.¹⁴⁹

In short, the gap between law and practice remains significant. Further, while the law reform examples cited here reflect important progress, there appears to be far less attention to the indirect forms of gender discrimination that can function as drivers increasing the risks of statelessness for women. For example, as a leading cause of statelessness in the region, the lack of birth registration and access to identity documentation — essential to proving nationality — poses significant problems. As Manby notes, 'civil registration and identification systems are key to recognition of nationality', although these systems remain weak in the region owing largely to colonial legacies.¹⁵⁰ This issue has strong gender dimensions, as women often face greater challenges in accessing identity documentation, birth registration, and accessing and navigating bureaucratic processes.¹⁵¹ For example, in its recent concluding observations on South Africa, the CEDAW Committee noted its concern that many women, especially in rural areas and informal settlements, 'face challenges in accessing birth registration and identity documents, depriving them of access to basic services.'¹⁵² The Committee also pointed to the lack of safeguards in the birth registration laws to prevent children of undocumented women from becoming stateless.¹⁵³ In both Mozambique and Madagascar, there is a noticeable gap between the higher proportion of men who have identity documentation, as compared to the lower rates involving women.¹⁵⁴ In the context of Zambia, where only 10% of births are registered, the UNHCR points to the impact of gender discrimination even

¹⁴⁹ ACHPR 'The Right to a Nationality in Africa' (2015) at 7.

¹⁵⁰ Bronwen Manby 'Citizenship and statelessness in the member states of the Southern African Development Community' UNHCR (2020) at 1.

¹⁵¹ See Mbiyozo *op cit* note 1 at 7.

¹⁵² CEDAW Committee 'Concluding observations on the fifth periodic report of South Africa' (2021) UN Doc CE-DAW/C/ZAF/CO/5 at para 41.

¹⁵³ *Ibid.*

¹⁵⁴ Manby *op cit* note 150 at 72.

¹⁵⁵ Mitte *op cit* note 2.

where laws are gender neutral, noting that traditional practices of birth registration managed by traditional chiefs often give precedence to men.¹⁵⁵ Thus, it appears that even where there has been progress on reforming overtly gender discriminatory laws, the reality for women tends to be impacted by gender discriminatory norms in practice.

V. CONCLUSION

According to Coomaraswamy, 'statelessness is a status of profound marginalization'.¹⁵⁶ As the foregoing discussion shows, this profound marginalisation is particularly acute for stateless women, or those who are at risk of being stateless, who often must navigate multiple and compounded levels of discrimination and risks on the basis of their gender. This article has sought to highlight some of the key direct and indirect forms of gender discrimination that contribute to statelessness, as well as some of the key consequences of statelessness particularly impacting women. The denial of nationality rights comes with a much greater risk of the denial of a wide range of human rights and elevates risks of gender-based violence and exploitation for women. With the exception of the focus on gender-discriminatory nationality laws, this gender gap has received relatively limited attention in statelessness scholarship and practice. This deficit is perhaps not surprising in light of the normative gender gaps persisting in the international legal framework on refugees and statelessness, where the foundational treaties omit reference to sex or gender discrimination. It seems that attention to gender issues in statelessness has long been side-lined. Yet, as the foregoing discussion has sought to demonstrate, gender discrimination significantly impacts statelessness and the risk of statelessness, including in the Southern African region.

Despite the gender gaps in the Statelessness Conventions, analysis of relevant international human rights laws and policies, binding in Southern African countries, demonstrates that there are strong legal protections of the rights to nationality, equality and non-discrimination on the basis of gender. Selected regional and domestic developments in the African human rights system indicate that there is also growing awareness of and responses to this issue in the regional context. For example, the affirmation of key protections related to gender discrimination in the AU Draft Protocol on Nationality is significant. However, even the Maputo Protocol provides an exception allowing states to retain gender discriminatory laws with respect to passing nationality to children, indicating that robust protection of equality rights in nationality and statelessness issues still face challenges. Nonetheless, there are encouraging developments in domestic law reform efforts to address these issues in countries throughout Southern Africa. The Unity Dow case from Botswana remains an important example of how gender-discriminatory

¹⁵⁶ Radhika Coomaraswamy 'Beyond borders: Statelessness and the people in between' International Conference on Statelessness Keynote Speech (26 June 2019), available at https://files.institutesi.org/Keynote_Radhika_Coomaraswamy.pdf, accessed on 12 May 2022.

nationality laws have been successfully challenged and reformed on the basis of their violation of equality and non-discrimination rights, setting a precedent for law reform in many other jurisdictions. However, as we have seen in the above discussion, law reform is only part of the response. As the African Commission on Human and Peoples' Rights notes, significant gaps remain between these guarantees on paper and implementation in practice at the national level. Moreover, there is evidence of indirect forms of gender discrimination impacting the application of gender-neutral laws, undermining women's nationality rights, including with access to identity documentation and birth registration. This preliminary analysis suggests that gender discrimination is so widespread in nature that it requires closer attention to how indirect, systemic gender discrimination plays out in the implementation of even gender-neutral laws and administrative and bureaucratic processes related to nationality, with consequences for elevated risks of statelessness.

The promising progress in recognising how gender discrimination against women impacts statelessness is welcome. There is a clear trend towards reform of gender-discriminatory nationality laws and affirmation of equal nationality rights at international, regional, and national levels. But, as many people, especially women, around Southern Africa struggle to obtain or retain identity documents, register the births of their children, and face gender-discriminatory laws and policies, it is apparent that more work and further research is needed. International human rights law, and especially the substantive view of equality enshrined in CEDAW, calls for much more attention to the many ways in which varied forms of discrimination against women contribute to statelessness and compound the effects of being stateless. Intersectional feminist analysis highlights the need to explore underlying structural inequalities and discriminatory norms that play out in women's vulnerability to statelessness, and the compounded and intersecting grounds of discrimination that are often involved. While this article has sought to draw attention to some of these issues, and provide insights into current developments on gender and statelessness in the Southern African region, further attention in research and literature is needed. Deepening understanding of the unique gendered dimensions that are both a cause and consequence of statelessness is important to ensure a rights-based and comprehensive response in prevention and protection efforts.

Statelessness, Trauma and Mental Well-being: Implication for Practice, Research and Advocacy

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Abstract

The issue of statelessness is inextricably linked to psychosocial wellness and is a crucial mental health factor to consider in the holistic care, and protection of stateless persons. There is a dearth of research and limited literature examining the mental health implications for stateless persons and their exposure to multiple and ongoing rights violations. This paper describes the systematic and systemic human rights violations linked to statelessness and how these contribute to individual trauma and stress — subsequently affecting well-being. The paper utilises a basic trauma lens in understanding statelessness and presents a novel contribution to interventions addressing statelessness. Findings from the study reveal statelessness-linked stressors. Historic systematic human rights violations, traumatic events and situations, and daily stressors become mental health burdens and challenges for those experiencing statelessness. Service providers working with stateless persons should be aware of the impact of statelessness on mental health and should refer cases to mental health and psychosocial practitioners who can provide services that reduce socio-emotional distress while strengthening resilience and coping strategies. The findings emphasise the promotion of stateless people's psychosocial well-being — looking at both curative and preventative strategies, toward the establishment of just and inclusive societies.

Keywords: rights violations, stressors, psychosocial wellness

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I. INTRODUCTION

Statelessness is when a person is not recognised by any country as a citizen, and they cannot call any country their own. South Africa is reported to have many undocumented migrants, who are either stateless or vulnerable to becoming stateless. This population includes both adults and young people under the age of 18. Due to lack of country affiliation and subsequent protection, stateless persons have been referred to as ‘outcasts from the global political system of states’,¹ as ‘legal ghosts’,² illegal immigrants,³ counted as ‘undifferentiated aliens’,⁴ as ‘non-individuals’, ‘nowhere people’ and ‘nowhere individuals’ as they do not have a country to call home.

Stateless adults and children experience challenges when they try to access fundamental rights and services and they are at risk of marginalisation, discrimination, and insecurity.⁵ Both *de facto* and *de jure* stateless people are unable to access the privileges, services, protections, and rights that citizens can demand from their governments.⁶ Globally, there is an increasing number of persons who are stateless or at risk of becoming stateless and this is an issue of concern.⁷ ⁸ Numerous studies have been conducted on statelessness from legal and rights-based perspectives, yet there have been very few connections and exploration into the mental health of stateless people, their inability to thrive and the trauma that they experience due to their precarious status.⁹ ¹⁰

The interconnected nature of rights violations for stateless persons means that the siloed responses are likely to produce fewer ideal and sustainable outcomes. What is required is a comprehensive, integrated response to issues affecting stateless persons, so that the rights of all stateless adults and children are fulfilled. This includes understanding the role of daily or environmental stressors and systematic marginalisation in mitigating mental health symptoms in people who are stateless.

¹ UNHCR ‘The problem of statelessness has become a live issue again’ UNHCR Department of International Protection, Geneva (1996) para 2, available at www.unhcr.org/protect/PROTECTION/3b837ec14.html, accessed on 04 November 2022.

² UNHCR ‘The world’s stateless people. Questions and answers’ UNHCR Media Relations and Public Information Service, Geneva (2007) 1 at 5, available at <https://www.refworld.org/docid/47a707900.html>, accessed on 06 November 2022.

³ Roshni Chakraborty & Jacqueline Bhabha ‘Fault lines of refugee exclusion: Statelessness, gender, and COVID-19 in South Asia’ (2021) 23(1) *Health and Human Rights Journal* 237 at 238, available at <https://www.hhrjournal.org/2021/05/fault-lines-of-refugee-exclusion-statelessness-gender-and-covid-in-south-asia/>, accessed on 06 April 2022.

⁴ Bill Frelick & Maureen Lynch ‘Statelessness: A forgotten human rights crisis’ (2005) FMR 65 at 66, available at <https://www.fmreview.org/sites/fmr/files/textOnlyContent/FMR/24/39.html>, accessed on 06 April 2022.

⁵ Laura van Waas ‘The children of irregular migrants: A stateless generation?’ (2007) 25(3) *Netherlands Quarterly of Human Rights* 437 at 439.

⁶ Roshni Chakraborty & Jacqueline Bhabha (2021) op cit note 3 237 at 238.

⁷ Jacqueline Bhabha ‘Arendt’s children: Do today’s migrant children have a right to have rights?’ (2009) 31(2) *Human Rights Quarterly* 410 at 411.

⁸ Maureen Lynch ‘Lives on hold: The human cost of statelessness’ Refugees International (2005) 1 at 2, available at <https://www.refworld.org/docid/47a6eba00.html>, accessed on 09 November 2022.

⁹ Andrew Riley, Andrea Varner, Peter Ventevogel, MM Taimur Hasan & Courtney Welton-Mitchell ‘Daily stressors, trauma exposure, and mental health among stateless Rohingya refugees in Bangladesh’ (2017) 54(3) *Transcultural Psychiatry* 304 at 304.

¹⁰ Aisha K Yousafzai, Joan Lombardi, Erum Mariam, Tina Hyder & Zarlusht Halaimzai ‘Statelessness and young children’ (2022) 4(1) *The Statelessness & Citizenship Review* 154 at 155, available at <https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/415>, accessed on 09 November 2022.

This subsequently has important implications for the distribution of scarce resources for mental health and psychosocial support services. This paper clarifies the role of stressors in mediating the relationship between trauma exposure and current mental health and well-being among stateless populations. As such, the discussions contribute to the debates on the evolving nexus on psychosocial and legal discourse on the relative importance of addressing trauma in statelessness as part of an integrated approach.

This paper draws on the authors' experience as a clinical social worker and migrant (Author 1) and child protection social worker and social development specialist (Author 2). This paper explores the psychosocial characteristics of and rights violations of stateless persons and promotes the psychosocial care and support they would require.

II. UNDERSTANDING STATELESSNESS

(a) Definition and scope

In this section, we tease out what definitions and data are applicable in determining who is stateless. According to Art. 1 of the 1954 Convention relating to the Status of Stateless Persons, a stateless person is an individual 'who is not considered as a national by any state under the operation of its law'. This seems like an easy identification process based on this clause from the Statelessness Convention. However, the identification process to determine statelessness is complex because it includes both a factual and legal analysis.¹¹

Identifying the statistics related to statelessness is a complex task, that is context specific and 'one which must also consider that it may take several years of failed applications for documents for a person to find out that they are not, as it turns out, "considered as a national" by any state'.¹² When it comes to identification of stateless persons, we concur that:

A lower standard of proof should be applied when determining statelessness, for example by using the term 'substantiating' one's statelessness instead of 'proving' it (similarly to refugee status determination). In addition, the burden of proof should be shared between the applicant and state authorities. The applicant's main procedural obligation should be to cooperate with the authority, not to provide all necessary evidence.¹³

Global challenges on accurate statelessness numbers have been reported — leading to a lack of solid, well methodologically grounded statistics related to statelessness. Considering this, this paper 'concentrates on addressing the problems [related to statelessness] than trying to get the "correct" statistics'.¹⁴ Despite the tension related

¹¹ UNHCR *Handbook on Protection of Stateless Persons* (2014) 1 at 12.

¹² Bronwyn Manby 'Statelessness statistics and IROSS: The UN Statistical Commission grapples with definitions' Global Citizenship Observatory Robert Schuman Centre (2022) para 7, available at <https://globalcit.eu/statelessness-statistics-and-iross-the-un-statistical-commission-grapples-with-definitions/>, accessed on 09 November 2022.

¹³ Gabor Gyulani 'Remember the forgotten, protect the unprotected' (2019) 32 *FMR* 48 at 49.

¹⁴ Bronwyn Manby (2022) op cit note 12 para 3 10.

to the numbers of stateless persons, the authors acknowledge that there are millions of stateless persons globally, which warrants debates and implementation of critical mental health and well-being framework/s that protect them and is centred around them.

The adoption of the 1948 Universal Declaration on Human Rights, called for the right to a nationality to be recognised for the first time as a fundamental right and a right for everyone to enjoy. In 1954, the Convention relating to the Status of Stateless Persons provided the definition of a stateless person. The 1961 Convention on the Reduction of Statelessness provides safeguards for States to incorporate within their nationality law to avoid statelessness and toward the realisation of everyone's right to a nationality.

(b) Causes of statelessness

Statelessness can be caused by various complex, multi-dimensional and multi-systemic factors. The pathways to statelessness may vary from one country to the next, including: '(i) political change; (ii) expulsion from territory; (iii) discrimination; (iv) descent-based nationality; (v) withdrawal of nationality; and (vi) laws on birth registration.'¹⁵ The three causes of statelessness as adopted, which incorporates the above pathways, are:¹⁶

- i) State succession-restoration that occurs 'when an existing State splits into two or more states, when part of a State secedes to form a new State, when territory is transferred from one State to another, or when two or more States unite to form a new state.'¹⁷ Statelessness can be linked to colonisation, de-colonisation and consequent nation-building whereby new independent states without pre-colonial national identity have had to deal with borders arbitrarily drawn, dividing and pitting ethnic groups against each other while privileging some and marginalising others, as part of the divide and rule policy.¹⁸ The newly formed or independent states may set considerable conditions or define their citizens narrowly, such that many people are rendered stateless and excluded due to their questionable attachments. Examples of this include decolonisation processes in Africa, dissolution of the Soviet Union and Yugoslavia, secession of South Sudan and Eritrea. Persons in these contexts can be at risk or rendered stateless when they fail or are unable to be granted citizenship in the successor states, i.e., political and border changes.
- ii) Discrimination and arbitrary denial or deprivation of nationality: In this

¹⁵ Ajwang' Warria 'Stateless transnational migrant children in South Africa: Implications and opportunities for social work intervention' (2020) 6(2) *AHMR* 6 at 10.

¹⁶ Asako Ejima 'Ghosts in America: Working towards building a legal framework for stateless individuals in the United States' (2021) 53(1) *Case W. Res. J. Int'l L.* 357 at 366, available at <https://scholarlycommons.law.case.edu/jil/vol53/iss1/13>, accessed on 06 April 2022.

¹⁷ Asako Ejima (2021) op cit note 16 357 at 365.

¹⁸ ISI 'The world's stateless' (2014) 1 at 25, available at <https://files.institutesi.org/worldsstateless.pdf>, accessed on 06 April 2022.

- instance, statelessness is linked to ethnic, gender or religious discrimination. An example is biological female-identifying mothers' inability to pass on nationality to their children, i.e., citizenship laws based exclusively on patrilineal descent. Gender discrimination can leave children stateless in instances that their father is stateless, unknown, or unable to transmit his nationality. Thus, citizenship deficits affect women and men differently and it can also be experienced and claimed in gendered ways.¹⁹
- iii) Technical causes refer to situations where statelessness is caused by gaps in a country's nationality laws and conflicts between different countries' citizenship laws. Countries most often grant nationalities through either blood relationship (*jus sanguinis*) or through birth in the country (*jus soli*). When a child is born to nationals of a country that grants nationality based on *jus soli*, a country that only confers nationality based on *jus sanguinis* may not be able to acquire any nationality at birth. Other 'technicalities' include: denying nationality to abandoned children; automatic loss of nationality of nationals residing out of their country of origin without registering with their national embassy or consulate in country of residence within a specific period; marriage practices of certain countries where the foreigner loses their citizenship when they marry a citizen of that country; and climate and environmentally induced displacement. Furthermore, inability to prove nationality for nomadic or internally displaced persons, undocumented migrants who face challenges registering births of their children especially if born at home or based on the unreasonable document and administrative processes.²⁰ Although lack of birth registration by minority populations does not equate to statelessness, lack of documentation often leads to people being denied access to citizenship and state services.

Statelessness can also affect whole communities because of deliberate exclusion of these ethnicities. Nationality laws can be drawn up in a discriminatory manner, whereby they deny minority populations access to nationality — such as the case of the Rohingya in Myanmar, denationalisation of Jews by Germany, and retroactively revoking nationality from persons of foreign descent, such as persons born in the Dominican Republic since 1929. These stateless groups suffer from intergenerational marginalisation and exclusion, which subsequently has consequences on the social fabric of entire communities.²¹

It is crucial to note that a person may become stateless due to a combination of factors mentioned above. A person may also very easily move from having citizenship to losing it and vice versa. These are all factors that need to be taken into consideration when developing a continuum of trauma-informed, trauma-transformed and

¹⁹ Roshni Chakraborty & Jacqueline Bhabha (2021) op cit note 3 237 at 239.

²⁰ Ajwang' Warria (2020) op cit note 15 6 at 12.

²¹ ISI (2014) op cit note 18 1 at 27.

integrated services as a response to statelessness.

(c) Forced migration and statelessness: The links

Statelessness differs from forced migration, but they might influence each other, leading to increased levels of vulnerability, traumatisation, marginalisation, and discrimination. The nexus between statelessness and forced migration and displacement exists on several levels: (i) statelessness can lead to forced migration; (ii) the vulnerability of individuals and families to statelessness increases as a result of forced migration; and (iii) when one is stateless, it can increase one's vulnerability in situations of forced migration.

In as much as there are connections between forced migration and displacement and statelessness, it is worth highlighting that many people with refugee status following forced migration, globally, are not stateless but are citizens of their countries of origin. Therefore, not all refugees and asylum seekers are stateless and not all stateless persons are refugees or displaced persons. Millions of stateless individuals have never been displaced — and they live in their countries of birth. However, many people are both refugees and stateless:

Many stateless persons do not move (though research suggests that 1 in 3 stateless persons has been forcibly displaced), and if they do move, they may or may not be classed as refugees. [Thus,] ... while some stateless persons are refugees, and some are migrants, key concerns relating to statelessness will be obscured if we speak only about refugees or migrants.²²

One of the consequences of statelessness is forced migration.²³ An earlier study reports that most stateless persons are victims of forced displacement. Indeed, statelessness has been described as 'rooted displacement' or 'displacement in situ' because a stateless person is displaced irrespective of wherever they are.²⁴ Paragraph 72 of the New York Declaration states: 'We recognize that statelessness can be a root cause of forced displacement and that forced displacement, in turn, can lead to statelessness...'

Forced migration can cause vulnerability to statelessness. This is because the individual might lose their documentation and thus cannot prove their citizenship connection to a specific country.²⁵ Furthermore, during migratory journeys, the parents of children born in transit often experience registration administrative challenges and they may endure hardships trying to prove their citizenship and the child's eligibility for citizenship. Furthermore, unaccompanied, and separated minors

²² Tendayi Bloom 'Statelessness and the global compact for migration' Refugee Law Initiative School of Advanced Study University of London (2017) para 12, available at <https://rli.blogs.sas.ac.uk/2017/09/11/statelessness-and-the-global-compact-for-migration/>, accessed on 06 April 2022.

²³ Mohammad Sajedur Rahman & Nurul Huda Sakib 'Statelessness, forced migration and the security dilemma along borders: An investigation of the foreign policy stance of Bangladesh on the Rohingya influx' (2012) *SN Soc Sci* 1, 159 at 161, available at <https://doi.org/10.1007/s43545-021-00173-y>, accessed on 09 November 2022.

²⁴ Aimée-Noël Mbiyozo 'Statelessness in southern Africa: Time to end it, not promote it' *Institute for Security Studies (ISS)* (2019) 1 at 9, available at <https://issafrica.s3.amazonaws.com/site/uploads/sar32.pdf>, accessed on 06 April 2022.

²⁵ Ajang' Warria (2020) op cit note 15 6 at 19.

are often at risk of statelessness.²⁶ When a child's birth is not registered, especially in the context of forced migration, where citizenship is not automatic, it may put them at risk of statelessness and trafficking.^{27 28 29} Indeed, international conventions may be in place but denial of rights leading to vulnerabilities are evident.^{30 31}

The gendered nature of forced migration cannot be denied. The same can be said of access to citizenship.³² In many countries, including those affected by war (such as Syria, Somalia, Democratic Republic of the Congo), women cannot confer citizenship to their children as easily as men can do. Moreover, mothers might not be allowed to register the birth of their children, or they may struggle to prove the children's paternity when separated from the children's fathers. These factors put children at risk of statelessness.³³

A remarkable difference between forced migration, refugeeism and statelessness is that although a dim hope, refugees have reasonable hope that they might go back to their home countries, whereas stateless forced migrants rarely have a chance to obtain the citizenship of their former country of residence.

III. CONSEQUENCES OF STATELESSNESS

Citizenship or nationality is the essential link between a person and the State. Thus, the consequences of statelessness are dire from social, political, and economic perspectives — with studies showing that stateless individuals are among the world's most vulnerable groups, least known, least heard, and least visible. Being stateless not only presents legal and policy challenges for national, regional, and international law, it also creates psychosocial challenges for the individual and their families as their lives are on hold. Indeed, statelessness can mean a lifetime of hardship(s) if it remains unchallenged and unresolved. It is crucial to consider the direct and indirect impact of statelessness through a human rights lens because statelessness is associated with discrimination in accessing basic rights and it could render the person at risk of other human rights violations.³⁴ This supports the argument that 'when human rights are violated, the doors to creating statelessness are opened ... and statelessness is at the nexus of human rights and displacement.'³⁵

International human rights instruments accord to stateless persons equal rights to marriage, freedom of belief, expression, movement, religion, and socio-economic and cultural rights. However, huge gaps are evident in terms of guaranteed rights

²⁶ Ajwang' Warria (2020) op cit note 15 6 at 12.

²⁷ Aimée-Noël Mbiyozo (2019) op cit note 24 1 at 19.

²⁸ Tharani Loganathan, Zhie Chan, Fikri Hassan, Zhen Ling Ong & Hareen Abdul Majid 'Undocumented: An examination of legal identity and education provision for children in Malaysia' (2022) 17(2) *PLoS One*, 1 at 18.

²⁹ Ajwang' Warria 'Forced child marriages as a form of human trafficking' (2017a) 79 *Children and Youth Services Review* 274 at 275.

³⁰ Ajwang' Warria 'International and African regional instruments to protect rights of child victims of transnational trafficking' (2017b) 12(5) *Victims & Offenders* 682 at 695.

³¹ Jacqueline Bhabha (2009) op cit note 7 410 at 422.

³² Aimée-Noël Mbiyozo (2019) op cit note 24 1 at 9. Gabor Gyulani (2019) op cit note 13 48 at 49.

³³ Gabor Gyulani (2019) op cit note 13 48 at 49.

³⁴ Ajwang' Warria (2020) op cit note 15 6 at 12.

³⁵ Maureen Lynch (2005) op cit note 8 1 at 4.

for non-citizens in international rights conventions and the realities faced when the national laws are implemented. Indeed, in practice, statelessness is often accompanied by the deprivation of basic rights and discriminatory treatment and these gaps between rights and realities must be tightened and closed. This is because the plight of stateless people is a matter of human security and ‘the deficits of statelessness can, like a genetic disability, be transmitted from one generation to the next’,³⁶ continuing the cycle of degradation, rights violations, and hopelessness.

The consequences of statelessness include lack of access to healthcare, social services, and legal protection. Stateless individuals and their families generally have poor prospects — they often lack access to education, do not have a national identity, and are subjected to social stigma, forced evictions, discrimination, violence, and harassment.³⁷ Statelessness is often transmitted from one generation to the next. This causes many children to start out life without a nationality, on a pathway to childhood statelessness. Violation of the right to nationality is (in)directly linked to the violation of other rights such as education, nationality, political participation, arbitrary detention, property ownership, and freedom of movement. Without citizenship, one cannot be issued an identity card or move with ease — which can lead to unemployment, labour rights violations, and exploitative, insecure, and unpredictable employment. This then has an impact on accessing basic services such as housing,³⁸ food, and education.³⁹ Stateless individuals are excluded from social security, pension entitlements, disability allowances and other social assistance or financial services, thus having inadequate standards of living.

Family life, functioning and relationships can also be severely impacted by statelessness and the official invisibility. From a family systems perspective, one family member lacking citizenship can be a challenge to the functioning of that family and the preservation of relationships and the family unit. There may be difficulty in contracting marriages, finding a partner, or desiring to marry or start a family. Threats of arrest, detention and deportation affect the enjoyment of family life and can lead to physical family separation. The stateless often face insoluble problems on property rights or the custody of children following spousal death or separation. When it comes to healthcare, statelessness not only exacerbates the risk of infections, it further limits options for access to medical care, including maternal and child health.⁴⁰ COVID-19 also exposed further vulnerabilities of stateless persons.

The links between statelessness and early or forced marriages and trafficking in persons have often been overlooked.⁴¹ Individuals and families who are stateless for prolonged periods of time, out of frustration and a sense of agency take it upon themselves to resolve their cases to the best of their abilities and use the limited

³⁶ Roshni Chakraborty & Jacqueline Bhabha (2021) op cit note 3 237 at 243.

³⁷ Tharani Loganathan et al. (2022) op cit note 28 1 at 18.

³⁸ Ben Gronowski ‘The rights to a nationality and the right to adequate housing: An analysis of the intersection of two largely “invisible” human rights violations’ (2019) *Statelessness & Citizenship Review* 239 at 240.

³⁹ Aisha K Yousafzai et al. (2022) op cit note 10 154 at 155.

⁴⁰ Roshni Chakraborty & Jacqueline Bhabha (2021) op cit note 3 237 at 243.

⁴¹ Ajwang’ Warriia (2020) op cit note 15 6 at 13.

resources that they have. This often means that they may negotiate to be smuggled or their vulnerability leads them to trafficking perpetrators. In addition, women may purposely marry local men and parents are reported to lie about their daughter's age to marry them off early. Statelessness can thus perpetuate child marriages and trafficking in persons and vice versa and attempts to fight one may implicate the other.

Stateless persons are likely to encounter travel restrictions, social exclusion, violence, discrimination, exploitation, and are at risk of forced displacement and prolonged or indefinite arbitrary detention. There is also worry and anxiety linked to arrests or attempted and repeated deportations and where they will be returned to, as they are not linked to any country. The lack of being given a legal status, leads to a precarious and degraded status of illegal and undocumented immigrant, resulting in a protection deficit and being deprived of critical rights. Denial of rights can lead to trauma for a stateless person.

Citizenship constitutes an unearned form of social capital that is claimed and experienced in distinctively gendered ways. The COVID-19 pandemic has shone a bright light on the perils of statelessness, especially for women, who face exacerbated socio-economic inequities, the forced commodification of their sexuality, and exclusion from mechanisms of justice.⁴² The vulnerabilities of stateless people are generally increased as they are considered and marginalised as 'other' or 'outsiders', with their survival, rights, and dignity already compromised by social exclusion mechanisms such as legal invisibility, geographic segregation, and social ostracism. Citizenship means access to rights and thus, speaking out is a struggle. For many stateless people talking out or acting when wronged or faced with a situation of abuse can also become problematic or increase their vulnerability. The lack of citizenship silences stateless persons and robs them of their voices. Stateless parents were overwhelmed by the effect of COVID-19 and subsequently had limited or no time and resources to advocate on behalf of their stateless children.

The resolution of cases of statelessness through the (re)instatement or conferring of citizenship can have a positive impact on a stateless person's enjoyment of rights and quality of life. In certain circumstances, it has been reported to end years or even lifetimes of exclusion, marginalisation and abuse. This, however, is not the case for everyone and it begs the question: To what extent does the formal acquisition of citizenship end the psychosocial challenges and traumatic experiences encountered and endured by previously stateless persons?

IV. MENTAL HEALTH OF STATELESS PERSONS

This section presents and addresses mental health challenges that prevail in stateless persons, particular stressors that may elicit these, and how interventions may assist. It is worth noting that the experience of being stateless, in all its forms, levels and periods experienced is highly stressful and traumatising. The damage of mental health

⁴² Roshni Chakraborty & Jacqueline Bhabha (2021) op cit note 3 237 at 237.

and psychosocial status to stateless persons is enduring. Given the high likelihood of post-statelessness mental health challenges, it is crucial to gain insight into how best to provide psychosocial care. The evidence on such interventions is limited to non-existent. As a point of departure for the discussion points in this section, we use a case example based on the experience of one of the authors during social work intervention with a stateless adolescent in South Africa. The aim of using the one case example is to show the interconnectedness of the trauma (i.e., big ‘T’ versus small ‘t’) and the intersectional lens to statelessness. This is because statelessness intersects with many factors leading to it largely remaining unrepresented in national, regional, or global discourses.

Case example

In 2007, I was working as a social worker at an institution in South Africa that accommodated orphaned and vulnerable children. During this time, I was assigned the case of Andrew (not his real name). Andrew was a seventeen-year-old teenage boy who was born in and had migrated from Tanzania as a toddler. His stepfather who took care and custody of him was an Umkhonto we Sizwe war veteran who was in exile at the height of the anti-apartheid struggle in South Africa during the late 1980s and early 1990s. Andrew was born in Tanzania, and he did not have any legal documentation when his stepfather relocated to South Africa, at the dawn of democracy, with him and his Tanzanian biological mother.

The efforts by Andrew’s stepfather to obtain South African citizenship for him, were without success. Years passed until Andrew’s mother passed away and his stepfather remarried. The new wife of Andrew’s stepfather did not want to stay with Andrew, claiming that he was not a biological son to her new husband. Andrew ended up in institutional care due to neglect and constant problems at home caused by the displeasure from his stepfather’s wife. Andrew was a highly intelligent boy and he also excelled as a soccer player. He had dreams to play for Bafana Bafana — the South African national team. He calls South Africa home, and it is the only country he identified with. He had no memory of Tanzania and he had never gone back to visit since moving to South Africa. He only spoke English and several South African languages. In 2007, Andrew was supposed to write his matric exams. Unfortunately, he did not have a South African or Tanzanian birth certificate or any identity document. The Tanzanian embassy could not help his case due to the bureaucratic process involved in family tracing and proving his birthplace. As such, the Tanzanian embassy could not prove if Andrew was indeed born in Tanzania and that his mother was a Tanzanian citizen. As the same time, he was denied South African documentation, rendering him stateless.

Andrew was told that he could not register as a candidate for the final high school exams. He approached the social worker with this concern, and was reassured that every effort possible would be made to help with his case and that the issue will be resolved in time to allow him to register for the exams. Despite the reassurances and the possible solutions suggested to him, Andrew was growing despondent by the day. Not

being able to write these exams was weighing down on him. He was showing signs of stress and he would come to see the social worker daily to check on the progress of his case. One weekend, the social worker had a family emergency that necessitated travel away from the residential care facility. Upon the social worker's return, he learned that Andrew had passed on after committing suicide. The issue of lack of documentation had taken its toll on him, and he had become hopeless, socially isolated from family, with feelings of worthlessness and hopelessness. Andrew had confided in his peers that he could not bear to see his dream of featuring for the South African national team and writing his matric exam fail due to a lack of documentation. As far as he was concerned, he was South African and did not see a reason why granting him an identity document was such a big issue. "Uncle, why are they rejecting me like this?" he would often ask the social worker. The multi-layered stressors and psychosocial and physical health issues converged to create an experience of loneliness, hopelessness, worthlessness, and despair, leading to suicide.

The case of Andrew above represents a tip of the iceberg of the suffering that many stateless persons endure on a day-to-day basis due to lack of documentation. Statelessness leads to a situation of precarity where people live with uncertainty and perpetual worry every single day of their lives. This impacts the mental health of affected stateless persons and the prolonged day-to-day precarity eventually leads to more severe forms of traumatic mental health conditions such as depression and anxiety. For Andrew, lack of documentation blocked his advancement in schooling, it crushed his hopes as a budding footballer who saw himself representing the South African national team. Sadly, he could not handle the mental toll that was induced by his situation of statelessness. Thus, statelessness in combination with other factors eventually led to his untimely and regrettable demise at such a young age. The hopes, dreams and potential of this young teenage boy were crushed. Andrew had lived with this situation for many years and it was something that had inconvenienced him time after time, but he was able to navigate the inconveniences that came with statelessness until he encountered the major huddles that eventually cost him his life. Such situations come with tremendous mental strain and stress that eventually lead to complex trauma, somatic illnesses and even death, as in the case of Andrew. Indeed, it is challenging to live with daily uncertainty and inconvenience.

For Andrew, as is the case for millions of other stateless persons, statelessness represents rejection, and a denial of being. The need for belonging and acceptance is a universal desire in all people and it is needed at all levels of our ecology, from family, school, community, and the country at large. To this end, a denial of citizenship is in essence a denial of one's existence, identity and right to citizenship. While this is legally a breach of human rights, there are hidden mental health costs to statelessness that haunt affected persons daily. Dreams are shattered, hopes dashed and opportunities are limited because the person does not have documentation. The 'world' of statelessness shuts out persons from access to economic opportunities,

career advancement, education, and travel, among other necessary life chances. It is a life filled with daily stressors — an existence that is stressful and detrimental to one's well-being.

Daily stressors experienced by stateless persons may worsen their mental health adaptations that are experienced by limiting every-day protective factors and reducing their sense of resilience.⁴³ Environmental stressors may vary in intensity and can include: lack of access to basic needs, residing in insecure and overcrowded housing, fear of being arrested, lack of academic opportunities, and diminished livelihood prospects. Daily stressors associated with poverty and insecure conditions have an adverse impact on mental health — with ongoing chronic stressors interfering with recovery and prolonging symptoms. Stories shared by stateless persons illustrate their frustration with a lack of identity or belonging and are indicative of their struggles for survival and recognition.

Experiences of statelessness can easily be viewed and understood to be traumatic and capable of inducing symptoms of anxiety and depression. Stateless persons are frequently exposed to severe psychological trauma, characterised by social stigma, violence, detention, and threats of (or actual) deportation. This could lead to a decrease of the severity of (un)diagnosed disorders even after citizenship is granted. In this regard, trauma-informed psychosocial care and support is aimed at addressing the stateless persons' psycho-emotional needs and providing opportunities for a better future. The help includes engaging with the person's internal resources by drawing on their unique lived experiences, creativity, and motivation while acknowledging the long restorative healing journeys to be undertaken.

The duration of being stateless may serve as a proxy for statelessness adversity — being associated with prolonged and repeated exposure to violence, marginalisation, restricted movement, and lack of access to services. This mirrors the impact of multiple traumas, which are often more challenging to process, as they are of a longer duration, unpredictable, and entail varying levels and intensity of violence and discrimination.

V. IMPLICATIONS FOR PRACTICE, RESEARCH, AND ADVOCACY

What makes statelessness traumatic are the experiences that are both visible or hidden, and that involve a threat to a person's functioning, physical or emotional well-being and that of their family members. Being in a state of statelessness can also be overwhelming — it can foster helplessness and result in intense feelings of fear, anxiety, and lack of control. The knowledge of being stateless, is bound to change and influence the way that person understands themselves, relationships, the world, and others. It is also important to understand culture-specific descriptions and manifestations of trauma or of stressful experiences. These are aspects that any professional who works with stateless individuals and families ought to know and acknowledge.

⁴³ Andrew Riley et al. (2017) op cit note 9 304 at 306.

From an intergenerational perspective, the stress, anxiety, or depression linked to stateless parents or caregivers can increase the internalised symptoms of their child. In addition, the timing and duration of exposure to the contextual stressful incidents can have consequences on children's developmental outcomes. Like Andrew's situation in the case example, cumulative risk or prolonged multiple risks and limited future economic prospects can affect the severity to which a person's mental health is affected. A study on stateless Iraqi Kurdish children and adolescents indicates that experiences of risk factors in early childhood rather than later in adolescence have more adverse consequences.⁴⁴ Thus, from a multi-systemic approach, there is a need to work with the whole family, irrespective of the nature of statelessness in that family unit. This also calls for further research on the family's functioning, as impacted by statelessness.

Daily stressors associated with the lives of stateless persons can be of more urgent concern than past traumatic events. This is because they play a significant role in mental health outcomes and ought to be considered as potential avenues for intervention, in reducing mental health symptoms and increasing functioning and wellness. This is consistent with the belief that healthy coping and resilience can be fostered by supportive recovery environments. When engaging with stateless persons, it is important to maintain an attitude that empowers the person, acknowledging their worth, rather than seeing them as sources and carriers of pathology. This is based on the belief that the stateless person has agency and is best able to understand their needs⁴⁵ and challenges. They must, therefore, be included in the development and design of intervention plans to alleviate their problems.

The findings emphasise the importance of investigating and researching associations between human rights violations and mental health, with a focus on preventative strategies and integrated interventions. Future research can look at how rights violations and the resulting trauma from statelessness become internalised by individuals and communities and from there seek to identify interventions that can be implemented early. Addressing mental health symptoms alone in stateless persons or simply assigning them a nationality, is insufficient. This paper emphasises integrated and holistic rather than siloed approaches when intervening on statelessness issues. Trauma practitioners such as social workers, psychologists, and counsellors should work in partnerships with legal practitioners and activists to reduce emotional distress while strengthening coping strategies and resilience and addressing systemic rights violations. In addition, the unique situations, rights violations experiences, social exclusion, and 'vulnerability of stateless persons as compared to many other non-nationals require a greater openness to granting more favourable rights to stateless persons than to other migrants who are not so fundamentally disadvantaged'.⁴⁶

⁴⁴ En Chi Chen 'Stateless Iraqi Kurdish children and adolescents' mental health: A scoping review' (2020) Research Square at 22, available at <https://doi.org/10.21203/rs.3.rs-113316/v1>

⁴⁵ Asako Ejima (2021) op cit note 16 357 at 379.

⁴⁶ Katherine Perks & Amal de Chickera 'The silent stateless and the unhearing world: Can equality compel us to listen?' (2009) 3 *Equal Rights Review* 42 at 51.

Adopting a trauma-informed approach means viewing and engaging with a stateless individual's behaviours, responses, feelings or emotions and attitudes as a collection of coping skills arising as a response to rights violations and traumatic experiences. For this to be achieved, there is the need for multi-systemic changes and commitments to practices by applying (basic) information of trauma and recovery to design and deliver policies and services. Providing trauma-informed care and services reduces situations and circumstances that can lead to additional harm or rights violations through practices that are not supportive of well-being and recovery. Trauma-informed services by any practitioner can increase a stateless person's 'choice and control over the course of their recovery and focus on safety, strengths, spiritual and emotional well-being, and the development of trusting relationships.'⁴⁷ In providing a positive trauma-informed intervention to stateless persons so that they can lead satisfying and fulfilled lives, trauma practitioners must pay attention to their own personal wellness. Providing care and services to wounded persons can result in a variety of psychological reactions that can cause secondary stress disorders and lead to vicarious trauma. Therefore, trauma specialists and other practitioners working with stateless persons ought to take care of themselves and set limits on the levels of emotional energy they can safely exert on their work.

VI. LIMITATIONS OF THE STUDY

Due to the inadequate linkages with core social, political, and developmental issues, stateless persons remain uncouneted and disenfranchised — and their very existence may even be denied. When we observe victims and survivors who have their rights denied and centre their lives or stories based on hierarchies of victimhood, we are perpetuating the unjust belief that there are those who are more deserving [of being heard] through having collective voices. From a quantitative perspective, we acknowledge that multiple cases increase the credibility of the study. However, when using a qualitative approach, a small sample is not generalisable and is a limitation of many studies.

The aim of presenting the case example in this paper is to illustrate the wide range of interconnecting yet challenging situations that a stateless person may experience when navigating unjust systems.⁴⁸ When access to having one's story recognised is contingent on the stories of many others who travel a similar road but with inaccessible stories, this is in effect a denial of basic truth — that each of us must have interlinking stories to satisfy or ensure acknowledgement of our traumas. Trauma experience is individual, that is, it is based on the meaning that one attaches to it and not what others make of it. Trauma-informed research within statelessness studies calls for these stories to be platformed and amplified in a genuine way⁴⁹ —

⁴⁷ Rose Clervil, Kathleen Guarino, Carmela J DeCandia & CA Beach 'Trauma-informed care for displaced populations: A guide for community-based service providers' Waltham, MA: The National Center on Family Homelessness, a practice area of American Institutes for Research Health and Social Development Program (2020) 1 at 18.

⁴⁸ Jeanine Hourani 'Reclaiming statelessness narratives by resisting "deficit" discourse and amplifying the voices of stateless people' University of Melbourne (2021) at para 4.

⁴⁹ Janine Hourani (2021) op cit note 48 at para 7.

surfaced and not silenced and forgotten. From a research perspective, we support the view that 'enabling stateless people's voices to be heard more strongly and more widely is a fundamental requirement for a better understanding of the problem of statelessness and how to tackle it.'⁵⁰ We strongly acknowledge that engaging with stateless people's voices and lived experiences can strengthen advocacy and policy because it informs balanced debates and helps in the person-centred identification of needs, gaps, and solutions in the resolution of statelessness. In securing a better future for them, targeted funding, and dedicated support is crucial.⁵¹ We should be cautious not to discredit single voices because they can also provide insights to increase our understanding of some complexities around statelessness and enable further opportunities for these to be strengthened, refuted, or clarified.

In as much as there is increasing research on traumatic events and interventions being universal phenomena,⁵² there is a need to investigate culture-specific manifestations of trauma, as exhibited by stateless persons in different contexts as well as cultural transformative ways to identify local idioms of distress and explanatory models of somatic symptoms. This paper is based on a review of literature; hence, empirical studies are recommended to understand statelessness-related traumas based on lived experiences and the systematic rights violations. This would give voice to this silenced yet vulnerable population and to identify what justice means to them.

VII. CONCLUSION

In this paper, we argue that statelessness, whether de jure or de facto has traumatic effects on the individuals and families. Mental health distress for stateless persons may be mitigated by interventions targeting environmental stressors and risk factors (pre-, during and post-statelessness, if applicable) to promote well-being. Policy-makers and activists should work collaboratively with mental health practitioners to broaden their understanding of effective, holistic interventions that include tackling psychosocial and emotional distresses brought about by statelessness. The authors hope that this study will inspire additional efforts in understanding and incorporating a critical trauma-informed lens influencing mental well-being toward the development of more nuanced and transformative multi-level and multi-systemic interventions.

⁵⁰ Ieksejs Ivashuk 'Tackling statelessness: The fundamental importance of stateless people's voices' (2022) 70 FMR 13 at 14, available at <https://www.fmreview.org/issue70/ivashuk>, accessed on 05 November 2022.

⁵¹ Katie Robertson & Sarah Dale 'A place to call home' Peter McMullin Centre on Statelessness (2021), available at https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3645547/StatelessChildrenReport.pdf, accessed on 05 November 2022.

⁵² Andrew Riley et al. (2017) op cit note 9 at para 1.

Statelessness, Development, and Protection of ‘Disadvantaged Groups’: Bridging the Post-2030 Sustainable Development Gaps

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Abstract

Statelessness constricts development opportunities, human capital, and the potential of affected communities and persons over successive generations. The marginalisation of stateless persons, deprivation of their basic rights, legal recognition, and access to essential services further induce their vulnerability and the risk of intergenerational statelessness. Unfortunately, the nexus between statelessness and development remains poorly investigated amid the lack of coherent measures to address it. Hence, the need to understand how global, regional, or national development policies, programmes, and processes often constrict stateless persons and communities. The paper argues that mismatches in the implementation of multilateral development programmes and national policies increase deprivation by statelessness and its conditions of vulnerability, suspicion, and exclusion of affected persons and communities. Although not explicitly encapsulated to address statelessness, the Sustainable Development Goals (SDGs) unlock significant opportunities, with relevance and applicability of some of the goals. Therefore, incorporating statelessness into the post-2030 development agenda is critical for addressing its challenges, and improving the human security and conditions of stateless persons.

Keywords: statelessness, development, vulnerability, SDGs, human rights, inclusion

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I. INTRODUCTION

A stateless person, in a precise legal phrase or as defined in international law, denotes a person not considered a citizen by any state, under the operation of its law.¹ Statelessness is prohibited under international law; it is often induced by the refusal of a person's right to nationality, birth registration, and denationalisation or renunciation of nationality by several factors, including socio-political circumstances.² Regrettably, statelessness remains a highly contested subject matter in many aspects, including data, statistics, definitions, and terminologies, and politically, it is facing resistance. For instance, the United Nations High Commissioner for Refugees (UNHCR) statistical reporting estimated 4.2 million stateless people across 94 countries (including those of undetermined nationality in 76 countries).³ Given the UNHCR's assumption that the number of stateless persons is substantially higher, and the inability of most countries to collect adequate data on statelessness, the Institute on Statelessness and Inclusion (ISI) projected the existence of at least 15 million stateless people globally.⁴ The restriction of their basic rights — such as access to birth registration and identity documentation, and socio-economic opportunities — healthcare, education, property ownership, legal employment, freedom of movement and political participation, undermine their individual potentials. Also, their 'difficulties in accessing opportunities, owning or registering businesses; limited access to bank accounts or loan(s); and, in some cases, the threat of extortion, detention or expulsion' often trap them in poverty and extreme circumstances across the world.⁵ Consequently, marginalisation and refusal of their basic rights generate social mobility tensions, including socio-economic crises,⁶ and thus, constitute a major development problem over successive generations.

Development is a multi-dimensional concept that encompasses the reorganisation and reorientation of a socio-economic and political system toward improving the quality of human lives. This implies the process of bringing about a social change that enables people to attain their human potential, capabilities, and aspirations.⁷ According to Michael Todaro and Stephen Smith, development highlights three important objectives. The first entails raising human living standards, i.e., incomes and consumption, and general well-being, including health and education, through relevant growth processes. The second aspect emphasises

¹ United Nations Convention Relating to the Status of Stateless Persons 1954, Article 1(1).

² Brad Blitz 'Statelessness: Advocacy campaigns and policy development' (2009) 32 *Nationality for All* at 25.

³ United Nations High Commissioner for Refugees (UNHCR) 'UNHCR urges governments to accelerate progress and resolve plight of world's stateless' (2021), available at <https://www.unhcr.org/en-us/news/press/2021/11/618387874/unhcr-urges-governments-accelerate-progress-resolve-plight-worlds-stateless.html>

⁴ Institute on Statelessness and Inclusion (ISI) 'Statelessness in numbers: 2020 – An overview and analysis of global statistics' (2020), available at https://files.institutesi.org/ISI_statistics_analysis_2020.pdf

⁵ ISI 'Statelessness, human rights and the sustainable development agenda' (2017), available at <http://children.worldsstateless.org/3/childhood-statelessness-and-the-sustainable-development-agenda/statelessness-human-rights-and-the-sustainable-development-agenda.html>

⁶ United Nations Development Group (UNDG) 'Statelessness: UNDG guidance note on human rights for resident coordinators and UN country teams' (2017).

⁷ Organisation for Economic Co-operation and Development (OECD) 'Development' (2020) *Development Matters*, available at <https://www.oecd.org/development/>

the creation of conditions conducive to the growth of human self-esteem through social, political, and economic systems and institutions that promote human dignity and respect. The third aspect presupposes increasing people's freedom by enlarging their range of choice variables, such as goods and services.⁸ The reality that stateless persons co-exist on the margins of society globally, and remain unheard, unnoticed, and neglected, challenges the fundamental principles of the global development agenda and human rights, as advanced by the Universal Declaration of Human Rights (UDHR)⁹ over the past seventy years.

Statelessness has been attributed to several causes, ranging from discrimination in nationality laws (based on racial, ethnic, religious, gender, or linguistic minority status), to challenges of birth registration and documentary proof of identity. Other factors include state succession, conflicts between nationality laws, wars and displacement, and lack of safeguards to avert statelessness in nationality laws. Displacement may serve as a cause and consequence of statelessness. When induced by human rights abuses and abysmal development outcomes against vulnerable and deprived populations, statelessness may propel voluntary movement or forced displacement of people across international borders. Likewise, protracted displacement prompted by irregular migration may also result in statelessness.¹⁰

Moreover, occurring at different times, and in different contexts, all regions of the world are confronted by problems inducing statelessness. For example, members of Europe's Roma community were rendered stateless when the post-World War I (1914–1918) new state system could not accommodate them. Furthermore, the Palestinians, the Tamils of Sri Lanka, and the Kurds across the Middle East have become stateless due to empire collapse, occupation, or decolonisation.¹¹ In Africa, groups at risk of statelessness fall into five categories. These include: (a) orphans, abandoned infants, and other vulnerable children, including those trafficked for various purposes; (b) people of mixed parentage; (c) border populations, including nomadic and pastoralist ethnic groups who regularly cross borders, as well as those affected by border disputes or transfers of territory; (d) migrants — historical or contemporary — without (valid) documentation of nationality, especially their descendants, refugees, and internally displaced persons (IDPs); and (e) those deported or returned to a country 'of origin' where they have limited, or no current ties.¹²

This study reveals that states' unwillingness or inability to provide accurate data, inadequate mechanisms for registering stateless persons, and the lack of

⁸ Michael P Todaro & Stephen C Smith *Economic Development* 6 ed (2014) 12.

⁹ United Nations (UN) 'Universal Declaration of Human Rights' (1948) 4, available at <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>

¹⁰ UNDG op cit note 6 at 5.

¹¹ UNHCR 'Citizenship and statelessness in the member states of the Southern African Development Community' (2020) 7 SSRN *Electronic Journal*, available at <https://doi.org/10.2139/ssrn.3783295>

¹² African Commission on Human and Peoples' Rights (ACHPR) 'The right to nationality in Africa' African Union (AU) (2015).

obligation to report or index the numbers of stateless persons in their territories have worsened the phenomenon.¹³ The consequences of being without nationality, denial of citizenship, and inability to register to vote, marry, and apply for a travel document in a country of abode, exacerbate the deprivation of stateless persons. The long-term detention of stateless persons outside their country of origin or previous country of residence when refused re-entry to their territories of origin often threatened their well-being and community. Thus, denial of their basic rights — rights to education, employment, and medical care — for being unable to prove any legal connection to a country,¹⁴ not only exacerbates their vulnerability and marginalisation but induces development challenges.

Unfortunately, the neglect of stateless persons and communities by development actors and processes has often lagged them in national or regional development. Against this backdrop, scholars and activists have increasingly advocated for incorporating statelessness into development programming and research. The ISI’s World Statelessness Report (2014) advances the human security and prospects of stateless persons.¹⁵ Remarkably, the Sustainable Development Goals (SDGs), articulated in 2015, unlock significant opportunities in this regard, by setting an ambitious agenda to be achieved by 2030.¹⁵ Although statelessness is not explicitly encapsulated in the SDGs, the relevance and applicability of the goals to statelessness are apparent at first glance.

Given the above dichotomy, this study advances the need to understand the nexus between the fundamental causes of statelessness and the challenges of non-inclusive development. It takes into cognisance, (a) how the growing vulnerability of marginalised groups, including the stateless, enhances the risk and trend of statelessness; (b) the implication of intergenerational statelessness on human security and development; and (c) bridging the implementation gaps between national policies and multilateral mechanisms to address the vulnerability of stateless persons and other excluded groups. Furthermore, an inductive review of public documents — secondary and primary — including official reports, online sources, and scholarly publications on statelessness and development is conceived along several themes. These include: (a) critical debates on statelessness, frameworks, and campaign for the rights to a nationality, toward socio-economic inclusion; (b) the SDGs and statelessness; (c) socio-economic rights — risks of exclusion, discrimination, and intergenerational statelessness; and (d) challenges and prospects.

¹³ UNHCR & Inter-Parliamentary Union (IPU) *Nationality and Statelessness: A Handbook for Parliamentarians* (2005) 6.

¹⁴ *Ibid.*

¹⁵ ISI *op cit* note 5 at 3.

¹⁶ UNHCR ‘The Sustainable Development Goals and addressing statelessness’ Briefing Notes (2017) 2, available at <http://www.refworld.org/docid/58b6e3364.html>

II. CRITICAL DEBATES ON STATELESSNESS: FRAMEWORKS AND CAMPAIGN FOR THE RIGHTS TO A NATIONALITY, AND SOCIO-ECONOMIC INCLUSION

Statelessness as a concern for human rights and development is a truism that is poorly understood. This is due to inadequate publication, teaching, and research on its causes and ramifying effects. Critical debates on statelessness and development reflect on the SDGs; however, the purpose to relieve or alleviate the vulnerabilities of stateless persons predates the SDGs. Institutional reports reflect on the impact of relevant international standards, treaties, and conventions concluded through international and regional human rights obligations. The UDHR, a milestone international document adopted by the United Nations (UN) General Assembly on 10 December 1948, enshrines the rights and freedoms of all human beings. Its article 15 explicitly provides the foremost guarantee to all: ‘Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.’¹⁷ Recognising the UDHR’s guarantee on the right to a nationality, legal provision among state parties concerning the prevention of statelessness was further elaborated in two important international conventions — the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These conventions represent a landmark in the historical development of international law for the protection of stateless persons.¹⁸

Promoting the dignity and human security of the stateless and vulnerable groups brings statelessness into the human rights regime. The 1966 International Covenant on Civil and Political Rights (ICCPR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the 1990 Convention on the Rights of the Child (CRC), among others, reflect states’ obligations relating to acquisition and loss of nationality and the protection of vulnerable groups.¹⁹ However, these conventions’ emphasis on the prevention and reduction of statelessness is undermined by the lack of procedures for the determination of statelessness, amid persistent gaps and discrimination in nationality laws. To bridge this gap, the 1986 Declaration on the Right to Development, recognises the universal freedom to ‘participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights can be fully realised.’²⁰

Statelessness has taken a centre stage in official policy discourse at the United Nations (UN); this is explicitly connected to the campaigns to regularise migration, identity and nationality, and policies on non-discrimination.²¹ International campaigns, particularly by international non-governmental organisations (NGOs) and monitoring bodies, vigorously influence the profile of de jure and de facto

¹⁷ UDHR op cit note 9.

¹⁸ Alice Edwards & Laura van Waas ‘Statelessness’ in Elena Fiddian-Qasimiyeh Gil Loescher Katy Long and Nando Sigona (eds) *The Oxford Handbook of Refugee and Forced Migration Studies* (2014) 290–301.

¹⁹ UNDG op cit note 6 at 2.

²⁰ Blitz op cit note 2.

²¹ UNHCR op cit note 11.

stateless populations, although both remained unsettled. In most instances, they are supported by UN agencies such as the UNHCR and the Office of the United Nations High Commissioner for Human Rights (OHCHR), and UN Committees, including the Committee on the Elimination of Racial Discrimination, a joined-up action by the UN to boost the protection of human rights through social and economic factors for development, safety, and security. Its 2003 draft report, by the UN Special Rapporteur on the rights of non-citizens, revealed the huge gap between the guarantees of international human rights law to non-citizens and the realities of the challenges confronting them. It also provided the agenda setting for activists and human rights monitoring organisations working with the UNHCR, e.g., Refugees International and the Open Society Institute's (OSI) Justice Initiative.²²

The United Nations Children's Fund (UNICEF) and PLAN International's joint ten-year campaign on universal birth registration was instrumental in addressing the challenges of both *de jure* and *de facto* stateless persons. This includes the challenge of proving one's nationality before accessing basic services, travelling, marrying, giving birth, and protecting children from the dangers of legal anonymity, or trafficking. Plan International's 2005 campaign featured in the recommendations of the UN Secretary-General's 2006 Study on Violence Against Children, and the human rights monitors' reports and legal cases brought before international tribunals improve the profile of statelessness. The significance of this reflects on increased western governmental agencies' direct involvement in coordinating the cause of preventing statelessness since 2006.²³ The joint African Union (AU)–UNICEF 'No Name Campaign: For Every Child, a Legal Identity, For Every Child Access to Justice', launched in February 2019, identifies birth registration as fundamental for access to child-friendly justice. It has rallied actions and rapid implementation by AU member states toward a commitment to universal registration of a child's birth and repositioning civil registration and crucial statistics in Africa, to address the indignity of invisibility.²⁴ Nevertheless, the persistent idea of proving one's nationality before accessing basic services is discriminatory and requires urgent attention.

Moreover, the agenda on statelessness was also popularised by mass protests across the Global North in the mid–2000s. This was geared toward transforming the (Westphalian) state into more inclusive models of political organisation and supporting the growing transborder migration and the recognition of multi-ethnic and multi-national populations. The protests were often linked to the treatment of minorities and the right to non-discrimination. The opinion found support among grassroots campaigners, non-professional associations, local NGOs, migrant community organisations, and collective pushing to regularise the status of irregular workers, unsuccessful asylum seekers, and 'over-stayers'. This includes the May 2006 protest by over one million persons across American cities on the plights of

²² Brad Blitz 'Statelessness, protection and equality' (2009) *Forced Migration Policy Briefing* No 3 at 1.

²³ ISI op cit note 5.

²⁴ African Union 'No Name Campaign' (2021), available at <https://au.int/en/newsevents/20200617/no-name-campaign>

some 12 million undocumented migrants left with no route to citizenship and being criminalised.²⁵ This resonated across Europe, through various protests, such as the May 2007 rally 'From Strangers into Citizens' in the United Kingdom, and the revival of debate in France over the 'sans papiers' — undocumented former migrants from North Africa. Likewise, the 2007 pan-European 'caravan of the erased' convoy of activists from Ljubljana (Slovenia) to Brussels protested the cancellation of residency rights and mistreatment of over 18,000 persons who lost their social, economic, and political rights in the aftermath of Slovenia's independence.²⁶

Regional human rights mechanisms across Africa, Asia, Europe, and the Americas complement the international conventions, institutional processes, and campaigns. The AU's 2006 Migration Policy Framework for Africa (MPFA), for instance, incorporates guidelines from the 1954 and 1961 Statelessness Conventions. The 2018 revised MPFA and Plan of Action (2018–2030) provide improved strategic guidelines to AU member states and Regional Economic Communities (RECs) in the management of migration. This includes the states' capacities to 'develop national policy frameworks to counter statelessness, through long-term residency, reform citizenship legislation, and grant more rights to foreigners in member countries. Other measures include boundary demarcations, protection of the rights of those at risk of loss of nationality, and forced displacement.²⁷ In addition, the African Commission adopted the African Commission on Human and Peoples' Rights (ACHPR) Resolution on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa. The April 2013 draft study on the right to nationality in Africa, adopted a multifaceted thought process on the right to nationality in the continent.²⁸ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) — drawing its mandate from articles 32–46 of the African Charter on the Rights and Welfare of the Child (ACRWC) — together with the African Court on Human and Peoples' Rights were instrumental in the formulation of the 2015 Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, adopted by the ACHPR.²⁹

Significant essays and institutional reports have distinguished two contexts in which statelessness emanates — the migratory and in situ contexts of statelessness.³⁰ Statelessness in the migratory context illustrates the migrant stateless persons or those with a migratory background. The in-situ statelessness encompasses the populations in their own country who have stable and significant ties, i.e., through

²⁵ Blitz op cit note 2.

²⁶ Blitz op cit note 22.

²⁷ African Union Commission (AUC) 'Migration Policy Framework for Africa and Plan of Action (2018–2030) (2018), available at <https://au.int/en/documents/20181206/migration-policy-framework-africa-mpfa>

²⁸ ACHPR op cit note 12 at 10.

²⁹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa' (2015).

³⁰ Caia Vlieks 'The concepts "statelessness in situ" and "statelessness in the migratory context" in T Bloom K Tonkiss & P Cole (eds) *Understanding Statelessness* (2017) 35–52

birth or long-term residence, with a state. These two contexts have also determined the different forms of legal responses, in different countries, to address the challenges of statelessness.³¹ These encompass: (a) the determination of statelessness and protection status (including facilitation of access to naturalisation, as required under Article 32 of the 1954 Convention Relating to the Status of Stateless Persons — for stateless persons in the migratory context; and (b) recognition of nationality — for the stateless in situ persons.³²

Similar contemporary thoughts on statelessness characterised three significant milestones — the post-Second World War (1939–1945) drafting of the UDHR; the inception of the twenty-first century (protests in the Global North); and the recent UNHCR #IBelong campaign (2014), which coincides with the pioneer Global Forum on Statelessness.³³ The UNHCR's #IBelong campaign enhances states' and other stakeholders' commitment to the Global Action Plan to end statelessness by 2024.³⁴ The above milestones significantly put statelessness on the front burner of multilateral discourses, human rights policies, awareness, and development agendas. With enhanced identification of aliens, birth registration, naturalisation, and permanent residency worldwide (particularly in the Global North), the campaign's influence is not uniform, as commitments and outcomes vary across countries and regions.³⁵ Nonetheless, Thailand's development of nationality laws, and evaluation of historical situations of stateless persons, aliens, and minorities, are noteworthy across the Global South. Since 2005, the Thai government's efforts in reducing statelessness include measures on education, quality of life and integration of stateless and vulnerable persons, amid collaborations with civil societies and international organisations.³⁶

The intricacy of a parastate caught between statehood and frozen conflict elicits yet another development concern for statelessness. The entrapment of the Azawad — a remote parastate situated in northern Mali — in a protracted conflict involving non-state armed groups, national security forces, and external interveners, is a critical example.³⁷ The above reality illustrates a temporary and volatile circumstance linking parastate, patronage politics, hybrid governance and statelessness, amid deprivation and marginalisation. The typical nature of the Sahara Desert's spatial porosity highlights how ethnic and religious drivers intertwine and overlap with the

³¹ Gábor Gyulai 'Statelessness in the EU framework for international protection' *European Journal of Migration and Law* (2012) 279.

³² C Vlieks op cit note 30.

³³ Tendayi Bloom Katherine Tonkiss & Phillip Cole *Understanding Statelessness* (2017).

³⁴ UNDG op cit note 6.

³⁵ ACHPR op cit note 12; Bronwen Manby 'The Sustainable Development Goals and "Legal identity for all": "First, do no harm"' (2021) 14 *World Development* at 279; UNHCR op cit note 11; Punthip K Saisoonthorn 'Development of concepts on nationality and the efforts to reduce statelessness in Thailand' (2006) 25 *Refugee Survey Quarterly (Nationality and Reduction of Statelessness: International, Regional and National Perspectives)* at 40; Christoph Sperfeldt 'Legal identity in the sustainable development agenda: Actors, perspectives and trends in an emerging field of research' (2022) 26 *IJHR* at 217, available at <https://doi.org/10.1080/13642987.2021.1913409>

³⁶ Saisoonthorn *ibid*.

³⁷ Edoardo Baldaro & Luca Raineri 'Azawad: A parastate between nomads and mujahidins?' (2020) 48 *Nationalities Papers* 48 at 100.

struggle for identification, recognition, and borderline impositions.

The inclusion of stateless and vulnerable persons in global development discourse, a previously neglected concern, as implied, occupies a primacy in the SDG aim to ‘provide legal identity for all’ by 2030, including birth registration.³⁸ While this is praiseworthy, it is subject to criticism due to a lack of clear definition and link with the ‘right to a nationality’. While the SDGs take birth registration as attaining legal identity, this may not be the case, as many stateless persons and communities exist even with their births registered. Advocacies for independent oversight of executive decisions on legal identity may be reinforced by regulation of enrolment processes and reforms of nationality laws. These can enhance effective public-driven identity schemes.³⁹ The challenges associated with the trends of birth registrations, technological solutions to legal identity problems, and the risks of identification systems, particularly in the Global South, where a significant population at risk of statelessness exists, can be further evaluated. Thus, the SDGs’ legal identity target can be refocused with priority on the ‘right to a nationality’ and practical measures for addressing the vulnerability of stateless persons.

Unfortunately, the mismatch in citizenship laws, state collapse or changes in nationality laws, including denationalisation, i.e., the removal of a person’s citizenship, have potentially rendered many people stateless.⁴¹ Yet, complex and multi-faceted, contentions about appropriate responses to address the rising trend of statelessness have amplified concerns for the victims’ rights eligibility and legal personhood. Understanding statelessness and developments requires the need to link the increasing deprivations, conditions of vulnerability, suspicion, and exclusion of stateless persons across the world, including people at risk of statelessness. Digging deeper into the SDGs unearths not only its provisions for stateless persons’ access to essential services, but its potential for preventing or addressing statelessness. However, some causes for concern regarding statelessness that need to be renegotiated, also become apparent upon its critical assessment.

III. THE SDGS AND STATELESSNESS

The purpose of development is to improve human well-being, address human security problems including poverty, and inclusively enhance opportunity. In September 2015, the United Nations General Assembly adopted the 2030 Global Agenda for Sustainable Development, replacing the Millennium Development Goals (MDGs) (2000–2015). It comprised 17 goals across a broad range of areas and challenges to be addressed — including poverty, education, health, gender and inequality, climate change and justice. The 17 goals further encompassed a total of 169 targets, with

³⁸ Manby op cit note 35; Sperfeldt op cit note 35.

³⁹ Manby ibid.

⁴⁰ Sperfeldt op cit note 35.

⁴¹ Matthew J Gibney ‘Should citizenship be conditional? The ethics of denationalisation’ (2013) 75 *The Journal of Politics* at 646.

specific objectives to be attained, and indeed a total of 232 agreed indicators against which achievable progress is monitored. The SDGs differ from its precursor — the MDGs — in diverse and critical ways. They are broad — addressing a complex and diverse range of interconnected issues — intersecting different development challenges and opportunities, and universal issues — achievable by all UN member states and regions rather than mere low and middle-income countries. The SDGs also provide an exceptional opportunity to entrench human rights principles within the development agenda, hence ensuring that the most vulnerable and excluded persons, including the stateless, enjoy equal access to development. This view was captured by former UN High Commissioner for Human Rights, Navi Pillay, in the run-up to the drafting of the SDGs:

The Post-2015 Agenda must be built on a human rights-based approach, in both process and substance. This means taking seriously the right of those affected to free, active and meaningful participation. ... ensuring the accountability of duty bearers to rights-holders, especially the most vulnerable, marginalized and excluded. It means a focus on non-discrimination, equality, and equity in the distribution of costs and benefits. It means embracing approaches that empower people, both politically and economically. And it means explicitly aligning the new development framework with the international human rights framework — including civil, cultural, economic, political, and social rights, as well as the right to development. In essence, it means deliberately directing development efforts to the realization of human rights.⁴²

The SDG as a plan of action attempts to leave no one behind. It pays utmost attention to the most deprived groups, combatting systems and structures that stimulate exclusion and impoverishment of vulnerable and disadvantaged groups, including stateless persons. Statelessness is detrimental to human development, trapping affected people and communities in vicious poverty and deprivation. Accordingly, the September 2015 UN Summit's outcome document envisaged:

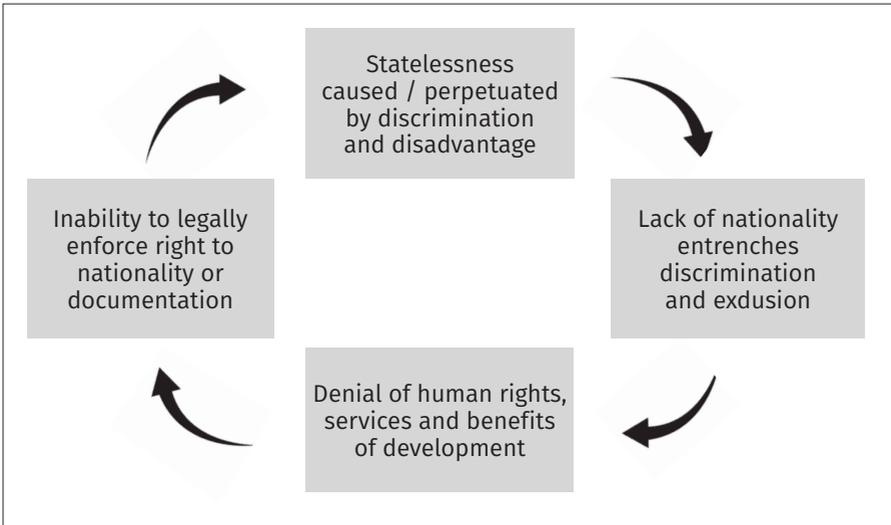
“(a) world of universal respect for human rights and human dignity; of justice and equality; of respect for race and ethnicity; and of equal opportunity permitting the full realization of human potential while promoting shared prosperity”⁴³

The intergenerational nature of statelessness, where affected parents are inherited by their children and grandchildren, exacerbates exclusion, poverty, disadvantage, and marginalisation of stateless persons. Such a factor perpetuates statelessness across the most affected communities in the world (see Figure 1). Thus, the persistence of statelessness may undermine the progress of attaining the SDGs.

⁴² ISI op cit note 5 at 3.

⁴³ Ibid.

Figure1: Development challenges and intergenerational cycle of statelessness



Source: ISI (2018) at 18

The SDGs emphasise how development benefits the stateless persons through inclusion in the implementation of development priorities, and sustained effort to eliminate structural discrimination and disadvantage. By far, all 17 goals (see Figure 2) are relevant to stateless persons and communities. Invariably, some of the SDGs have a stronger link with statelessness than others. SDG 5 (gender equality), SDG 10 (reducing inequality) and SDG 16 (peace, justice, and strong institutions) oblige member states and other states to combat structural inequality and discrimination, intrinsic to the root causes of statelessness. Other goals address critical areas where stateless persons seem disadvantaged, toward bringing development programming to stateless persons. These include SDG 1 (combatting poverty), SDG 2 (zero hunger), SDG 3 (health and well-being), SDG 4 (quality and affordable education), SDG 6 (water and sanitation), and SDG 8 (decent work and economic growth), and SDG 11 (sustainable cities and communities).⁴⁴

⁴⁴ ISI 'All about the SDGs: What statelessness actors need to know' (2018).

Figure 2: Sustainable Development Goals (2015–2030)



Source: United Nations – SDGs (2020)

Significantly, the campaign to end statelessness, championed by the UNHCR-led #Ibelong and its 10-point Global Action Plan have focused on the right to nationality, identity, and birth registration, as protected under international human rights treaties. These now find support in the SDGs, just as the International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights (ICESCR), and other relevant regional instruments such as the 1990 African Charter on the Rights and Welfare of the Child (ACRWC), and the 1997 European Convention on Nationality are relevant to statelessness. Hence, several goals can contribute to preventing and reducing statelessness, including enhancing the well-being of stateless persons and groups.⁴⁵ How applicable are the SDGs to statelessness? Given the fact that most of the world's stateless persons and communities remained consigned to the bottom of society in terms of economic opportunity, social inclusion and political participation, the principal objective of the 2030 Agenda 'to reach the furthest behind first' and 'leave no one behind' distinctly applies to the stateless. Specific SDGs and targets (see Figure 3), if properly implemented, will help prevent and reduce statelessness. These notably include SDG 5, Target 5.1 — relating to the elimination of gender discrimination, and SDG 16, Target 16.9 — urging states to provide legal identity for all, and birth registration.⁴⁶

Moreover, the SDGs and related targets also illustrate their relevance to improving the stateless persons' living conditions. For instance, SDG 4, Target 4.1 obliges states' commitment to ensuring by 2030, 'that all girls and boys complete

⁴⁵ Blitz op cit note 2.

⁴⁶ UNHCR op cit note 16.

free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes.’ Achieving this target will alleviate stateless children’s challenges in accessing education and obtaining certificates of school completion. Again, SDG 4 is significant for protecting stateless persons and ensuring their access to basic rights.⁴⁷ By improving their basic rights and living conditions, these SDGs may enhance the integration and inclusion of stateless (and former stateless) populations in development at all levels. This may empower large in situ groups, with longer-term initiatives toward resolving their statelessness and averting new incidents.⁴⁸

Figure 3: UNHCR global actions and key SDGs/Targets relating to statelessness

Actions to end statelessness	Statelessness mandate	
		Key SDGs and Targets
Action 1: Resolve existing major situations of statelessness.	1	Reduction SDG 10, Target 10.3 .and SDG 16, Target 16.b
Action 2: Ensure that no child is born stateless.	2	Prevention/Reduction
Action 3: Remove gender discrimination from nationality laws.	3	Prevention/ Reduction SDG 5, Target 5.1; SDG 10, Target 10.c and SDG 16, Target 16.b
Action 4: Prevent denial, loss or deprivation of nationality on discriminatory grounds.	4	Prevention SDG 10, Target 10.3 and SDG 16, Target 16.b
Action 5: Prevent statelessness in cases of State succession.	5	Prevention
Action 6: Grant protection status to stateless migrants and facilitate their naturalization.	6	Protection/Identification SDG10, Target 10.c and SDG16, Targets 16.9 and 16.b
Action 7: Ensure birth registration for the prevention of statelessness.	7	Prevention SDG 10, Target 10.c and SDG 16, Targets 16.9 and 16.b
Action 8: Issue nationality documentation to those with entitlement to it.	8	Prevention SDG 10, Target 10.c and SDG 16, Targets 16.9 and 16.b
Action 9: Accede to the UN Statelessness Conventions.	9	Protection/Prevention/Reduction
Action 10: Improve quantitative and qualitative data on stateless populations.	10	Identification SDG 17, Target 17.18

Source: UNHCR (2017) at 4.

Tore, the UNHCR’s mandate of resolving (current) and averting (future) incidents of statelessness encompasses 4 key elements: identify, prevent, reduce, and protect.⁴⁹ This obliges the following: to work with governments to identify stateless persons and populations with undetermined nationality; to prevent the occurrence of statelessness; to reduce statelessness, particularly in protracted situations; and to work with states and stakeholders to protect and assist stateless groups/persons.

⁴⁷ Ibid.

⁴⁸ Manby op cit note 35; Sperfeldt op cit note 35.

⁴⁹ UNHCR op cit note 16.

Concerning this mandate, SDGs 5, 10, 16, and 17, in addition to certain related targets appeared most applicable.

- § SDG 5: Target 5.1, ‘End all forms of discrimination against all women and girls everywhere’, is directly relevant to addressing the issue of gender discrimination in nationality laws. This is relevant because where nationality laws make women’s nationality status contingent on their husbands’, or prevent (stateless) men from acquiring their wives’ nationality, can be a major cause of statelessness.⁵⁰
- § SDG 10: Target 10.3, ‘Ensure equal opportunity and reduce inequalities of outcome, ... eliminating discriminatory laws, policies, and practices, and promoting appropriate legislation, policies, and action.’ This confronts discrimination based on ethnicity, race, religion, language, or gender. Instances of denial, loss, and deprivation of nationality on discriminatory grounds may induce statelessness. Targets 10.3 and 16.b ensure that stateless persons enjoy their human rights without discrimination due to lack of citizenship.
- § SDG 16 seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels.’ Its Target 16.9 aims to, ‘by 2030, provide legal identity for all, including birth registration’ toward leaving no one behind, including the stateless. Accordingly, a lack of nationality should not constitute a barrier to human rights protection or equal access to development. Target 16.b implores states to ‘promote and enforce non-discriminatory laws and policies for sustainable development’, particularly in terms of education, health, equality, work, and addressing poverty.
- § SDG 17 requires states to ‘strengthen the means of implementation and revitalize the global partnership for sustainable development’. This illustrates key action enablers across the whole SDG framework. It focuses on implementing the SDGs through partnerships, and stakeholder engagement, including civil society, the private sector, and donor states and organisations. Its Target 17.18 centres on data, monitoring, and accountability: “By 2020, enhance capacity-building support to developing countries, including for least-developed countries and small island-developing states, to increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts.’ This provides an opportunity for the improvement of statistical data on stateless populations —

⁵⁰ UNHCR *ibid*; ISI *op cit* note 44.

particularly in developing countries — who are frequently ignored by authorities and are sometimes uncouneted in national population censuses, databases, and administrative registries. Likewise, Target 17.18 could be used to improve civil registration and vital statistics (CRVS) systems to integrate stateless persons and people of undetermined nationality in national development planning.

The above targets can only be applied for the benefit of stateless persons, provided that the assumption behind them is inclusive, given the risk of neglect and vulnerability of the stateless. Nonetheless, the universal goals set out by the Sustainable Development Agenda recognise the roles all regions and states must play to achieve the goals rather than imposing an idea inflexibly on states. Hence, all UN member states exercise the free will to mainstream the SDGs into national planning, develop their national implementation strategies, and regularly review progress. This embraces engagements among stakeholders — civil society, private sector, local governments, and interest groups — and offers crucial opportunities for agenda setting and review, advocacy, and monitoring at all levels — global, regional, national, and local. Importantly, the SDGs provide development actors and stakeholders with the tools to break the cycle of exclusion, rights deprivation, and intergenerational statelessness, through development programming. Addressing statelessness requires constructive collaboration between actors in the development, human rights, and statelessness areas. This implies understanding the intersection and divergence between sustainable policies, development agenda, and (legal) frameworks.

IV. CHALLENGING THE ARBITRARINESS OF ADMINISTRATIVE DETENTION

Statelessness and discrimination or inequality are mutually reinforcing; this underscores the need to take human rights and development into cognisance. Hence, the rights to equality and non-discrimination are entrenched in several international, regional, and national policies. The ICESCR, adopted by the United Nations in 1966, and entered into force on 3 January 1976, is the principal human rights treaty on socio-economic rights. Other treaties, such as the CRC, CEDAW, and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, advocate for socio-economic rights.⁵¹ Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) guarantees every child's right to registration at birth and to a nationality. The AU Commission's draft 'Protocol on the right to a nationality and the eradication of statelessness' in Africa was included in the African Charter on Human and People's Rights.⁵² Despite these frameworks, the risk of intergenerational statelessness inhibits human rights-based development.

⁵¹ UNDG op cit note 6.

⁵² ACERWC op cit note 29 at 3.

Development overlaps with socio-economic rights, setting the core and minimum standards and services required by states for everyone in its territory. In every new generation of statelessness, malnourished and uneducated children grow into unemployed adults, with less to offer their children, compared to what their parents offered them, including regressions in generational higher education rate from parent to children. The historical impediments exacerbated by the lack of documentation and 'legal status' are constant in the Global South. Historically disadvantaged persons or communities, whose heritage has been disrupted, are often discriminated against and marginalised. This includes their vulnerability to rights violations, illegal detentions, and denial of access to basic services — healthcare, social protection, housing, and education. The Sama Dilaut (a.k.a., Bajau Laut) is a classic example of intergenerational and protracted statelessness, exacerbated by displacement and ethno-religious discrimination. This migratory semi-nomadic group inhabits the South East Asian seas of the territories of eastern Borneo (Indonesia and Malaysia), the west coast of Sulawesi (Indonesia) and the southern Philippines.⁵³

In the Horn of Africa, vulnerable children in Somalia, Eritrea, Djibouti, and Ethiopia, whose parents are displaced, including those of mixed parentage or members of cross-border communities remain at risk of intergenerational statelessness.⁵⁴ Statelessness in Southern Africa is predominantly induced by colonial history, migration, border changes, abysmal civil registry systems, and discrimination based on gender and ethnicity. Four of Africa's nine biggest countries with stateless populations are in Southern Africa: South Africa, the Democratic Republic of the Congo, Madagascar, and Zimbabwe. No state in the region has a system for the identification and protection of stateless persons, and only a few have adopted national laws and action plans for the protection of civil, political, and socio-economic rights.⁵⁵ A critical example is The Bill of Rights enunciated in Chapter 2 of South Africa's 1996 Constitution, which guarantees the rights to human dignity, equality, nonracialism, and non-sexism.⁵⁶ Unfortunately, weaponised nationalism, xenophobia, and increasing restrictive migration measures inhibit the implementation of South Africa's National Development Plan (NDP), aimed to eliminate poverty and reduce inequality by 2030. These further put irregular and undocumented migrants, their children, refugees and asylum seekers, and other excluded minorities at risk of statelessness.⁵⁷ West Africa is also replete with a poor birth registry, undocumented

⁵³ Helen Brunt 'World stateless children: Stateless at sea' (2017) Institute on Statelessness and Inclusion at 3, available at <http://children.worldstateless.org/3/childhood-statelessness-and-the-sustainable-development-agenda/stateless-at-sea.html>

⁵⁴ UNHCR 'Children, long-term refugees among population at risk of statelessness in Horn of Africa' (2022), available at <https://www.unhcr.org/afr/news/press/2022/2/61fba07159/children-long-term-refugees-among-population-at-risk-of-statelessness-in.html>

⁵⁵ UNHCR op cit note 11 at 4.

⁵⁶ Antonia Porter 'The rights of vulnerable and marginalised groups in South Africa' (2018) 2 Centre for Conflict Resolution, available at <http://www.jstor.org/stable/resrep05159.5>

⁵⁷ Aimée-Noël Mbiyozo 'Statelessness: An old problem with new threats' (2019) 5 ISI, available at <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats>

nomads, and forced displacements, particularly by conflicts and environmental change. Côte d'Ivoire hosts one of the world's largest stateless populations, with an estimated 1.6 million affected persons. The gaps in nationality laws induce the denial of legal identity and nationality, to the affected populations.⁵⁸

The SDGs' 'leaving no one behind' does not reference the right to a nationality. How does the concept of 'legal identity' without the 'right to a nationality' solve the predicaments of stateless persons? These questions agitate the minds of stateless rights activists. Given the risk of neglect, vulnerability, and discrimination of stateless persons, on the grounds of race, national origin, or religion and their exclusion from the national socio-political and economic arrangements, it is regrettable that many states do not even acknowledge their existence or statistics on stateless populations. Subjecting access to socio-economic services to citizenship undermines the goal of a human rights-based approach to statelessness. This truism remains worrisome amid states' exclusive sovereignty in nationality matters and the limits of international law. Hence, the mismatch in the SDG goals and the implementation of national development plans. The minimal political incentive (or huge strong disincentive) for states' support of stateless persons might impede the SDGs' aspiration to 'leave no one behind'. The SDGs' development agenda's mantra of 'leaving no one behind', can only be successful if complemented with rights-based approaches to development that eradicate stereotypes and 'othering' of the marginalised and excluded groups.

The report of the Expert Group on Refugee, IDPs and Statelessness Statistics (established in 2016) and the UN Economic and Social Council (ECOSOC) decision (2021/224) in November 2021, was submitted for deliberation at the 54th session of the Statistical Commission in March 2023. While acknowledging the many causes of statelessness relating to challenges or gaps in nationality laws, policies, and manners of their application or practice, it seeks to provide feedback and valuable information and recommendations to improve official statistics on stateless populations nationally, regionally, and globally.⁵⁹ The OHCHR collaborates with the UNHCR to promote awareness on statelessness, and its human rights implications and proffers solutions to it. The UNHCR-OHCHR joint Virtual Roundtable on 'Equality and Non-Discrimination in Nationality Matters to End Statelessness' (21 October 2021), highlighted the imperative of removing all forms of discrimination from nationality laws, policies, procedures, and practices.⁶⁰ Nevertheless, the post-SDGs 2030 goals and targets should explicitly reference statelessness toward enhancing their socio-economic rights and protection in national development processes. Additionally, development actors need to incentivise states to acknowledge the stateless persons'

⁵⁸ Raymond A Atuguba Francis X D Tuokuu & Vitus Gbang 'Statelessness in West Africa: An assessment of stateless populations and legal, policy, and administrative frameworks in Ghana' (2020) 8 *Journal on Migration and Human Security* at 14, available at <https://doi.org/10.1177/2331502419900771>

⁵⁹ United Nations Economic and Social Council (UN-ECOSOC) 'Statistical Commission fifty-third session: Report of the Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics' (2022) Vol (E/CN.3/20 New York, available at <https://doi.org/10.1093/oxfordhb/9780199560103.003.0007>

⁶⁰ Office of the United Nations High Commissioner for Human Rights 'Outcome document prepared following the OHCHR/UNHCR Virtual Roundtable on Equality and Non-Discrimination in Nationality Matters to End Statelessness' (2021) 1, available at <https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf>

existence in their territories to enhance their rights to nationality and development. Therefore, expanding the linkages between development priorities and human rights obligations is a crucial strategy.

V. CONCLUSION: CHALLENGES AND PROSPECTS

Deprivation, marginalisation, and exclusion of stateless persons undermine their human security and dignity, even though their rights are protected under international law. For development actors, statelessness presents a fundamental power dynamic — one that is most challenging for the outline and delivery of inclusive development opportunities, premised on distributive justice. The lack of complementarity between development frameworks and human rights raises critical questions about global development policy implementation. There are different groups of stateless persons with different vulnerabilities and interests; hence, stateless persons are not homogenous. In situations where some are intentionally excluded from acquiring the nationality of a given state, for political and socio-economic reasons, such intentional exclusions could be addressed through inclusive development endeavours. Ensuring development for stateless persons requires a comprehensive response, ranging from reviewing nationality laws along the UNHCR Global Actions and redesigning national development strategies along the SDG goals and targets toward addressing the layers of vulnerabilities in stateless populations. Similarly, the right to a nationality is universal, and no matter the national policies’ encumbrances, access to health and education should not in principle be constrained by citizenship.

The legal identity target in the SDGs provides guarantees for social inclusion and more equitable distribution of development opportunities. However, strengthening identification may heighten unintended consequences, and, in some cases, undermine development and human rights outcomes, particularly within the context of complex political economies and weak institutions. The experience with identification systems underlines three interconnected risks of exclusion.⁶¹ The first risk stems from identification and registration systems that are premised on policies of mandatory proof of legal identity for accessing basic rights, essential services, and protections. The second risk of exclusion can be linked to discriminatory regulations and practices. These regulations may be exclusionary or produce results based on their implementation, thus leading to negative ends for the disadvantaged. The third related risk emanates from the reality that digital identification systems at national levels are connected to citizenship or permanent residence status. Hence, determining legal status — ‘national’ or ‘non-national’ — is often problematic, particularly in countries with an abysmal enrolment process, where most people also lack proof of legal identity.⁶²

Equally, the revolutionary nature of SDGs transcends its benchmark for the delivery of development objectives. It further requires the evaluation and reform

⁶¹ Sperfeldt op cit note 35.

⁶² Sperfeldt *ibid*; UNDG op cit note 6.

of discriminatory and exclusive legal and societal structures. For example, SDGs 3 and 4 respectively aspire to a world where everyone has access to quality healthcare and education. If ‘everyone’ includes the stateless, as the intention of the drafters of the SDGs implied, why are they often denied these fundamental services? Many of the goals and targets demand structural change, thus aligned with human rights obligations. SDGs 5, 10, and 16 stand out in addressing some of the root causes of statelessness (discrimination in all its manifestations) including factors that disadvantage the stateless. The SDGs’ approach enhances the integration of human rights frameworks and development processes to address human vulnerability and exclusion. Its significant window of opportunity can be expanded in the post-2030 global development agenda setting. Explicit provisions to integrate statelessness and other vulnerable groups need to be formulated and mainstreamed into the post-SDGs (2030) global development agenda. This should encompass a full-fledged goal, with targets that encourage inclusion and prioritise issues and indicators connected to statelessness in national and regional development plans.

Furthermore, it is crucial to develop a collaborative strategy on statelessness, that is tailored to local (national) and regional contexts and political realities. Statelessness actors, including human rights, migration, and development experts, should be directly involved in the conversation, programming, and implementation strategies. A strategy, incorporating joint and complementary advocacy, communication, and stakeholders’ engagement among development and human rights actors, the private sectors, local government and traditional institutions, civil society, and the diplomatic community can periodically monitor and evaluate the ‘state of statelessness’ at all levels of governance (including transnational). Finally, international finance entities and development institutions have crucial roles to play by supporting applied research in mapping the nexus between statelessness, poverty, deprivation, and vulnerability. The outcome should be evidence based and provide a better understanding of the root causes and consequences of statelessness, including mechanisms for effective reforms.

The Role of Colonialism in Creating and Perpetuating Statelessness in Southern Africa

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Abstract

Some of the largest stateless populations in the world are in Southern Africa. Statelessness in the region is primarily linked to colonial histories, border changes, migration, gender, ethnic and religious discrimination, and poor civil registry systems. Colonial and white minority rulers created and implemented multi-tiered citizenship systems — extending full rights only to settlers. Like all other aspects of society, colonisers based citizenship on ethnic exclusion, exploitation, and discrimination. Native Africans were forced into legal subordination with minimal rights that were superseded by those of white settlers. At independence, most Southern African countries adopted nationality laws based on the models of their former colonial rulers while making efforts to reverse the systems of discrimination. Efforts to redress the inequalities via nationality laws have had unintended and intended consequences on vulnerable populations and exacerbated statelessness. Xenophobia is another consequence of colonial heritage that has perpetuated statelessness. Colonial powers relied on political exclusion. They used violence to ‘divide and conquer’, creating and reinforcing racial, ethnic, and tribal clashes. In many parts of Southern Africa, we see an increase in xenophobia and nationalism as the emerging form of political exclusion, resulting in restrictive and repressive migration responses to prevent migrants from arriving or integrating into societies. There are concerning signs that states are instrumentalising statelessness as a migration management tool. Rising nationalism and anti-migrant sentiments threaten to undo gains in the fight against statelessness.

Keywords: xenophobia, migration, native, settler, Madagascar, Zimbabwe, South Africa, nationalism, exclusion

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I. INTRODUCTION

Since the beginning of known history, people moved throughout Southern Africa relatively freely in search of new territories and resources. Today, many Africans of African descent are not considered citizens by any country. They are stateless. According to the United Nations High Commissioner for Refugees (UNHCR), the international legal definition of a stateless person is 'a person who is not considered as a national by any State under the operation of its law'.¹

Nationality is the legal bond between an individual and a state. This paper uses the terms nationality and citizenship interchangeably. It is the central right that determines how a country treats a person — the right to have rights. Stateless people do not have a nationality and are not entitled to other human rights. They struggle to access social services, healthcare, education, free movement, or political participation. They are among the world's most vulnerable and are at high risk of exploitation, arbitrary detention, and expulsion.² Statelessness has been described as a 'forgotten' issue — one of the most neglected areas of the global human rights agenda.³ Some people become stateless due to movement, while others are born stateless. Most stateless people remain in the country of their birth.⁴

Statelessness across Southern Africa is primarily linked to colonial histories, border changes, migration, gender, ethnic and religious discrimination, and poor civil registry systems.⁵ The nature of movement changed significantly under colonialism. European nations sent settlers and established government structures in the race to colonise the continent, farm the best land and extract the best resources. They drew and re-drew arbitrary borders, often through territories that had previously formed one political unit, established laws about who could move, and created tiered citizenship regimes that favoured the rights of settlers over native inhabitants.⁶ Native African inhabitants were told where they could and could not move and live and were used — often forcibly — to provide labour.

Manby explains that colonialism in Southern Africa relied on native labour and established complex labour recruitment systems to build and manage colonial infrastructures. Under colonial conquest, authorities encouraged — even coerced and forced — labour migration, primarily to work on farms and mines. Throughout

¹United Nations High Commissioner for Refugees (UNHCR) 'About statelessness', available at <https://www.unhcr.org/ibelong/about-statelessness/>

²Bronwen Manby 'Citizenship and statelessness in the member states of the Southern African Development Community' UNHCR (2020).

³See the address by then UNHCR High Commissioner Antonio Guterres to Intergovernmental Meeting at Ministerial Level to mark the 60th anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness held in Geneva, Switzerland, 7 December 2011, available at www.unhcr.org/admin/hcspeeches/4ecd0cde9/statement-mr-antonio-guterres-united-nations-high-commissioner-refugees.html

⁴United Nations High Commissioner for Refugees (UNHCR) *Emergency Handbook* Stateless person definition, available at <https://emergency.unhcr.org/entry/52865/stateless-person-definition>

⁵Liesl H Muller 'Legal identity for all – ending statelessness in SADC' in Southern Africa Litigation Centre *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* (2016).

⁶Bronwen Manby 'Statelessness in Southern Africa' UNHCR (2011), available at <https://www.refworld.org/pdf/id/50c1f9562.pdf>

most of the colonial period, people could move relatively freely throughout the British colonies of Southern Rhodesia (Zimbabwe), Northern Rhodesia (Zambia), and Nyasaland (Malawi). Labour migrants from non-British or non-colonised countries, including Mozambique, Eswatini, and Lesotho, were also recruited. At its peak in 1956, 300,000 migrant labourers were working away from their homes within the 'Central African Federation' (Southern Rhodesia, Northern Rhodesia, and Nyasaland). Under independent white minority rule, South Africa and Zimbabwe continued similar recruitment practices. Colonists also brought Asian indentured servants to provide labour. Countries with the most extensive histories of labour migration and land dispossession where large numbers of 'foreigners' have remained after independence have encountered the most nationality disputes since the end of colonialism.

Manby further explains that European colonisers established multi-tiered citizenship structures that provided full citizenship rights only to settlers. Like all other aspects of society, the citizenship system was founded on racial and ethnic exclusion, exploitation, and discrimination. Some indigenous people were granted full citizenship rights in Portuguese and French colonies under exceptional circumstances. Settlers were simultaneously offered full citizenship benefits in their European 'home' countries. Native Africans were forced into legal subordination with minimal rights that were superseded by those of white settlers.

In the post-colonial period, strong resentment lingered toward colonial powers for their legacies of extreme inequality and dispossession.⁷ Most Southern African countries adopted nationality laws based on the models of their former colonial rulers. Some, however, made efforts to reverse the system of discrimination and even sought laws to disenfranchise their colonial oppressors.

Some countries, such as Mozambique, established citizenship rules offering preference to people who had participated in the liberation and punishing those who fought against it. In some other parts of the region, nationality laws discriminate according to ethnicity, favouring people belonging to groups whose ancestral origins are within the territories. Malawi restricts citizenship to children born to at least one parent who is not only a Malawian citizen but also of the 'African race'; Eswatini has similarly included nationality provisions that make it difficult for non-ethnic Swazis to obtain citizenship. Many of these measures have ended up dispossessing native Africans who were also unjustly marginalised by colonialism, even more than they have affected settlers. Now, many native Africans are denied citizenship in their current territory because their ancestors once lived in a different territory.

Democratisation has dismantled minority white rule, and new constitutions have enshrined the rights of native people across the region. However, in the wake of colonialism, the practice of political exclusion has remained.⁸ Classifying people

⁷Bronwen Manby 'Struggles for citizenship in Africa' Open Society Justice Initiative (2009), available at www.justiceinitiative.org/publications/struggles-citizenship-africa

⁸Brian Klaas 'Political exclusion in Africa' in Oxford Research Encyclopedia of Politics (2019), available at <https://doi.org/10.1093/acrefore/9780190228637.013.1326>

and creating distinctions between ‘insiders’ and ‘outsiders’ has remained using new classifications of protectionism against ‘others’. Nationality has become an increasingly important tool for classifying people. People who come from or have links outside of a country are increasingly viewed as ‘others’ or ‘outsiders’. Migration has become criminalised, and blurred distinctions between ‘legal’ and illegal migration have become entrenched in political and media narratives. Politicians have homed in on these exclusionary practices as an expedient political tool. Political exclusion is the ‘easiest’ way to stay in power in the short term, even if it creates long-term instability.⁹

This paper explores colonialism’s role in modern-day statelessness in Southern Africa. It examines the cases of South Africa, Zimbabwe, and Madagascar to show how the colonial legacies founded on exclusionary practices and defining ‘outsiders’ and ‘insiders’ are creating and perpetuating statelessness. It explores how, in post-colonialism, each of these countries leverages nationality as a form of ‘othering’ to achieve slightly different ends. In Zimbabwe, statelessness is used as a form of political repression; in South Africa, to deter irregular migration and even asylum-seeking; and in Madagascar, as an enduring form of ethnic and religious discrimination. It warns that these exclusionary practices risk increasing and intensifying statelessness and that the costs, while often invisible to the general public, greatly outweigh any perceived benefits.

II. METHODOLOGY

This paper is based on a literature review of existing publications on statelessness in the Southern African region. It extracts and summarises relevant text about the colonial period to describe the role of colonialism in creating and perpetuating statelessness. It examines current national immigration policy frameworks to assess the direction of current and proposed immigration platforms, namely in the Republic of South Africa. Finally, it references papers and media articles from scholars who research xenophobia in Southern Africa to establish current xenophobia trends and trajectories and link them to colonial practices.

III. STATELESSNESS IN SOUTHERN AFRICA

The very nature of statelessness — that people are undocumented and unaccounted for — makes it impossible to know how many people in the world, or in any region or country, are affected.¹⁰ The African Commission on Human and Peoples’ Rights estimates that hundreds of thousands, possibly millions, of Africans do not have access to a nationality.¹¹ The status of many others is in doubt or in dispute. According to the UNHCR, it is not possible to determine the number of stateless

⁹Ibid.

¹⁰United Nations (UN) “‘2 million’ stateless people globally, warns UNHCR chief in call to States for decisive action’ UN News (12 November 2018), available at <https://news.un.org/en/story/2018/11/1025561>

¹¹Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons “The right to nationality in Africa’ African Commission on Human and Peoples’ Rights (2014).

people in the Southern African Development Community (SADC) states, but they host 'significant' populations of people who are stateless or at risk of statelessness.¹²

As of 2021, 95 countries reported 4.3 million stateless individuals to the UNHCR.¹³ Due to the counting difficulties and under-reporting, actual estimates are between 12–15 million.¹⁴ Not only is it extremely difficult to estimate the actual number of undocumented people, but only a fraction of countries report statelessness statistics. As of 2004, only 30 countries reported statistics on stateless people. By 2021, this had grown to 95 — less than half of all countries. Many of the countries (approximately 20) with known stateless populations do not report statistics.

The number of stateless people in Southern Africa is unknown in part because none of the 16 states have procedures to capture data and report statelessness statistics.¹⁵ Among the nine African countries where the UNHCR recognises that there are major populations at risk of statelessness, four are in the SADC region: Zimbabwe, South Africa, Madagascar, and the Democratic Republic of the Congo (DRC).¹⁶

The 1954 Convention Relating to the Status of Stateless Persons affirms that the fundamental rights of stateless persons must be protected.¹⁷ It establishes a set of minimum standards of treatment for stateless people in respect to a number of rights, including education, employment, and housing. It also guarantees stateless people a right to an identity, travel documents and administrative assistance. Only eight of the 16 SADC member states have acceded to the 1954 Convention: Angola, Botswana, Eswatini, Lesotho, Malawi, Mozambique, Zambia, and Zimbabwe.

The 1961 Convention on the Reduction of Statelessness aims to prevent statelessness and reduce it over time.¹⁸ The 1961 Convention establishes that children should acquire the nationality of the country where they are born if they do not acquire any other nationality and provides safeguards to prevent statelessness in the case of state succession or renunciation of nationality. Only four SADC States have acceded to the 1961 Convention — Angola, Eswatini, Lesotho, and Mozambique.

¹²Manby op cit note 2.

¹³United Nations High Commissioner for Refugees (UNHCR) 'Refugee data finder global trends' Annex Table Statelessness (2021).

¹⁴Laura van Waas & Maria José Recalde 'Nationality and statelessness' *Oxford Bibliographies* (2017).

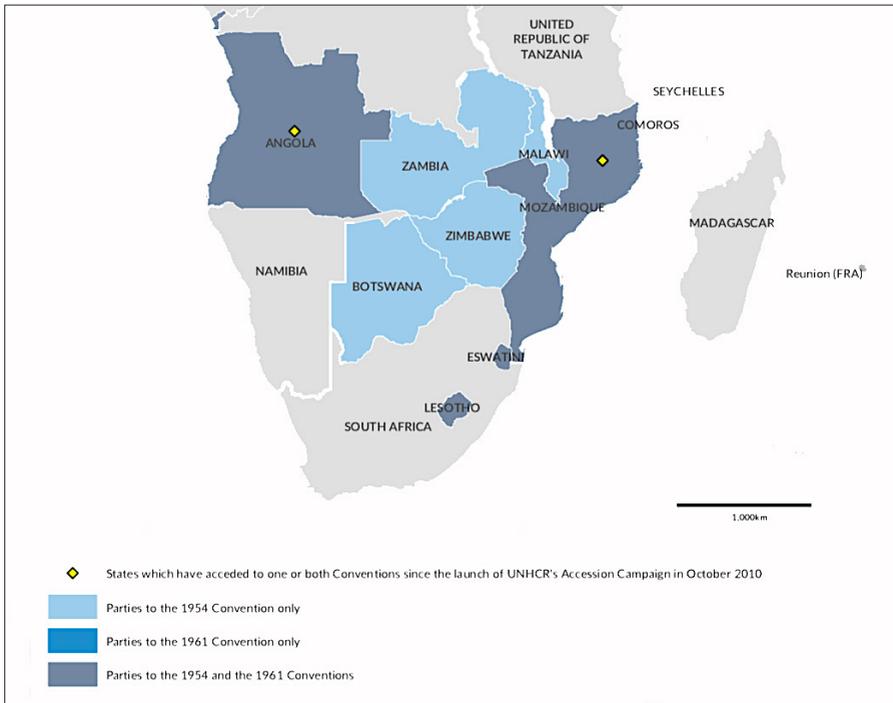
¹⁵Manby op cit note 2.

¹⁶Citizenship Rights Africa 'Statelessness', available at <https://citizenshiprightsafrica.org/theme/statelessness/>, accessed on 28 November 2022.

¹⁷Convention Relating to the Status of Stateless Persons 1954, available at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtmsg_no=V-3&chapter=5&Temp=mtmsg2&clang=en

¹⁸Convention on the Reduction of Statelessness 1960, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=V-4&chapter=5&clang=en

Figure 1: SADC States party to the 1954 Convention relating to the Status of Stateless Persons and to the 1961 Convention on the Reduction of Statelessness:¹⁹



In Southern Africa, the stateless population overlaps with an even larger undocumented population. The World Bank estimates that over 137 million people in the region are undocumented.²⁰ Many people face severe restrictions in accessing documentation regardless of whether their nationality is contested.

Historically, it was far less necessary to prove where one lived or belonged. People who were habitually resident in a country were typically considered citizens.²¹ Today, identification and documentation are essential to all forms of social and civic participation, including proving nationality. Even residents of the most remote and isolated communities now must establish their identity and nationality.

Efforts to document people — such as the World Bank’s ID4D campaign that seeks to ensure every person on the planet has identification by 2030 — are helping. A growing number of people can access identification, particularly digital

¹⁹Manby op cit note 2.

²⁰World Bank ‘Identification for Development (ID4D) Global Dataset’, available at <https://datacatalog.worldbank.org/dataset/identification-development-global-dataset>

²¹The Hague & the Wits Institute for Social and Economic Research (WISER) ‘The Hague Colloquium on the Future of Legal Identity’ (2015).

and biometric.²² Paradoxically, these efforts are exposing more people to risk as most people learn their nationality is questioned while trying to access documents. Similarly, the push to document more people runs the risk of leaving undocumented people even further left behind. In some cases, people who were previously treated as citizens are being refused nationality documents.²³

One of the most prominent causes of statelessness in Southern Africa is the lack of birth registration. While birth registration does not confer citizenship, all identity documents rely on proof of birth and nationality. It is impossible to claim nationality without a birth certificate. Identity documents are a fundamental feature of life and social and civic participation.

In its General Comment on Article 6 on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child focuses specifically on the issues related to birth registration across Africa. It claims: “The right to birth registration is one of the rights that consistently appears not to be fully implemented by States parties.”²⁴

It lists poverty, lack of education, gender discrimination, ethnic discrimination, or membership of a vulnerable group — such as refugees or irregular migrants — as common barriers to registration. A lack of decentralised, properly managed civil registrations also contributes.

More than half of the children born in Africa are not registered at birth.²⁵ The United Nations Development Programme (UNDP) has noted that more than half of all children in the SADC region are still unregistered at age five. Birth certificates are not issued immediately in some regions and take weeks or months to be issued. In other cases, issuing birth certificates requires administrative processes or costs that are not accessible to all parents.

Nationality deprivation and denationalising has seen a resurgence in recent years, primarily, ostensibly as a counter-terrorism or security tool.²⁶ The focus on nationality has increased in the globalisation era, including in Southern Africa. As absolute migration continues to grow, it has become an increasingly important tool for classifying people, and citizenship is increasingly being used as a migration management tool. United Nations (UN) Secretary-General Antonio Guterres has warned that damaging forms of nationalism and anti-migrant and anti-refugee sentiments are at risk of driving statelessness upwards.²⁷ Citizenship deprivation

²²World Bank ‘Identification for Development (ID4D) 2018 Annual Report’ World Bank Group (2018), available at https://id4d.worldbank.org/sites/id4d.worldbank.org/files/2018_ID4D_Annual_Report.pdf

²³Manby op cit note 6.

²⁴African Committee of Experts on the Rights and Welfare of the Child (ACERWC) ‘General comment on Article 6 on the rights and welfare of the child’ (2014), available at <https://data2.unhcr.org/en/documents/download/62899>

²⁵United Nations Children’s Fund (UNICEF) ‘Crisis of invisibility in Sub-Saharan Africa: Less than 1 in 2 births registered’ Press release (07 December 2017), available at <https://www.unicef.org/wca/press-releases/crisis-invisibility-sub-saharan-africa-less-1-2-births-registered>

²⁶Global Citizenship Observatory (EUI) & the Institute on Statelessness and Inclusion (ISI) ‘Instrumentalising citizenship in the fight against terrorism’ (March 2022), available at https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf

²⁷United Nations (UN) “‘Dangerous nationalism’ seriously threatens efforts to tackle statelessness: UNHCR chief” UN News (7 October 2019), available at <https://news.un.org/en/story/2019/10/1048722>

and denationalising are back in fashion to sanction people deemed ‘undesirable’.²⁸ There has been increased nationalism and restrictive migration responses to prevent perceived ‘others’ from integrating into societies. Some governments are intentionally framing foreigners as threats to society. This is putting people at risk of, or creating, or perpetuating statelessness.

IV. CASE STUDIES

(a) *Zimbabwe*

Citizenship Rights in Africa Initiative labels Zimbabwe as the ‘main’ citizenship crisis in Southern Africa.²⁹ When the country gained political freedom in 1980, the citizenship issue was immediately politicised. The colonial government expropriated land from native farmers and gave it to white settlers to profit for decades from commercial farms. It established labour recruitment systems from Nyasaland (Malawi), Northern Rhodesia (Zambia), and Mozambique.

Labour migration largely ceased when Rhodesia declared independence from Britain in 1965, but most foreign workers stayed. When the country gained majority rule in 1980, between one-quarter and one-half of farmworkers had foreign origins, although most had been born in Zimbabwe.³⁰ More worked in commercial and mining sectors.

In the new democracy, citizenship was immediately highly politicised.³¹ The 1979 Constitution allowed for dual nationality. This was negotiated on behalf of the defeated white settlers, almost all of whom retained British nationality, to protect their interests in the country. The ruling Zimbabwe African National Union (ZANU) — now ZANU-PF (Patriotic Front) — opposed this provision, and by 1983, the new majority government had already amended the Constitution to prohibit dual citizenship. The spirit of this amendment was directed at white settlers who were able to hold both Zimbabwean and British citizenship.

In 1984 the government passed a new citizenship law prohibiting dual citizenship and requiring Zimbabweans to renounce any other citizenship they were entitled to.³² Approximately two-thirds of the one million white residents left Zimbabwe, while 20,000 renounced entitlements to foreign citizenship to keep their Zimbabwean ones. Thousands more held foreign passports but remained residents without full citizenship.

A large percentage of the farmworkers, mineworkers, and commercial workers of foreign African origin were impacted by the dual nationality ban even though

²⁸Guy Goodwin-Gill ‘Statelessness is back (not that it ever went away...)’ (12 October 2019) EJIL: Talk! Blog of the European Journal of International Law, available at www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/

²⁹Citizenship Rights in Africa Initiative ‘Southern Africa’, available at <http://citizenshiprightsafrika.org/region/southern-africa/>, accessed on 28 November 2022.

³⁰Manby op cit note 7.

³¹Bronwen Manby ‘Report on Citizenship Law: Zimbabwe’ Robert Schuman Centre for Advanced Studies European University Institute (2019).

³²Bronwen Manby ‘Dual citizenship, denationalisation and disenfranchisement in Zimbabwe’ in Bronwen Manby *Citizenship in Africa: The Law of Belonging* (2018) 149–163.

most had never accessed, or had any desire to access, another citizenship that they hypothetically had rights to. The government was suspicious of farmworkers with foreign origins, based chiefly on their association with white farm owners.¹ Many of these people were unaware that they had entitlement to other citizenships or were required to renounce them and failed to submit a declaration to the authorities as required.

The 1979 Constitution also discriminated by gender, limiting the transfer of citizenship by birth to children born to Zimbabwean fathers or mothers if out of wedlock. Only foreign wives of Zimbabwean husbands were able to access citizenship. Women could not pass on citizenship to their children by non-Zimbabwean fathers or to their non-Zimbabwean husbands. Like the dual nationality debate, where the target was supposed to be 'elite' women with foreign husbands, poor rural women living in border regions were the most affected populations.

The rise of the Movement for Democratic Change (MDC) as political opposition to ZANU-PF in 1999 led to more restrictions on both citizenship and voting rights. The subsequent decades were marked by state-sponsored violence and repression against political opponents to hold on to power.² Hundreds of thousands of farmworkers of foreign descent were considered anti-government political opponents. Denationalisation formed part of a broader effort to disenfranchise people who might support opposition parties and prevent them from political participation. In January 2000, an estimated 30% of the two million farmworkers and their families who lived on commercial farms were of foreign descent.³

The government increased requirements on people with potential claims to foreign nationality, ratcheting up rules requiring people to submit a declaration renouncing potential citizenship. People then had to produce foreign documentation to establish that they were not entitled to citizenship, and the government imposed strict deadlines for submitting these documents. The majority of the people affected by these laws were people born or whose parents were born in neighbouring countries.⁴

The government wilfully established impossible requirements, even in the best of cases. In 2001, the Mozambican High Commission in Zimbabwe announced it was overwhelmed with applications and was unwilling to supply documentation proving people were not eligible for citizenship. The Malawian High Commission could not provide documents to people who were unable to provide sufficient detail — meaning they did not have enough documentation to renounce the citizenship to which they supposedly had a claim. Many people lost citizenship based on their inability to satisfy extremely difficult — and in some cases non-existent — criteria. It proved impossible for many to renounce what they had never possessed.

¹Katinka Ridderbos 'Stateless former farmworkers in Zimbabwe' in *Forced Migration Review* (2009) FMR 32.

²Dewa Mavhinga 'Reversing Zimbabwe's Dismal Rights Record Since 1980' *Human Rights Watch* 20 April 2020, available at www.hrw.org/news/2020/04/20/reversing-zimbabwes-dismal-rights-record-1980

³Manby op cit note 32.

⁴Ibid.

According to Manby, these efforts impacted Zimbabwe's neighbouring countries. Hundreds of individuals moved from Zimbabwe to Mozambique, where they had ancestry but could not satisfy citizenship requirements for either country. Similarly, Malawi received an unknown number of returnees who had to undergo expensive and lengthy processes to prove their citizenship. Hundreds of thousands — possibly even millions — fled to neighbouring South Africa. Some received refugee status while others migrated or stayed illegally.

In response to pressure from neighbouring countries, in 2003, the government provided some small concessions that allowed people born in Zimbabwe who are descendants of farmworkers, mineworkers, domestic employees, or other unskilled labourers to apply for confirmation of their citizenship. Very few could access these concessions because they had already lost their citizenship, and the administrative burden was too high.¹

When the unity government began in 2009, citizenship laws were among the many battlegrounds between the MDC and ZANU-PF. The MDC successfully fought for expanded citizenship provisions in the new 2013 Constitution, including allowing dual citizenship for those who acquired more than one at birth.

To date, the Citizenship Act has not been amended to reflect these changes. Many people began re-applying for confirmation of citizenship with hopes of voting, crossing borders, and getting a bank account or a job, but their applications were denied. As recently as August 2019, the Zimbabwe Human Rights Commission has called for assistance for border communities in obtaining identification documents, noting that the Registrar-General is commanding high fees, demanding non-existent documents, and wrongly recording information on documents.²

(b) South Africa

South Africa has an unknown number of stateless people and does not report any statelessness statistics. However, statelessness is believed to be a substantial problem and threatens to grow as the country appears to be on a path to continue weaponising nationality and deepening xenophobia. While promising an Afrocentric orientation and policy platform, South Africa has become one of the most hostile destinations in the world for African migrants.³

Most of the stateless population in South Africa are believed to be migrants, asylum seekers, and refugees from neighbouring countries. Orphaned or abandoned children and children born to undocumented or irregular migrants are also at risk of increasing statelessness. A 2019 study conducted by the Scalabrini Centre of Cape Town found that 40% of foreign children in youth and care centres faced statelessness,

¹Ibid.

²*The Herald* 'ID nightmare for border communities' (13 August 2019), available at www.herald.co.zw/id-nightmare-for-border-communities/.

³Christopher Claassen 'Explaining South African xenophobia' Afrobarometer WP 173 (2017).

while an additional 47% were at considerable risk of it.¹ The report found that 34% of the foreign youth in care had no documentation. In the Limpopo province, near the borders of Mozambique, Zimbabwe, and Botswana, 82% had no documents. A further 23% of children held documentation as dependents under the Refugees Act, but many were no longer in contact with the principal applicant, whose presence is required to extend and finalise asylum claims.

Under colonial and apartheid rule, only white people were granted citizenship rights. Documentation was used as a means to control populations. Native inhabitants were denationalised and allocated to 'homelands' under the poorly-veiled guise that these areas were independent. Native inhabitants were documented and provided with 'passes' to control their movement and reduce their rights.

At the same time, labour migration played a fundamental role in the apartheid and colonial eras. South Africa's industrial development was built on labour migrants both from within and from neighbouring countries. South Africans from the 'homelands' were recruited to cities, mines, farms, and corporations. Mines could hire an unlimited number of foreign workers.²

Once apartheid was toppled, South Africa attempted to create equal access to socio-economic and citizenship rights for all and sought to reopen its borders and economy. It integrated with SADC and joined the African Union. All classes of migration expanded.³ Many African migrants perceived it as politically and economically stable. Most of the legal regimes for immigration and citizenship created in the two decades post-apartheid were drafted with a commitment to Afrocentric ideals and encompass relatively progressive measures.⁴

South Africa is the primary regional economic and mixed migration hub. Most migrants come from neighbouring countries. According to the 2011 Statistics South Africa Census, 68% of migrants are from SADC countries and 7% from other African countries. Many are low-skilled and seek temporary work. Currently, they do not have access to legal visa pathways. As such, many enter or stay irregularly.

Labour migration has shifted substantially from company-sponsored to mixed. According to the International Organization for Migration⁵ the proportion of foreign nationals in the mining workforce was estimated at 40% in the 1980s and rose as high as 60% in 2009. Increased restrictions and weakening mining and industrial sectors have caused male contract migration to fall substantially to 23% in

¹Lotte Manicom 'Foreign children in care: South Africa' Scalabrini Centre of Cape Town 2019, available at https://www.scalabrini.org.za/wp-content/uploads/2019/07/Scalabrini_Centre_Cape_Town_Foreign_Children_in_Care_Comparative_Report_South_Africa_2019.pdf

²Jonathan Crush & Clarence Tshireke 'Contesting migrancy: The foreign labor debate in post-1994 South Africa' (2001) 48 *Africa Today* at 49.

³International Organization for Migration (IOM) 'The well-being of economic migrants in South Africa: Health, gender and development' Working Paper for IOM, World Migration Report (2013), available at www.iom.int/files/live/sites/iom/files/What-We-Do/wmr2013/en/Working-Paper_SouthAfrica.pdf

⁴Aimée-Noël Mbiyozo 'Aligning South Africa's migration policies with its African vision' Institute for Security Studies, available at <https://issafrica.org/research/policy-brief/aligning-south-africas-migration-policies-with-its-african-vision>

⁵IOM op cit note 42.

2013.⁶ Declining regular options have resulted in increased mixed and clandestine migration. Migrants using irregular and unregulated methods have increased, and more women, youth, and families migrate.

Immigration sentiments and policies have become increasingly restrictive as xenophobia has become more entrenched. The Department of Home Affairs (DHA) has been focused on applying a self-styled 'risk-based' approach to immigration legislation. Policy reforms have focused on implementing restrictive measures to reduce low-skilled immigration from neighbouring countries. While South Africa insists upon its commitment to Afrocentric ideals, it prioritises restrictive measures that disproportionately and negatively impact African migrants from neighbouring countries.⁷

There is also a substantial gap between legislative provisions and administrative practice. While legislation is increasingly passed to restrict entry and reduce the rights of foreigners inside South Africa, the legal frameworks that protect people and give them rights are not implemented as prescribed. Migrants in South Africa struggle to access their respective rights and report rampant xenophobia and corruption within the department. The DHA has widely been accused of wilfully creating administrative barriers to frustrate and deter irregular migrants.⁸

The DHA has litigated against citizenship cases, typically on the grounds that 'illegal' migrants are seeking legal loopholes that would compromise the country's security. In a 2019 case related to a former orphan of (presumed) Eswatini origin whose children have been rendered stateless despite having a South African father, the DHA director of travel documents and citizenship, Richard Sikakane, disputed statelessness itself, claiming, 'I seriously dispute that any person can be born stateless.'⁹

In 2018, the DHA proposed new regulations for the Births and Deaths Registration Act (BDRA), calling to replace birth certificates for children of foreign parents with 'birth confirmations'. Human rights advocates have argued against the proposed birth confirmations, claiming that — by Home Affairs' own admission — birth confirmations do not amount to birth certificates. They argue that several legal frameworks, including the South African Constitution itself, provide every child with the right to be registered immediately after birth regardless of the parents' immigration status.¹⁰

South Africa has the highest rate of birth registration in the region. Due to a

⁶Jonathan Crush Belinda Dodson Vincent Williams & Daniel Tevera 'Harnessing migration for inclusive growth and development in Southern Africa' Southern African Migration Programme (2017).

⁷Mbiyozo op cit note 43.

⁸Tove van Lennep 'The state of the South African refugee protection regime: Part II – Politics and policy' Helen Suzman Foundation, available at <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status>

⁹Tania Broughton 'Mother challenges Home Affairs' *Mail & Guardian* (16 August 2019), available at <https://mg.co.za/article/2019-08-16-00-mother-challenges-home-affairs>

¹⁰Centre for Child Law (CCL) & Lawyers for Human Rights (LHR) 'Comments on the draft regulations to the Births and Deaths Registration Act' (November 2018), available at <http://citizenshiprightsafrika.org/wp-content/uploads/2018/11/CCL-LHR-Comments-on-the-draft-regulations-to-the-BDRA-16-Nov-2018.pdf>

concerted effort to improve registrations, they rose from less than 25% of children under age 5 in 1998 to 95% in 2012. However, this rate declined to under 90% by 2018, coinciding with increased restrictions targeting children born of non-citizen parents.¹¹

The proposed regulations put children born to foreign parents at risk of statelessness. These regulations inaccurately presume that children can have their births registered at an embassy. Children of refugees and asylum seekers cannot approach embassies without jeopardising their status or, in some cases, exposing themselves to actual harm. Even in cases where harm is not a real risk, consular services are difficult to access. Lack of information about procedures, high costs related to travel and documents, or fear of interacting with authorities are additional barriers.

The proposed BDRA excludes stateless children from birth certificates altogether as they do not have an embassy to approach. This contradicts the existing citizenship law that claims that stateless children born in South Africa can be recognised as citizens, but only if their births are registered. Orphaned and abandoned children are unlikely to be able to prove a link to a country. The lack of a birth certificate will prevent them from being adopted.

Prior to proposing these regulations, South Africa's birth registration practices were already widely criticised for putting children at risk of statelessness. Human rights advocates have long observed and commented on the significant legal and administrative barriers to birth registration and nationality that perpetuate childhood statelessness for both South Africans and foreigners.

These measures form part of a larger immigration policy direction that is prioritising restrictive measures that disproportionately and negatively impact African migrants. The DHA has demonstrated a history of sometimes over-reaching to problematise asylum seekers and low-skilled Africans despite a lack of evidence.¹² They shift blame from a department rife with corruption and mismanagement onto foreign-born people who rely on it. These measures come at high financial and human rights costs that seek to distract from the real problems at hand.

These restrictive measures are occurring alongside rising xenophobic violence and antagonism. Claassen attributes poverty, relative deprivation, frustration with government, social mobilisation, and resource competition as the root frustrations for community xenophobia and concludes that scapegoating African immigrants leads to aggression.¹³

(c) Madagascar

Madagascar has a sizeable population of Muslims of Indo-Pakistani origin, often referred to as 'Karana'. Many arrived from pre-partition India in the 19th century

¹¹Manby op cit note 2.

¹²Mbiyozo op cit note 43.

¹³Claassen op cit note 39.

but are stateless despite having been in the country for multiple generations. Most are Muslim. When Madagascar gained independence from France in 1960, the nationality laws distinguished between those who were automatically Malagasy at birth and those required to apply. Non-French foreigners in the country were not granted citizenship and were left stateless.¹⁴

The Karana were not considered ethnically Malagasy so were generally not given citizenship. Most of the estimated 20,000 Karana are believed to be stateless despite being born in Madagascar and never knowing any other homes.¹⁵ The US Department of State indicated that up to 5% of the country's two million Muslims are stateless. In 2021, Madagascar had a total population of approximately 28.4 million.¹⁶

Other ethnic and religious minorities are similarly affected, including people of Chinese, Comorian, and mixed descent.¹⁷ Many have attempted to gain citizenship but have been denied or have faced discriminatory administrative practices. Even those who legally qualify, in practice face many obstacles in accessing nationality and are not considered nationals. Reports have emerged that Muslim-sounding names have been sufficient to deny a citizen application. People have claimed that officials will arbitrarily request non-existent proof that an individual is Malagasy, despite the presentation of all required documents if their names 'sound' foreign or if they suspect a person of not being Malagasy.

Statelessness has been passed on through generations among the Karana. Karana living in Madagascar are forced to pay for, obtain, and maintain residency permits that describe their nationality as 'undetermined'. People have also cited high levels of corruption, a lack of access, a lack of awareness, and limited judicial oversight as barriers to gaining documents, even if they qualify. While a lack of documentation has led to exclusion, hardship, and poverty for some, the Karana are still considered wealthy and powerful and contribute substantially to Madagascar — close to one-third of GDP.¹⁸ Preventing them from citizenship stymies economic development for the whole country as it discourages these same people from investing in growth.

Until 2017, only children born to Malagasy fathers were granted citizenship. Mothers were unable to confer citizenship to their children. Children born in marriage to Malagasy mothers and non-Malagasy fathers were not granted citizenship and had to apply, unless statelessness could be proven, which was exceptionally difficult to prove. Married women were only allowed to pass on nationality in very limited circumstances. As a result, many couples have avoided marriage as a means of

¹⁴Focus Development Association 'Global campaign for equal nationality rights and institute on statelessness and inclusion' Joint Submission to the Human Rights Council at the 34th Session of the Universal Periodic Review (2019), available at https://files.institutesi.org/UPR34_Madagascar.pdf

¹⁵Markku Aikomos 'Madagascar's Karana people still awaiting nationality' UNHCR (2017), available at www.unhcr.org/news/stories/2017/11/5a018ff44/%20madagascars-karana-people-still-awaiting-nationality.html

¹⁶World Bank 'Madagascar', available at <https://data.worldbank.org/country/madagascar>, accessed on 28 November 2022.

¹⁷Equal Rights Trust 'My children's future: Ending discrimination in nationality laws' (2015), available at www.equalrightstrust.org/resources/my-childrens-future-ending-discrimination-in-nationality-laws

¹⁸Caroline McInerney 'Accessing Malagasy citizenship: The nationality code and its impact on the Karana' (2014) *Tillburg Law Review*.

conferring citizenship to their children.¹⁹

Madagascar fell under international pressure, including being subjected to Universal Periodic Review by the Human Rights Council. The review included recommendations from several countries, including Germany, Spain, Brazil, and the United States, who called on Madagascar to ‘reform its nationality law to ensure that all citizens have equal right to confer nationality to their children and the children born to citizen mothers are no longer at risk of statelessness’.

Madagascar, along with Sierra Leone, became the first country since the launch of the UNHCR #IBelong campaign in 2014 to eliminate gender discrimination in its laws. In 2016, Madagascar promulgated a new nationality law that removed gender discrimination regarding the conferral of nationality to children. Since 2017, children born to either a Malagasy mother or father are to be recognized as citizens.

The law also has retroactive application, so that children born before the reform are covered by it. By April 2018, 1,361 families had benefitted from the law. However, the law still prohibits Malagasy women from passing their nationality to their spouses while men are able to pass their nationality on to their wives.²⁰ The 2017 amendment to bring gender equality to the nationality law in Madagascar is a welcome change. The UNHCR has labelled it an ‘encouraging and important step in preventing and reducing statelessness.’²¹

Despite this progress in gender equality, Madagascar has not addressed its ongoing Karana situation and its continued denial of citizenship rights. There are no signs to date of improvement for the Karana people.

V. CONTEMPORARY EXPRESSIONS OF EXCLUSION

Since colonialism, exclusionary politics have been the mainstay of African politics.²² To claim and maintain power and build wealth, colonial powers manufactured political and social boundaries and established the use of designated political ‘insiders,’ ‘outsiders,’ and ‘foreigners’ to dehumanise and exclude.²³ The distinctions of who constitutes each category have evolved and changed since colonialism and white minority rule, but the practice of manufacturing political and social boundaries entrenched under colonialism remains in place. In each of the case studies above, post-colonial powers have continued — and even expanded — these practices of exclusion to achieve different ends.

The Durban Declaration of 2001 recognises that ‘colonialism has led to racism, racial discrimination, xenophobia, and related intolerance, and that Africans and people of African descent ... and indigenous peoples were victims of colonialism and continue to be victims of its consequences.’ It further notes that colonial theories

¹⁹Equal Rights Trust op cit note 56.

²⁰Focus Development Association op cit note 53.

²¹Aikomus op cit note 54.

²²Klaas op cit note 8.

²³Paddy O’Halloran ‘Colonial xenophobia and fear of “foreign” politics in the nineteenth-century Cape Colony: Implications for analyzing borderless politics today in S O Abidde & E K Matambo (eds) *Xenophobia, Nativism and Pan-Africanism in 21st Century Africa*, available at https://link.springer.com/chapter/10.1007/978-3-030-82056-5_6

and practices of racial and ethnic superiority of certain cultures over others persist today in one form or another.²⁴

In Zimbabwe, the ruling ZANU-PF party has used systemic repression to cling to power despite severe socio-economic and political failures. The party's record of harassing, arresting, and even killing critics and opponents extends to but is not limited to, people with supposed foreign ancestry. To prevent them from voting against the ruling party, it has stripped them or blocked them from obtaining citizenship, creating and perpetuating statelessness to achieve political ends.

In post-apartheid South Africa, indigenous populations have become frustrated that their living standards have not improved under democracy as promised. Many locals see foreigners as competing for resources in the context of poverty.²⁵ Foreigners have become an easy 'outsider' to scapegoat for unemployment, food insecurity, crime, and health and education failures. Expressions of xenophobia have increased sharply and have led to riots, looting, destruction, violence, and death. Vernacular and accent 'tests' have been applied by citizens to determine if someone is local or foreign.²⁶ Politicians and communities have endorsed violence and exclusion and leveraged xenophobic rhetoric and scapegoating to distract from their own failings.²⁷

In Madagascar, the post-colonial government has leveraged nationality to uphold longstanding discrimination against a targeted group. Despite the disenfranchised group's willingness and ability to contribute socially and economically to society, the Madagascar government and some Malagasy people officially and unofficially continue to target and prevent the Karana from full participation under the pretence of not looking or acting 'Malagasy enough'.

These practices reflect a worrying rise in nationalism and nationality deprivation happening globally. In the post-colonial and globalisation era, nationality has emerged as a key determinant of who is designated as 'insiders' or 'outsiders'. In many cases, xenophobia has increased as a misguided expression of patriotism.

William Mpfu argues that the term xenophobia conceals rather than reveals the structural racism that motivates it. He argues that South Africa has not recovered from homeland racist nationalism that placed black natives as targets for hatred, discrimination, and exclusion. Instead, they have redirected the racism and exclusion toward Black African 'outsiders' from other countries.²⁸

Nations have not adequately addressed these colonial legacies or accounted

²⁴See 'World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration and Programme of Action' United Nations Department of Public Information (2002), available at www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf

²⁵Godfrey Mulaudzi Lizette Lancaster & Gabriel Hertis 'Busting South Africa's xenophobic myths starts at grassroots' ISS Today, available at <https://issafrica.org/iss-today/busting-south-africas-xenophobic-myths-starts-at-grassroots>

²⁶Citizen Reporter 'Trevor Noah applauds Malema's "perfect" views on xenophobic attacks' *The Citizen* 10 September 2019, <https://citizen.co.za/news/south-africa/news-xenophobia/2177225/watch-trevor-noah-applauds-malemas-perfect-views-on-xenophobic-attacks/>

²⁷Jean Pierre Misago & Loren B Landau 'Truck driver "war" about more than migration' *New Frame* 28 June 2019, available at www.newframe.com/truck-driver-war-about-more-than-migration/

²⁸William Mpfu 'Xenophobia as racism: The colonial underside of nationalism in South Africa' (2020) 3 *International Journal of Critical Diversity Studies*.

for how they contribute to ongoing inequalities and discrimination.²⁹ Far more work is required to sensitise societies that many people are perpetuating the very tactics previously used against themselves or their own ancestors and family members. Unfortunately, because statelessness is a forgotten issue and stateless people are invisible, they lack advocates to raise awareness of the costs.

VI. COSTS TO SOCIETY

Nationalism does not resolve social issues. It has proven successful in rallying political support, but increases long-term risks and problems.³⁰ Creating and perpetuating statelessness does not resolve any root issues of social discontent; it worsens them. Some of the costs include development, health, and security.

Statelessness deepens inequality and creates challenges to achieving development goals. Nationality is a key element to achieve all development goals, including economic growth, peaceful and inclusive societies, equality, and access to education.³¹ Statelessness further threatens the ability to measure progress. Low-income countries are under pressure to demonstrate results and promote accountability against development goals.³² It is impossible to assess how well a country or community is achieving development goals locally or regionally without accurate statistics that preclude large numbers of undocumented and unaccounted-for people. Adequately informed statistics and measurements are crucial to development.

No country or population within the region can develop independently. A country is most stable and prosperous if its surrounding countries are stable and prosperous. Regional cooperation is required. Subjugating and exposing fellow Africans to statelessness and preventing them from reaching their full potential hamper national and regional development.

Poor living conditions, displacement, and lack of access to services make stateless populations particularly vulnerable to health issues, including communicable diseases. The COVID-19 pandemic provided a stark reminder that public health affects all of society. COVID-19 disproportionately impacted the most economically disadvantaged communities and stateless people were excluded from or struggled to access vaccines.³³ People living outside the scope of state-sponsored health services and in subpar conditions have low immunisation rates and are vulnerable to infectious diseases.

It is in the collective interest to ensure everyone has access to healthcare,

²⁹United Nations Human Rights Council (HRC) 'Acting High Commissioner for Human Rights Nada Al-Nashif – Address to UN Human Rights Council Interactive Dialogue on the Rights of Indigenous Peoples' (28 September 2022), available at www.ohchr.org/en/press-releases/2022/09/acting-high-commissioner-addressing-legacies-colonialism-can-contribute

³⁰Ottilia Maunganidze 'The "illegal migrant" red herring' ISS Today (24 October 2018), available at <https://issafrica.org/iss-today/the-illegal-migrant-red-herring>

³¹Tendayi Bloom Bronwen Manby & Khadija Badri 'Why citizenship is relevant to sustainable development: Considerations for the 2019 High Level Political Forum' European Network on Statelessness (May 2019).

³²The Hague & WISER op cit note 21.

³³Mkhululi Chimoio 'COVID-19: Vaccinating stateless people in South Africa' Africa Renewal (21 January 2022), available at www.un.org/africarenewal/magazine/february-2022/covid-19-vaccinating-stateless-people-south-africa

regardless of citizenship or immigration status.³⁴ Denying healthcare as a means of exclusion is not in the interest of public health. Comprehensive information about population statistics, vital events and health information like immunisation status or infection history are in the public interest.³⁵

Statelessness can also drive insecurity and displacement. While deprivation of nationality in Southern Africa has not escalated to state conflict, nationality disputes have escalated to violent conflict in other parts of the continent and the world.³⁶ Nationality disputes and xenophobic behaviours have caused diplomatic tensions in the region. These could worsen if countries continue to weaponise nationality against people from neighbouring countries.

As evidenced in South Africa, where xenophobic violence has led to major destruction and spikes in crime, exclusion and xenophobia pose very real security threats and inspire crime and insecurity. Furthermore, evidence has repeatedly proven that there is no correlation between crime and immigration status.³⁷ 'Foreignising' criminality distracts from real criminal and security issues and inhibits states' abilities and willingness to address crime.

Lack of representation in civil and political affairs, lack of pathways for upward mobility, disenfranchisement and economic insecurity are driving forces of unrest and insecurity. Statelessness exposes vulnerable people, including children, to harmful practices, including child trafficking, child labour, sexual exploitation, early marriage, illegal adoption, and child military conscription.³⁸

Strong civil registration contains inherent security properties. Governments benefit substantially from better documenting their populations. A state does not have knowledge of or jurisdiction over people if they are undocumented and unaccounted for. People without names, nationalities or birth dates are difficult to investigate and bring to justice. National security improves when governments document their populations effectively.

VII. CONCLUSION

Exclusionary politics have been the mainstay of African politics since colonialism. Colonial powers used violence to 'divide and conquer,' creating and reinforcing racial, ethnic, and tribal clashes and subjugating native inhabitants for settlers' benefit. In its wake, nations promised to embody human rights for all and empower natives. In some cases, there has instead been a rise in xenophobia and nationalism as an emerging form of political exclusion that repeats previous discrimination but with

³⁴Institute on Statelessness and Inclusion (ISI) 'Stateless in a global pandemic' Impact Report (2020), available at https://files.institutesi.org/Covid19_Stateless_Impact_Report.pdf

³⁵The Hague & WISER op cit note 21.

³⁶United Nations High Commissioner for Refugees (UNHCR) 'The state of the world's refugees: A humanitarian agenda' (1997), available at www.unhcr.org/3eb7ba7d4.pdf

³⁷Loren Landau 'The foreign invasion? How the anti-immigrant backlash makes us all unsafe' News 24 (18 August 2019), available at www.news24.com/Analysis/analysis-the-foreign-invasion-how-the-anti-immigrant-backlash-makes-us-all-unsafe-20190818

³⁸ACERWC op cit note 24.

new categories. It continues the colonial legacy of weaponising a particular status against other human beings. Among many other adverse outcomes, these threaten to undo gains in the fight against statelessness and, in fact, create and perpetuate it instead of stopping or slowing it.

Statelessness comes at extreme costs, not only to individuals but to states. These costs are well established and have been repeated in this paper. The case to reduce and prevent statelessness is clear. Yet, some states in Southern Africa show a concerning propensity to continue to ignore, perpetuate, and even create statelessness to achieve short-term political ends.

Importantly, nationalism and xenophobia distract from true issues and threats. Southern African countries face limited resources. Measures to create barriers to citizenship or denationalise cost these countries time, money, and efficiency, all the while doing nothing to address critical security, migration, or crime threats. Resources dedicated to denationalising or depriving nationality would be far better used to address real problems and threats.

While countries in the region are taking steps to address and reduce statelessness through different legal and policy measures, they must guard against nationalist practices and platforms that increase it. Citizenship is a fundamental and essential human right. Access to citizenship for all is a necessary step for nations and the region to thrive. Countries in the region should prevent efforts to deny, deprive, or restrict nationality, at every turn.

The Impact of Climate Change on Statelessness in the Southern African Region

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There are three ways by which nationality can be acquired: by descent, birth on the territory, or naturalisation. However, the determination of nationality remains ambiguous, and statelessness is becoming a major concern in the Southern African region. Statelessness often occurs due to the lacunae found in the laws, policies, and practices of states that deny individuals their right to nationality, at birth or later in life. Stateless persons become unfairly marginalised and denied their basic human rights and access to services, legal protection, and recognition. Statelessness is not only harmful to stateless persons themselves but can destabilise the society in which such persons live. Cross-border and permanent displacement due to the impacts of climate change is among the factors that can cause statelessness. Persons who are unable to prove their nationality often can be regarded as stateless. This article investigates how statelessness can be associated with cross-border and permanent displacement due to the impacts of climate change. It uses case studies of South Africa, Mozambique, and Tanzania. It evaluates the likelihood that such circumstances may lead to uncertain rights and legal statuses of stateless persons, issues that have the potential to be passed on to subsequent generations. The article concludes that climate change has far-reaching stateless implications. It recommends the law and policy review as among the possible solutions for effectively preventing statelessness and protecting and promoting stateless persons' rights in the Southern African region.

Keywords: statelessness, cross-border and permanent displacement, impact of climate change, Southern African region

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I. INTRODUCTION

The 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as a person who is not considered a national by any state under the operation of law.¹ International law contains various rights and instruments aimed at preventing and reducing statelessness. A failure by States Parties to comply with international obligations to address statelessness and grant nationality often leads to irregular citizenship laws, which in turn contribute to statelessness.² Khan refers to childhood statelessness and rightly points out that statelessness is not something that is caused or deserved by the individuals affected.³ For example, children do not have a choice when it comes to their place of birth, the actions of their parents, the identity of their parents, or the actions of the states.⁴ In Africa, the nationality status of a significant number of Africans is questionable because their nationalities are doubtful or in dispute.⁵ Without an official connection between an individual and a state, such an individual has neither protection from, nor responsibilities to, the state in which they live.⁶ Without an official connection of a bond between the state and individuals, individuals are not recognised by any state as their nationals, rendering them stateless.

The 1948 Universal Declaration of Human Rights (UDHR) affirms that all individuals are born equal in dignity and human rights.⁷ Article 15 of the UDHR provides that the right to a nationality includes the right not to be arbitrarily deprived of one's nationality. Other international human rights instruments such as the 1966 International Covenant on Civil and Political Rights (ICCPR)⁸ and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) refer to the realisation of human rights that includes the right to a nationality.⁸

A topic receiving increasing attention is the relationship between climate change and statelessness. In the words of McAdam, climate change and its effects on human beings are both legally and conceptually inconsistent.¹⁰ This article examines the extent to which stateless persons who are permanently displaced across borders due to the impacts of climate change in Southern Africa are protected by the current international and national regional frameworks addressing statelessness

¹ UN General Assembly, Convention Relating to the Status of Stateless Persons 28 September 1954, Art 1(1).

² See Maria José Recalde Vela *How Far Has the Protection of the Right to Nationality under International Human Rights Law Progressed from 1923 until the Present Day?* (unpublished LLM thesis, Tilburg University, 2014) at 10.

³ Fatima Khan 'Exploring childhood statelessness in South Africa' (2020) 23 *PELJ* at 5.

⁴ *Ibid.*

⁵ Aimée-Noël Mbiyozo 'Statelessness: An old problem with new threats' Institute for Security Studies (ISS), 13 November 2019, available at <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats>, accessed on 09 February 2022.

⁶ Hugh Massey 'UNHCR and de facto statelessness' UNHCR Legal and Protection Policy Research Series LPPR/2010/01 April 2010 at 3.

⁷ Universal Declaration of Human Rights, 1948, Art 1.

⁸ International Covenant on Civil and Political Rights, 1966, Arts 12(4) and 24.

⁹ International Covenant on Economic, Social and Cultural Rights, Art 1. See also the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, adopted by UN General Assembly Resolution 40/144 of 13 December 1985.

¹⁰ Jane McAdam 'Climate change displacement and international law: Complementary protection standards' UNHCR Legal and Protection Policy Research Series at 8–9.

and displacement. This article uses a contextual analysis by using case studies of South Africa, Mozambique, and Tanzania. These countries were chosen because they are located along the Indian Ocean and have been prone to rapid-onset disasters, and slow-onset disasters as explained below. Also, these countries form part of the Southern African region, which is currently faced with the problems of cross-border migration, displacements, and the impact of climate change, which all lead to statelessness situations in the region.¹¹

This article uses a desktop review of current law and literature in the region to assess the normative frameworks for responding to the needs of those individuals who are forced to move from their original places of habitation on account of environmental or climate change. It examines the extent to which existing laws and policies protect forcibly displaced persons who cross international borders in the Southern African region due to climate change. It assesses the degree to which a progressive interpretation of the laws and policies is required to expand the protection of stateless persons whose statelessness is caused by the impact of climate change. Lastly, the article concludes with recommendations on how statelessness caused by climate change in the Southern African region can be dealt with and ultimately eradicated.

Before addressing the issue of statelessness as a result of climate change and how this problem presents itself in the various jurisdictions selected for this article, it is necessary to briefly set out the global legal framework on statelessness and attempts to eradicate it.

II. REGIONAL, CONTINENTAL AND GLOBAL INITIATIVES TO ERADICATE STATELESSNESS

There have been multiple regional initiatives to reform nationality laws. Some examples of these initiatives are the 2015 Abidjan Declaration of Ministers of Member States of the Economic Community of West African States (ECOWAS) on the eradication of statelessness,¹² and the Southern African Development Community (SADC) Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC region adopted by the SADC Parliamentary Forum on 13 November 2016.¹³ Other initiatives include the Resolution on Legal Identity for Children, adopted in 2016 in Lusaka by the 134th Inter-Parliamentary Union Assembly,¹⁴ which was in line with the First Conclusions on Statelessness, as adopted by the Council of

¹¹ Bronwen Manby 'Citizenship and statelessness in the Member States of the Southern African Development Community' (December 2020) at 1. See also Aimée-Noël Mbiyozo 'Statelessness in Southern Africa: Time to end it, not promote it' (2019) Institute for Security Studies: Southern Africa Report 32 at 2.

¹² The Declaration was adopted on 25 February 2015 by the Member States of the Economic Community of West African States (ECOWAS) on the occasion of a ministerial conference organised by the United Nations High Commissioner and ECOWAS. It underlines, among other things, the need to end statelessness in the ECOWAS.

¹³ SADC Parliamentary Forum, 40th Plenary Assembly.

¹⁴ See the address by MP Godfrey Farrugia to the 134th IPU Assembly held in Lusaka, Zambia, between 19 and 23 March 2016, available at <chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/http://archive.ipu.org/conf-e/134/sr.pdf>, accessed on 19 May 2022.

the European Union (EU) in 2015. The existence of these initiatives is evidence of the seriousness of the problem and the determination to combat statelessness globally.

At a continental level, treaties such as the European Convention on Human Rights (ECHR) of 1950,¹⁵ the American Convention on Human Rights (ACHR) of 1969,¹⁶ the African Charter on Human and People's Rights (ACHPR) of 1981¹⁷ and the Arab Charter on Human Rights of 1994 were all adopted to promote and protect human rights. The ACHR, for example, lists five elements on how the right to a nationality should be recognised: the acknowledgement of a general right to a nationality; a provision that requires the state to grant nationality to a child born on its territory by virtue of *jus soli*¹⁸ who would otherwise be stateless; the prohibition of arbitrary deprivation of nationality; the prohibition of discriminatory practices in nationality matters; and allowing the right to change one's nationality.¹⁹

The provisions under the ACHR prohibit all forms of discriminatory practices and recognise nationality as an essential right. A combination of the above-stated elements makes Article 20 of the ACHR unique and comprehensive in ensuring the protection of an individual's right to a nationality. Article 1 of the Draft Protocol to the ACHPR refers to the right to a nationality and the eradication of statelessness in Africa.²⁰ The Draft Protocol to the ACHPR on the Right to Nationality in Africa of 2015 and the Draft Protocol to the ACHPR of 2017 on the specific aspects of the right to a nationality and the eradication of statelessness in Africa, among other things, have expanded the definition of stateless persons to include persons who are unable to establish a nationality. This accounts for the specific situations of statelessness that arise in Africa such as the cases of undocumented, unaccompanied, and separated refugee children on the continent.

At the international level, the United Nations High Commissioner for Refugees (UNHCR) #IBelong Campaign and the United Nations High Commissioner for Refugees Global Action Plan 2014 to 2024 all aim to end statelessness and the UNHCR has the mandate to assist stateless refugees.²¹ The Declaration of the International Conference on the Great Lakes Region (ICGLR) on Statelessness,²² which was carried out in line with the UNHCR's #IBelong Campaign to End Statelessness by 2024 (hereafter, the #IBelong Campaign), for example, obliges the Member States to end statelessness in the Great Lakes region of Africa. This can be viewed as a collective responsibility that hopes to yield positive results. The Member States recalled that the right to nationality is fundamental and highlighted how vast the problem of

¹⁵ It was opened for signature in Rome on 04 November 1950 and came into force on 03 September 1953.

¹⁶ It was adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

¹⁷ Referred to as the Banjul Charter, it was adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force on 21 October 1986.

¹⁸ It allows a person to become a national as long as they were born on the territory of a given state.

¹⁹ ACHR op cit note 16 Art 20.

²⁰ ACHPR op cit note 17 Draft Protocol of September 2015.

²¹ Since the UNHCR was established on 1 January 1951.

²² The Declaration of the International Conference on the Great Lakes Region (ICGLR) on Statelessness 27–28 June 2017.

²³ Ibid.

statelessness is in the region.²³

Though global, continental, regional, and national appeals and measures have been put in place to promote the right to nationality and to end statelessness, it remains a persistent issue, especially in Africa and in the Southern African region. At the end of 2015, the UNHCR reported that more than 1,021,418 persons were stateless in Africa due to armed conflicts and cross-border migration.²⁴ Although the UNHCR indicators refer to persons who fall under its statelessness mandate as those who are stateless according to this international definition, some countries include people with undetermined nationality and undocumented children in the statelessness definition.²⁵ The total number is therefore likely significantly higher.

We acknowledge in this article that there have been initiatives to end statelessness in Africa. Through the #IBelong Campaign and the Abidjan Declaration on Eradication of Statelessness,²⁶ the Heads of State of the ECOWAS have also shown that there is a political will to eradicate statelessness. Undeniably, there is an indication of a commitment to end statelessness and promote the right to nationality in Africa. The African Union (AU), for example, adopted a Draft Protocol on the right to a nationality in the African continent. The seven-point plan of action that resulted from the meeting of parliamentarians held on 26 and 27 November 2015 in Cape Town, focused on the role of parliaments in preventing and ending statelessness.²⁷ This underscores the importance of regional and international cooperation. Yet, statelessness in Africa remains critical because a large number of stateless persons are not documented.²⁸ The number of stateless persons tends to overlap with undocumented persons whose nationality statuses are unclear.²⁹ Given the gravity and uncertainties that can be associated with statelessness, the protection and promotion of the right to nationality in Africa, and in the Southern African region, in particular, statelessness-related issues and protection of stateless persons, cannot be ignored.

The 1954 Convention ensures minimum standards of treatment of stateless persons in respect of several economic, social, and cultural rights. These include the right to education, employment, housing, social security, healthcare services and other rights.³⁰ Importantly, the Convention also guarantees stateless persons a right to identity and travel documents and to administrative assistance. Furthermore, the 1961 Convention on the Reduction of Statelessness establishes an international framework to ensure the right to nationality of every person is protected by adopting

²⁴ UNHCR 'Global trends: Forced displacement in 2015' 2015 available at <http://www.worldsstateless.org/continents/africa/stateless-persons-in-africa>, accessed on 25 February 2022.

²⁶ 'Ibid.

²⁷ It was adopted in February 2015 by the ECOWAS to support the UNHCR's global campaign to end statelessness by 2024.

²⁸ 'The Conference on Ensuring Everyone's Right to Nationality: The Role of Parliaments in Preventing and Ending Statelessness, 26–27 November 2015' available at <http://archive.ipu.org/splz-e/captown15.htm>, accessed on 26 March 2022.

²⁹ Institute on Statelessness and Inclusion 'Stateless persons in Africa' available at <http://www.worldsstateless.org/continents/africa/stateless-persons-in-africa>, accessed on 31 January 2022.

³⁰ Ibid.

measures that safeguard and prevent statelessness at birth and later in life. This Convention is therefore complementary to standards contained in other international and regional human rights treaties.

Using the African Committee of Experts on the Rights and Welfare of the Child (the African Children's Committee) decision in the case of *Institute for Human Rights and Development and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya v the Government of Kenya (The Nubian Children case)*,³¹ the case has raised an important issue of the need to protect the right to nationality in Africa. In the *Nubian Children* case, an application was brought as an *actio popularis* on behalf of Nubians in Kenya who, despite having lived in the country for more than a century, were denied Kenyan nationality. The applicants argued that such denial of the Nubian children their right to nationality amounted to the violation of the provisions of the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC), specifically the rights of Nubian children to non-discrimination, nationality, and protection against statelessness, as well as other socio-economic rights like their rights to healthcare and education.³² The African Children's Committee emphasised taking cognisance of nationality and statelessness issues. It pointed out that there are negative effects of denying undocumented children's rights, and of children being vulnerable to unlawful arrests and deportation from their home country.³³ Additionally, the African Children's Committee noted the impact of the denial of nationality to the Nubian children on the realisation of socio-economic rights, such as access to healthcare and education, and ordered the Kenyan government to report on the implementation measures taken within a period of six months from the date of notification to comply with the African Children's Committee's decision.³⁴

The Nubian Children case underscores the need for states' obligation to promote the right to nationality and prevent statelessness to be honoured. Despite constitutional guarantees, the fulfilment of basic human needs and giving effect to the fundamental rights of stateless persons face extreme challenges in the Southern African region. This is largely due to the failure to realize even the socio-economic needs of a majority of citizens.³⁵ Therefore, stateless persons are not likely to benefit from the realization of their basic rights accorded to them under international and regional human rights laws. However, the Supreme Court of Appeal of South Africa (SCA), while referring to the fundamental human rights in the case of *Watchenuka v Minister of Home Affairs*,³⁶ has reminded us that human dignity has no nationality because it is inherent in all human beings. This includes all stateless persons,

³¹ 1954 Convention Relating to the Status of Stateless Persons, Arts 17, 18, 21, 22, 23, and 24.

³² *Institute for Human Rights and Development and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya v the Government of Kenya (The Nubian Children case)* Decision No 002/Com/002/2009.

³³ The 1990 African Charter on the Rights and Welfare of the Child, Arts 2, 4, and 6.

³⁴ *Nubian Children* op cit note 31 para 46.

³⁵ *Nubian Children* op cit note 31 para 69.

³⁶ International Labour Organization (ILO) 'Inequality in Southern Africa: Options for redress' (2013) ILO Policy Brief at 2, available at https://www.ilo.org/actrav/WCMS_230181/lang-en/index.htm, accessed on 10 October 2022. See also Ebenezer Durojaye & Gladys Mirugi-Mukundi 'General introduction to poverty and human rights in Africa' in Ebenezer Durojaye & Gladys Mirugi-Mukundi (eds) *Exploring the Link between Poverty and Human Rights in Africa* (2020) at 2.

including those who are displaced due to climate change, which this article will now turn to discuss.

III. STATELESSNESS ASSOCIATED WITH PERMANENT CROSS-BORDER DISPLACEMENT DUE TO THE IMPACTS OF CLIMATE CHANGE

For the last three decades, since the 1980s, global pollution, and the need to protect the environment have been raised as significant concerns.³⁷ For that reason, the international community has resolved that concerted efforts are needed to regulate how states may use the resources in their territories. In light of this, there are global calls for environmental protection to mitigate the impacts of climate change.³⁸

Climate change can lead to displacement in one of several ways — through the total inundation of low-lying island states; through designation by the relevant government of an area as a high-risk zone, unfit for human habitation; and through rapid- or slow-onset disasters or weather events.³⁹ Furthermore, while displacement is often thought of as being linked to conflict, there are times when that conflict is itself a result of climate change.⁴⁰ In each of these scenarios, displacement may be internal or across borders, temporary or permanent, and in the end, can lead to statelessness. Strauss et al. state that future carbon emissions will determine which areas we can continue to occupy or may have to abandon.⁴¹ Even with climate change mitigation and more stable global temperatures, the land area and population exposed to additional sea-level rise are likely to continue increasing for centuries.⁴² Therefore, climate change adaptation is still required, since population mobility is inevitable and is among the factors through which statelessness can be created. For

³⁷ See, for example, the Montreal Protocol of 1987 that binds the Member States of the United Nations to act in the interests of human safety even in the face of scientific uncertainty. Also, the Rio Conventions — the Convention on Biological Diversity (CBD) of 1992, the United Nations Convention to Combat Desertification (UNCCD) of 1994 (a legally binding treaty that was adopted to address desertification and the effects of drought, it focuses on the protection and restoration of land to ensure a safer, just and sustainable future), and the United Nations Framework Convention on Climate Change (UNFCCC) of 1992. The Rio Conventions were all adopted to address the need for adaptation to climate change. For example, the UNFCCC has been considered as an important international environmental treaty that aims to combat dangerous human activities or interference with the climate system. This includes the recognition of enhanced action and international cooperation on adaptation that is required. In view of this, States Parties to the UNFCCC established the Cancun Adaptation Framework in 2010 to guide the implementation of, and support for such adaptation. Subsequently, at the 2011 Durban Summit, States Parties advanced the implementation of the Cancun Adaptation Framework by operationalising various components and reinforcing a long-term commitment to adaptation action in line with the objectives of the UNFCCC. The Kyoto Protocol of 1997 extended the commitment of the States Parties to the UNFCCC to reduce greenhouse gas emissions that contribute to global warming.

³⁸ In legal terms, there were no limitations placed under customary international law to determine and control the effects of pollution. Globally, declarations, conventions and treaties were adopted to combat global warming, as stated under the United Nations Summit on Sustainable Development Goals of 2015, as well as the 2015 Paris Agreement to Combat Climate Change.

³⁹ Walter Kälin 'Conceptualising climate-induced displacement' in Jane McAdam (ed) *Climate Change and Displacement* (2012) at 85.

⁴⁰ Ibid. at 86.

⁴¹ Benjamin H Strauss, Scott Kulp & Anders Levermann 'Carbon choices determine US cities committed to futures below sea level' (2015) 112 PNAS 13508–13.

⁴² Celia McMichael, Shouro Dasgupta, Sonja Ayeb-Karlsson & Ilan Kelman 'A review of estimating population exposure to sea-level rise and the relevance for migration' (2020) 15 *Environmental Research Letters* at 21.

that reason, addressing the effects of climate change remains imperative.

(a) Low-lying island states (the sinking state problem)

The sinking state problem has in the past been regarded as the quintessential example of displacement and statelessness due to the impacts of climate change. The rise in global temperatures has resulted in rising sea levels, which are predicted to rise as much as 1.7 to 2 metres by 2100 and 2 to 3 metres by 2300. More pessimistic estimates predict that a rise of over 2 metres may be possible by 2100.⁴³ For certain low-lying island states, this means the entire state territory may be inundated with water, rendering the land uninhabitable and forcing the displacement of the state's population.⁴⁴ Scholars, such as Rouleau-Dick and Farron, opine that these persons may be rendered stateless as their state of origin will cease to exist.⁴⁵ This opinion is based on the application of the Montevideo Criteria, as laid out in the Montevideo Convention.⁴⁶ According to these criteria, for a state to exist, it must bear the following characteristics: a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.⁴⁷ Should a low-lying island state be inundated with water, it will no longer bear all these characteristics, and will therefore cease to be a state. For the previous populations of these island states, once the state itself no longer exists, these persons will be made stateless. However, not all scholars agree that this is the case.

It may not be correct to assume that these island states will certainly cease to exist, since they may adopt various adaptation strategies that allow the state to continue. For example, they may construct mechanisms to prevent seawater from overwhelming the island land or may purchase land from an existing state for their population to migrate to, should the island become uninhabitable.⁴⁸ Even if these states do lose their territory, this does not necessarily mean that they will cease to exist or be recognised as states. First, as McAdam points out, while fulfilment of the Montevideo Criteria is necessary for a state to come into existence, subsequently failing to meet one or more of these criteria does not automatically mean that status is lost.⁴⁹ In fact, there is a general presumption of continuity that supports the continued existence of these states, even where they lose their physical territory.⁵⁰ Therefore, we argue that even where the physical territory of these island states is lost, the state itself continues to exist, and the population thereof is not stateless.

⁴³ Etienne Piguet 'Climatic statelessness: Risk assessment and policy options' (2019) 45 *Population and Development Review* at 869.

⁴⁴ Antonio Joseph DelGrande 'Statelessness in the context of climate change: The applicability of the Montevideo criteria to "Sinking States"' (2021) 53 *NYUJILP* at 153.

⁴⁵ Michel Rouleau-Dick 'Sea level rise and climate statelessness: From 'too little, too late' to context-based relevance' (2021) 3 *Statelessness & Citizenship Review* 287-308; Sue Farron 'The significance of sea-level rise for the continuation of states and the identity of their people' (2021) 24 *PELJ*.

⁴⁶ Convention on Rights and Duties of States (Montevideo Convention), Art. 1, Dec. 16, 1934, 165 L.N.T.S. 19.

⁴⁷ *Ibid*.

⁴⁸ DelGrande op cit note 44 at 159.

⁴⁹ Jane McAdam 'Building international approaches to climate change, disasters and displacement' (2011) 33 *Windsor Yearbook of Access to Justice* at 8.

⁵⁰ DelGrande op cit note 44 at 155.

Another argument against the use of the legal framework of statelessness in the scenario of the sinking state is that it is not well suited to the sinking state scenario. Assuming that these states would lose their statehood on inundation, rendering their population stateless, this is unlikely to occur contemporaneously with the actual displacement of these persons. The land is likely to become uninhabitable long before the territory is completely inundated. The population will therefore be forced to migrate but will not yet be stateless as the state continues to exist.

A good example is Bangladesh; although the country is not a sinking island state, it is losing significant land on its shoreline due to its high population density and there is nowhere for displaced persons to move internally. Therefore, persons displaced from Bangladesh are a large asylum-seeking population in the Southern African region. There have been Bangladesh nationals who come to South Africa and other countries in the Southern African region intending to seek asylum and settle permanently.⁵¹ This is a problem that may not be ignored.

There is thus confusion about whether persons displaced in these scenarios would be stateless or not, and whether or not the international statelessness regime is appropriate to protect them. As Southern Africa is likely to be affected by this problem in future, states in the region will need to rely on their own legal regimes to provide protections to such persons.

(b) High-risk zones

The impacts of climate change can result in land being unsafe for human habitation.⁵² There may, therefore, be instances where the government of a state officially designates a certain area of that state as high-risk and unsuitable for human habitation.⁵³ Of course, generally in this scenario, the relevant government would be responsible for relocating the affected population.⁵⁴ Affected persons are, therefore, likely to be displaced internally and to be protected primarily by the state's legal system. However, the situation is far less certain where members of the affected population are already at risk of statelessness. For example, there may be members of the affected population who migrated from another state but do not have an asylum-seeker permit or refugee-status documentation. There may also be persons who were given asylum-seeker or refugee status but who have lost their documentation. Persons located in high-risk areas who do not have identity or registration documents may be unable to prove their nationality. While this does not render such persons automatically stateless, it does increase their risk of statelessness. Should this happen in South Africa, for

⁵¹ The Government of South Africa 'High Court dismisses case of Bangladeshi illegal immigrants against Home Affairs' available at <https://www.gov.za/high-court-dismisses-case-bangladeshi-illegal-immigrants-against-home-affairs>, accessed on 20 April 2022.

⁵² Walter Kälin op cit note 39 at 85 and 91.

⁵³ Walter Kälin op cit note 39 at 91.

⁵⁴ See World Bank 'Operational policy 4.12: Involuntary resettlement' World Bank Operational Manual (Washington DC, World Bank, 2001); Organization for Economic Cooperation and Development (OECD) 'Guidelines on aid and environment: No 3: Guidelines for aid agencies on involuntary displacement and resettlement in development projects (Paris, OECD, 1992).

example, under section 32 of the Immigration Act 13 of 2002, such persons could be considered illegal foreigners and will be subject to detention and deportation. These individuals, therefore, may be displaced across borders by the operation of the laws of South Africa. For such persons to be deported, their nationality must be determined. The lack of documentation makes this process more difficult. Should a person in such a scenario in South Africa claim to be a citizen of Bangladesh, the Bangladesh embassy will be called on to conduct a verification process to confirm the person's nationality. Should the embassy declare such a person to not be their citizen, the person would become stateless. The question then becomes, where these persons would be deported to.

(c) Rapid-onset disasters

A rapid-onset disaster or weather event can take many forms, such as flooding and tropical cyclones. The Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) has shown that due to climate change, rapid onset disasters have increased in both frequency and severity and that this trend is likely to continue.⁵⁵ A recent study prepared for the Centre for Environmental Rights found that Southern Africa is particularly vulnerable to these disasters.⁵⁶

For instance, during one weekend in April 2022, some areas of KwaZulu-Natal in South Africa received months' worth of rainfall in only one day. This severe rainfall caused mudslides and flooding that destroyed homes and infrastructure. This has been dubbed one of the worst weather storms in South Africa's history. Over three hundred persons lost their lives and thousands more lost their homes as a result of extreme rainfall and flooding.⁵⁷

Similarly, Mozambique has borne the brunt of multiple rapid-onset disasters, such as heavy rainfalls and flooding. In 2019, Tropical Cyclones Idai and Kenneth made landfall in Mozambique, resulting in hundreds of deaths and displacing over two million people. Likewise, the impacts of Tropical Cyclones Idai and Kenneth were felt in Tanzania while other tropical cyclones of 1872 and 1952, Tropical Cyclones Fantala and Jobo of 2016 and 2021 respectively, were recorded in both Zanzibar and mainland Tanzania.⁵⁸ Due to these tropical cyclones, people became homeless while

⁵⁵ Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report 'Regional Fact Sheet – Africa' 2021, available at https://www.ipcc.ch/report/ar6/wg1/downloads/factsheets/IPCC_AR6_WGI_Regional_Fact_Sheet_Africa.pdf, accessed on 17 May 2022.

⁵⁶ Robert Scholes & Francois Engelbrecht 'Climate impacts in southern Africa during the 21st century, Report for the Centre for Environmental Rights' September 2021 at 4, Global Change Institute at the University of Witwatersrand, available at https://cer.org.za/wp-content/uploads/2021/09/Climate-impacts-in-South-Africa_Final_September_2021_FINAL.pdf, accessed on 27 September 2022. See also Lere Amusan & Oluwole Olutola 'Addressing climate change in Southern Africa' (2016) 72 *Indian Quarterly* at 395.

⁵⁷ BBC 'Durban floods: South Africa floods kill more than 300' available at <https://www.bbc.com/news/world-africa-61092334>, accessed on 14 April 2022.

⁵⁸ Kombi Hamad Kai, Mohammed Khamis Ngwali & Masoud Makame 'Assessment of the impacts of Tropical Cyclone Fantala to Tanzania coastal line: Case study of Zanzibar' (2021) 11 *Atmospheric and Climate Sciences* at 245.

others lost their lives.⁵⁹ In January 2022, Tropical Cyclone Ana hit northern and central Mozambique, affecting 180,869 people. Less than two months later, Tropical Cyclone Gombe devastated Mozambique's Nampula province with heavy flooding, displacing tens of thousands of people.⁶⁰

Generally, this displacement happens internally. However, displacement across borders due to rapid onset disasters does, and will likely continue to occur, especially in scenarios where the government of the state in which the disaster occurs is unable or unwilling to provide humanitarian assistance to those affected by it.⁶¹ It is generally believed that this displacement will be temporary, as affected persons will be able to return once the disaster or extreme weather event subsides, but this is not always the case. As stated, the government may not be able or willing to address the damage caused by the disaster, or the nature of the damage may be such that it renders the land permanently unsafe for return. In these scenarios, persons may find themselves permanently displaced across borders. When this displacement is combined with other factors, such as poor birth registration, loss of identity documentation, or protracted periods of displacement, such persons are at serious risk of statelessness.

(d) Slow-onset disasters

Like rapid-onset disasters, slow-onset disasters or weather events are scientifically proven to have increased as a result of climate change and will likely continue to increase in both frequency and severity.⁶² Examples include rising sea levels and desertification. Like rapid-onset disasters, displacement due to slow-onset disasters is likely to be internal. As stated above, the primary responsibility for providing aid and security for internally displaced persons (IDPs) falls on the relevant state. IDPs are often also assisted by humanitarian organisations, such as the UNHCR. An unfortunate reality is that governments may be unable or unwilling to help, and the UNHCR is limited in what it can do by the funding it receives. External migration

⁵⁹ Hellen E Msemu, Declan L Finney & Samwel I Mbuya 'Forgotten accounts of tropical cyclones making landfall in Tanzania' (2022) 77 *Weather* at 127; and Pedram Javaheri 'A rare tropical cyclone is approaching one of Africa's most populated cities' CNN 22 April 2021, available at <https://edition.cnn.com/2021/04/22/weather/jobo-forecast-tanzania-tropical-cyclone/index.html>, accessed on 21 April 2022.

⁶⁰ UNHCR 'UNHCR and partners rush aid to thousands in Mozambique after Tropical Cyclone Gombe' 22 March 2022, available at <https://www.unhcr.org/news/briefing/2022/3/623992774/unhcr-partners-rush-aid-thousands-mozambique-tropical-cyclone-gombe.html>, accessed on 30 March 2022.

⁶¹ UNHCR 'Climate change and statelessness: An overview' 15 May 2009, available at <https://www.unhcr.org/protection/environment/4a1e50082/climate-change-statelessness-overview.html>, accessed on 15 February 2022. See also CEDAW General recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change Pursuant to Article 21(1) of the Convention dated 7 February 2018.

⁶² IPCC 'Special report on land desertification' available at <https://www.ipcc.ch/srccl/chapter/chapter-3/>, accessed on 10 October 2022; Robert Scholes & Francois Engelbrecht 'Climate impacts in southern Africa during the 21st century, Report for the Centre for Environmental Rights' September 2021, Global Change Institute at the University of Witwatersrand, available at https://cer.org.za/wp-content/uploads/2021/09/Climate-impacts-in-South-Africa_Final_September_2021.FINAL_.pdf, accessed on 27 September 2022.

is therefore the only remaining option. It may also not be possible for affected persons to migrate internally where population density does not allow it, as is the case in Bangladesh, or where the entire territory of the country is affected by the same problem. Somalia has been plagued by the worst drought the nation has seen in over four decades. Over one million persons have been displaced due to the harsh climate and uninhabitable land.⁶³ In such instances, affected person would be forced to migrate across borders. In the case of Somalia, persons may even be forced to cross multiple borders, as many of the other states in the region are also drought-stricken.⁶⁴ Unlike rapid-onset disasters, such displacement is more likely to be permanent, as the reason for the displacement is the land becoming uninhabitable.⁶⁵ Such protracted displacement scenarios place persons at an increased risk of statelessness.⁶⁶

(e) Conflict due to the impacts of climate change

Conflict has historically been thought of as one of the biggest contributors to cross-border displacement.⁶⁸ While this is true, recent research suggests that much of this conflict may, in fact, be driven by the impacts of climate change.⁶⁸ For instance, where resources are limited due to drought or increasing water salinisation due to sea-level rise, conflict over these limited resources may lead to displacement.⁷⁰ Links have been found between repeated internal displacement due to disasters and conflict in states such as Mozambique and Angola.⁷⁰ Persons who flee this conflict into foreign states are also at risk of becoming stateless.

In all the above scenarios, from rapid-onset disasters to climate change-driven

⁶³ UNHCR 'Somalis abandon their homes in search of food, water and aid as drought deepens' 29 September 2022, available at <https://www.unhcr.org/news/stories/2022/9/633419134/somalis-abandon-homes-search-food-water-aid-drought-deepens.html>, accessed on 03 October 2022.

⁶⁴ Shazia Chaudhry & James Ouda 'Perspective on the rights of climate migrants in the Horn of Africa: A case study of Somalia' (2021) 8 *Journal of Somali Studies* at 13.

⁶⁵ Walter Kälin op cit note 39 at 89 and 90.

⁶⁶ Ajwang Warriia 'Stateless transnational migrant children in South Africa: Implications and opportunities for social work intervention' (2020) 6 *AHMR* at 6.

⁶⁷ Fatima Khan & Nandi Rayner 'A historical overview of forcibly displaced persons in Southern Africa (2011–2020): Realising the expectations of the Global Compact on Refugees' Reference Paper for the 70th Anniversary of the 1951 Refugee Convention 2020, available at <https://www.unhcr.org/people-forced-to-leave-book/wp-content/uploads/sites/137/2021/10/Fatima-Khan-and-Nandi-Rayner-A-historical-overview-of-forcibly-displaced-persons-in-Southern-Africa.pdf>, accessed on 19 September 2022. See also Allison J Petrozziello 'Statelessness as a product of slippery statecraft: A global governance view of current causes, actors and debates' (2019) 1 *Statelessness & Citizenship Review* at 136. IPCC Annual Report 5, 2014 at 16, available at https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, accessed on 10 October 2022. See also UNFCCC Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts 'Technical Meeting Action Area 6: Migration, displacement and human mobility' 2016 at 3, available at https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/excom_iom_technical_meeting_aa6_pillar_2_coordination_and_coherence.pdf, accessed on 10 October 2022.

⁶⁸ IPCC Annual Report 5, 2014 at 16, available at https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, accessed on 10 October 2022. See also UNFCCC Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts 'Technical Meeting Action Area 6: Migration, displacement and human mobility' 2016 at 3, available at https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/excom_iom_technical_meeting_aa6_pillar_2_coordination_and_coherence.pdf, accessed on 10 October 2022.

⁶⁹ Shazia Chaudhry & James Ouda op cit note 64 at 24.

⁷⁰ Leah A Ndimurwimo & Leonard C Opara 'Access to justice for internally displaced persons: The global legal order' (2019) 6 *Journal of Law Society and Development* at 8.

conflict, displacement across borders does not automatically result in statelessness or a lack of protection. Depending on where persons are displaced and for how long, they may be protected by existing international and domestic legal instruments and may qualify as asylum seekers or refugees. The following section explores how the scenarios discussed above can result in statelessness and leave displaced persons without protection.

IV. CIRCUMSTANCES MAY LEAD TO UNCERTAIN RIGHTS AND LEGAL STATUSES OF STATELESS PERSONS

Various legal frameworks exist internationally and regionally aimed at the protection of persons forced or compelled to abandon their homes. The application of these frameworks depends on the nature of forced displacement. There are two types of forced displacement: internal and external.⁷¹ Internal displacement refers to the situation where persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters, and who have not crossed an internationally recognised state border.⁷² On the other hand, external displacement refers to situations where persons or groups of persons are forced or compelled to leave their country and seek sanctuary in or protection of another country. Depending on the nature of the displacement, the affected persons may fall into the categories of refugees (or asylum seekers), stateless persons, or IDPs. Affected persons may fall into more than one of these categories and have the rights and protections of more than one framework.⁷³ In each of the scenarios discussed in section III, the persons displaced may be at risk of statelessness, but depending on how they were displaced, and on what state they ultimately find themselves in, they will enjoy different rights, statuses, and protections.

(a) Statelessness status

Before dealing with how the status of such persons will be determined, it is necessary to elaborate on how the above scenarios can lead to statelessness specifically. While in the past, the focus has been on statelessness due to loss of statehood in the sinking state scenario, recently it has been acknowledged that statelessness is more likely to result in other discussed scenarios, that is, in the case of rapid- or slow-onset disasters, or climate change-induced conflict. This can occur because when persons are forced to migrate, they may lose their identity and registration documentation in the process.⁷⁴ This is especially true, for example, in the case of a rapid-onset disaster,

⁷¹ Walter Kälin op cit note 39 at 92.

⁷² Internal displacement, available at <https://www.internal-displacement.org/internal-displacement>.

⁷³ Walter Kälin op cit note 39 at 92.

⁷⁴ UNHCR 'Statelessness and climate change factsheet' 29 October 2021, available at <https://www.refworld.org/docid/617c01da4.html>, accessed on 7 February 2022.

such as flooding, where documentation may be swept away in flood waters. Affected persons may then be unable to be re-issued with documentation due to limited or no public services in the affected areas.⁷⁵ It is also possible that displaced persons were never in possession of identity or registration of birth documents and were therefore always at risk of being undocumented and potentially stateless, which risk is then exacerbated by the displacement, as they may be unable to return to their country of origin as they are unable to prove their nationality. The lack of documentation in itself, does not cause statelessness, as nationality can be proven in other ways. But the absence of documentation can make this process more difficult and for that reason can heighten the risk of a person being unable to prove their nationality and therefore becoming stateless.

Statelessness is also a possibility where single mothers, displaced across borders as a result of the impacts of climate change, give birth while displaced. Should the mother in question originate from a country that follows only the *jus soli* principle of nationality determination at birth, the child will not have the same nationality as its mother, because it was not born in the mother's state of origin. The state in which the mother gives birth may have laws that address this issue, but these laws do not always provide effective protection.⁷⁶ For example, in South Africa, section 2 of the South African Citizenship Act 88 of 1995 states that citizenship by birth may be acquired by children born in South Africa who would otherwise be stateless. However, in practice, this law is rarely applied properly. Often officials assume the child acquired its mother's nationality at birth. Often births to foreign nationals are not adequately registered or recorded in South Africa, making it difficult to prove that the birth did, in fact, occur in South Africa and that section 2 applies.⁷⁷ The protection of these laws is therefore limited and statelessness in childhood can result.

Irrespective of how persons came to be stateless, should their stateless status not be resolved, another risk is that of generational statelessness. For persons displaced permanently across borders due to the impacts of climate change, they will pass on their stateless status to their children, who will in turn pass it on to their children, unless the laws of Southern African nations develop to address this issue.

(b) Determination of statelessness status

Another important consideration in assessing the rights and status of stateless persons displaced by the impacts of climate change is how their status as a stateless person is determined, if at all. The majority of states in the Southern African region have not ratified either the 1954 or 1961 Statelessness Conventions. In Mozambique, where both have been ratified, a person may be considered *de jure* stateless if they meet the definition of a stateless person in Article 1 of the 1954 Convention. They would then be entitled to the protections offered by the 1954 Convention. However,

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Fatima Khan op cit note 3 at 17.

in South Africa or Tanzania, neither Convention has been ratified and there are no procedures for determining statelessness. In either of these countries, therefore, a person may be deemed at risk of statelessness or *de facto* stateless, but not *de jure* stateless as there is no mechanism for making this status determination. While the 1954 Convention encourages states to treat *de facto* stateless persons as *de jure* stateless persons, this is a recommendation rather than a requirement and is therefore not binding, even on those states that have ratified the 1954 Convention. In any event, should displaced persons find themselves in South Africa or Tanzania, they will not be entitled to protection under the Statelessness Conventions. In Mozambique, only *de jure* stateless persons may receive protection under these Conventions. None of these jurisdictions has legislation dealing with statelessness as a result of climate change or climate-induced displacement specifically. The importance of ratifying and domesticating the statelessness conventions, and of legislatively addressing climate-induced displacement, is therefore evident.

(c) *Refugee status*

There is general agreement that persons displaced by climate change do not qualify as refugees as the refugee situation is defined in a political context.⁷⁸ The 1951 Convention Relating to the Status of Refugees defines the term refugee as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁹

Persons fleeing the impacts of climate change do not satisfy the requirement of persecution.⁸⁰ They are not persecuted on the grounds of who they are or what they believe in. Even if the definition of persecution could be extended, since weather events are non-discriminatory, it would not be possible to show persecution on one of the established grounds (race, religion, etc.). Certain persons displaced by climate change may qualify for refugee status and the rights and protections that flow therefrom, where climate change and its impacts have led to conflict. Those persons displaced by conflict, where climate change and its impacts were a driver for

⁷⁸ Shazia Chaudhry and James Ouda op cit note 64 at 16.

⁷⁹ The 1951 Convention Relating to the Status of Refugees, Art 1A(2).

⁸⁰ See, for example, *Ioane Teitiota v New Zealand* CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020. The HRC stated that the applicant's deportation was not unlawful because he did not face an immediate danger to his life on Kiribati Island. The HRC recognised that climate change represents a serious threat to the right to life, which must be considered when dealing with the deportation of asylum seekers.

that conflict, will likely qualify as refugees, even under this restricted definition of a refugee.

The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa has a slightly more expansive definition of refugee, which includes every person who, owing to ... events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁸¹

Section 3 of South Africa's Refugees Act 130 of 1998 defines the term refugee in such a way that encompasses the expanded definition.

Some scholars are of the opinion that persons displaced across borders by rapid-onset disaster will likewise qualify as refugees under the more expansive definition of refugee in both the 1969 Convention and South Africa's Refugees Act.⁸² However, this is uncertain, and the provision will likely be interpreted as applying to situations involving conflict or violence, and not environmental degradation.

To be a refugee is not the same as being stateless, and qualifying for a refugee status does not solve the issue of statelessness of these persons. It does, however, afford them rights and protections that other displaced persons may not have.

(d) Humanitarian and human rights law

For those persons who are permanently displaced across borders due to slow-onset disasters or weather events, the rights and protections available to them may also be under international human rights and humanitarian law. For some, these may be the only rights and protections available to them. Unless these persons find themselves in Mozambique and are legally determined to be stateless, they will not be afforded the rights and protections of the Statelessness Conventions. They are also unlikely to qualify as refugees even under the more expansive definition. One of the major reasons for this is that migration due to slow-onset disasters or weather events is often seen as voluntary, or as forced displacement in the economic context and not in the political context. Persons will tend to leave before the land becomes completely uninhabitable. Whether this is voluntary or apolitical in the truest sense is subject to academic debate,⁸³ but it is sufficient to disqualify such persons from refugee status.

It is important to note that humanitarian and human rights law protections are also available to other groups of displaced persons. However, for those who qualify as refugees or *de jure* stateless, the protection offered is greater than for those who must rely solely on international human rights and humanitarian law. Since these rights are limited, it is important for Southern African nations to better adapt their laws on statelessness to deal with the problem of statelessness flowing from or due to

⁸¹ The 1969 OAU Convention, Art 1(2).

⁸² Grant Dawson and Rachel Laut 'Human Mobility and Climate Change' (2017) 8 *International Humanitarian Legal Studies* at 147.

⁸³ *Ibid.* at 132.

climate change, especially since it is widely agreed that the effects of climate change on Southern Africa are only likely to get worse.

V. PROMOTING THE RIGHTS OF STATELESS PERSONS IN THE SOUTHERN AFRICAN REGION

As discussed, the problem of cross-border displacement leading to statelessness in the Southern African region due to the impacts of climate change is challenging. This section discusses the current legal regimes in South Africa, Mozambique, and Tanzania. It assesses the sufficiency and efficacy of these regimes when it comes to addressing statelessness due to climate change, and makes certain recommendations based on this assessment.

(a) South Africa

(i) Current legal framework

In the *Nottebohm* case, the International Court of Justice (ICJ) defined nationality as a legal bond between an individual and the state, as it is the basis for a social fact of attachment, a genuine connection of existence, interest, and sentiments, together with the existence of reciprocal rights and duties.⁸⁴ While South Africa is not a party to either Statelessness Convention, it is a party to several international legal instruments governing the right to a nationality. Article 15 of the 1948 Universal Declaration of Human Rights states that ‘everyone has the right to a nationality’ and that ‘no one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.’⁸⁵ The 1989 United Nations Convention on the Rights of the Child (CRC) states that all children are entitled to a name, the right to acquire a nationality, and immediate birth registration.⁸⁶ The 1990 ACRWC likewise provides that every child has the right to acquire a nationality.⁸⁷ It also provides for the acquisition of the nationality of the child’s country of birth in cases where the child would otherwise be stateless.⁸⁸ Article 9(1) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obliges states to provide equal rights to men and women with regard to acquiring, changing and passing on nationality.⁸⁹ By protecting the right to nationality, the above-mentioned instruments serve the purpose of preventing statelessness. As a party to each of these instruments, South Africa is obliged to: respect and protect the right to nationality; ensure gender

⁸⁴ *Liechtenstein v Guatemala* ICJ (1955) ICJ Reports 23.

⁸⁵ United Nations Universal Declaration of Human Rights op cit note 7.

⁸⁶ The 1989 United Nations Convention on the Rights of the Child, Art 7.

⁸⁷ ACRWC op cit note 32, Art 6.

⁸⁸ ACRWC op cit note 32, Art 6(4).

⁸⁹ United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979).

equality in nationality laws; and protect the rights of children to acquire a nationality. In light of this, South Africa has attempted to domesticate these instruments in national legislation.⁹⁰

The importance of nationality is clearly acknowledged in the Final Constitution of the Republic of South Africa, 1996 (the Constitution). Section 20 states that no citizen may be deprived of citizenship.⁹¹ Section 28(a), pertaining to the rights of the child, states that every child has the right to nationality from birth.⁹² The South African Citizenship Act gives effect to South Africa's international law obligations, as well as the rights and spirit of the Constitution.⁹³

This right in the Constitution does not guarantee a right to South African nationality, but rather to a nationality.⁹⁴ Only children born to a South African parent will acquire South African nationality at birth.⁹⁵ Children born to foreign parents will acquire the nationality of their parents, based on the nationality laws of their parent's country of citizenship. Where the laws of this country do not allow this, for example as discussed above, where the country follows a system of *jus soli*, then the child can acquire South African nationality, as it would otherwise be rendered stateless.⁹⁶ It is important to note that the current legal framework discussed hereunder is currently under review, with the Minister of Home Affairs, Aaron Motsoaledi, suggesting that these various pieces of legislation are likely to be amended and may be consolidated.⁹⁷ This discussion is based on the law as it currently is and as it should be.

The Citizenship Act (as amended) has the potential to prevent and reduce statelessness as it has various sections that allow for the acquisition of South African citizenship by non-citizens.⁹⁸ Section 2(2) provides for the acquisition of South African citizenship at birth by a child born in South Africa if that child would otherwise be stateless. Section 4(3) provides for the acquisition of citizenship, upon reaching majority, by children born to non-South African citizens or permanent residents, who have their births registered in terms of the Births and Deaths Registration,⁹⁹ and who live in South Africa until the age of eighteen. Both of these sections, if consistently and properly applied, can prevent the statelessness of children born to foreigners on South African soil.

The Immigration Act has the potential to reduce statelessness and provide protection to those persons who are already stateless.¹⁰⁰ Currently, the Act, and the

⁹⁰ The South African Citizenship Act No. 88 of 1995.

⁹¹ The Constitution of the Republic of South Africa 1996.

⁹² *Ibid.*

⁹³ Citizenship Act op cit note 90.

⁹⁴ Raylene Keightley 'The child's right to a nationality and the acquisition of citizenship in South African law' (1998) *SAJHR* 411.

⁹⁵ Citizenship Act op cit note 90, section 2(1).

⁹⁶ Citizenship Act op cit note 90, section 2(2).

⁹⁷ *Business Day* 'Statelessness in the spotlight as Home Affairs to review three Acts' 27 January 2022, available at <https://www.businesslive.co.za/bd/national/2022-01-26-statelessness-in-spotlight-as-home-affairs-to-review-three-acts/>, accessed on 29 April 2022.

⁹⁸ Citizenship Act op cit note 90.

⁹⁹ The Births and Deaths Registration Act No. 51 of 1992.

¹⁰⁰ The Immigration Act No. 13 of 2002.

Regulations thereto, make no mention of stateless persons and how to admit or assist such persons. The Act requires applications for visas or permits to be made from outside the country. In this context, it does not cater for those persons who are stateless and unable to travel across borders. It nevertheless can be used to reduce statelessness and protect stateless persons through the application of section 31(2)(b). Section 31(2)(b) of the Immigration Act may offer potential relief for stateless persons, as it provides for an application to be made to the Minister for an exemption for permanent residence. This offers an alternative route to permanent residence for persons in special circumstances who have not been living in the country for over five years. The application can be made by an individual or category of foreigners and allows the Minister to grant a foreigner or category of foreigners the rights of permanent residence when special circumstances exist. It could be argued that persons displaced due to climate change are a category of persons that meets section 31(2)(b) requirements because their displacement due to the impacts of climate change constitutes special circumstances. Persons who have been displaced across borders and rendered stateless as a result of climate change find themselves in special circumstances because they cannot be returned to or relocated within their country, as, as stateless persons, they have no determined country. The use of this section will also not be necessary for persons who, while displaced as a result of climate change, qualify for refugee status. It may, therefore, be possible for stateless persons to use this exemption to acquire, if not citizenship, then at the very least permanent residence and the rights accompanying that status.

The Refugees Act, while not directly concerned with the issue of statelessness, can be used to protect stateless persons who also qualify as refugees.¹⁰¹ In terms of Section 3 of the Refugees Act, a person qualifies for refugee status if that person —

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere ...

This is discussed more fully in section (ii) below.

The potential of the above legislative provisions to prevent and reduce statelessness, as well as protect stateless persons, depends on how the legislation is interpreted and applied in practice.

When interpreting the sections of the Citizenship Act, for example, the words

¹⁰¹ The Refugees Act No. 30 of 1998.

of the Constitutional Court in the case of *Chisuse and others v Director-General, Department of Home Affairs and another*¹⁰² must be borne in mind. The court herein states that citizenship goes to the core of a person's identity, belonging, and security of person, and that the spirit and purport of the Citizenship Act is to widen pathways to South African citizenship, not to narrow them.¹⁰³ Unfortunately, in practice, officials in the Department of Home Affairs, when applying these sections, do so in a far more restrictive manner. For instance, in the case of *Minister of Home Affairs v Jose*, two brothers applied for South African citizenship under section 4(3) of the Citizenship Act after turning eighteen. Both satisfied all the requirements of section 4(3). The Department of Home Affairs was also ordered by the High Court to grant citizenship to the brothers. Despite all of this, the matter proceeded to the SCA due to undue delays in granting the citizenship application. The SCA stated that once all the requirements of section 4(3) are met, citizenship must be granted and there is no room for discretion. The SCA shed light on the plight of the applicants who were forced to live as non-citizens in the only country they had ever known.¹⁰⁴ This case is one example of the discrepancy between the laws of South Africa aimed at preventing and reducing statelessness, versus the practice in South Africa which may be exacerbating the problem.

When it comes to the Refugees Act, there is a similar problem, in that the interpretation of the Act may be over-restrictive, thereby limiting the potential protections available to stateless persons. The High Court held in the case of *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others*¹⁰⁵ that when deciding an application for refugee status according to section 3(b) of the Refugees Act, two inquiries are necessary. The first inquiry is into whether any of the circumstances stipulated in section 3(b) exist in the country of origin (the objective inquiry). The second inquiry is more subjective and looks at whether those circumstances were the cause of the individuals being compelled to leave. Compulsion rather than volition must have been the *predominant* reason for leaving. The court also states when deciding a refugee status, section 6 of the Act requires a humanitarian approach, which considers human welfare and the alleviation of human suffering.¹⁰⁶ This judgement has been cited with approval by the High Court in the case of *FNM v RAB*.¹⁰⁷ The Constitutional Court, in the case of *Ruta v Minister of Home Affairs*, seems to have given the section a stricter interpretation, stating that for refugee status under section 3(b), asylum-seekers who flee external disruption must have left their habitual residence under compulsion.¹⁰⁸ The Constitutional Court seems to require that compulsion be the reason for fleeing, rather than the predominant reason for fleeing, as indicated by the High Court in the *Radjabu* case.

¹⁰² *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC).

¹⁰³ *Ibid.*

¹⁰⁴ *Minister of Home Affairs and others v Jose and another* 2021 (6) SA 369 (SCA).

¹⁰⁵ *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others* [2015] 1 All SA 100 (WCC).

¹⁰⁶ *Ibid.*

¹⁰⁷ *FNM v RAB and others* [2018] 4 All SA 8 (GP).

¹⁰⁸ *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC).

Since the Constitutional Court is the highest court in the land, it appears that its interpretation in *Ruta v Minister of Home Affairs* must be given to section 3(b). This is an unfortunate interpretation, especially when dealing with persons displaced across borders by slow-onset disasters due to the impacts of climate change. This is discussed in more detail in section (ii) below.

(ii) Does the current framework offer sufficient protection?

Clearly, any protection offered by the existing legal framework in South Africa is limited by restrictive interpretation and implementation. However, the question to be explored is whether there is still potential for this framework to address statelessness, specifically where it is a result of cross-border displacement arising from the conflict, or violence due to the impacts of climate change. This question is considered in relation to persons displaced in the various scenarios discussed above. To respond to the above question, the underlying questions are, whether the legal framework offers sufficient protection for those persons displaced across borders and thereby rendered stateless; and whether the current legal framework is sufficient to protect those born stateless within South Africa's territory.

First, the sufficiency of the current framework differs depending on the nature of the displacement leading to stateless persons being in South Africa.

For persons displaced due to conflict or violence, which was driven by the impacts of climate change, as discussed above, these persons will be more likely to qualify for refugee status and will therefore be protected under the Refugees Act. While this does not solve the issue of their statelessness immediately, it does ensure that they enjoy certain rights and protections. In the long run, refugee protection requires the country of asylum to integrate refugees into their society and to naturalise them as citizens as durable solutions to their protracted displacement.

For persons displaced by sudden-onset disasters, as discussed above, these persons may qualify as refugees under the more expansive definition of refugees, as suggested in the *Ioane Teitiota v New Zealand* case (the *Kiribati* case), as they fled their country of origin due to events seriously disturbing the public order and their lives being in danger.¹⁰⁹ South Africa does not yet have case law on whether this interpretation would be accepted and the provisions of section 3 of the Refugees Act do not clarify the issue. Therefore, while there is potential for protection, the law is still uncertain.

The situation for those displaced by slow-onset disasters is even more uncertain, since they likely do not qualify as refugees, even under the expanded definition, since there is arguably, a voluntary element in their displacement. However, if the reasoning of the court in *Radjabu* could be followed, it would allow for a more flexible approach to refugee status applications. For those displaced by slow-onset disasters, even though there may be an element of volition in their movement, compulsion was

¹⁰⁹ *Ioane Teitiota v New Zealand* op cit note 80.

the *predominant* reason for their displacement, and they can therefore potentially qualify as refugees.

Both those displaced persons due to slow- and sudden-onset disasters would benefit from the humanitarian approach to the protection of displaced people. Hence, section 3(b) of the Refugees Act covers non-political events disrupting the public order, thereby causing human suffering and a more humanitarian approach generally, as discussed by the court in *Radjabu*. This approach could be used to support an application for refugee status even where all technical requirements are not met. However, since the Constitutional Court in *Ruta* seems to have taken a more restrictive approach, it is unlikely that those displaced by slow-onset disasters, and even those displaced by sudden-onset disasters, will qualify as refugees.

The exemption application in section 31(2)(b) of the Immigration Act offers an alternative source of relief for these stateless persons. To repeat the essence of this provision — the Minister can grant a category of foreigners the rights of permanent residence, should special circumstances exist.¹¹⁰ The position taken by the authors of this article is that stateless persons, displaced across borders due to the impacts of climate change, could qualify as a category of persons and that the impacts of climate change, such as drought, flooding, and desertification, could qualify as special circumstances if they are permanent and thus a cause of protracted displacement. The risks inherent in relying on this exemption provision are that the application will undoubtedly take time, and these persons may not have rights or protections in the interim, such as asylum-seekers do while awaiting the outcome of refugee status applications. Another potential risk is that permanent residence rights and status can be granted for a specified period.¹¹¹ For those who are able to return to their country of origin, this may not be an issue, but for those who are unable to, this leaves them without protection once this period comes to an end. The Minister will also be required to consider these applications without supporting documentation, such as passports and visas, which these persons will not have.

There is therefore potential in South Africa's current immigration and refugee legal frameworks to protect stateless persons displaced across borders due to the impacts of climate change, but without development, it is unlikely that this legislation will provide much protection or relief.

With regard to the second question, many people who have been displaced due to the impacts of climate change and find themselves across the border in South Africa, may give birth while in the territory. These children may be stateless at birth, either due to the problem of generational statelessness, i.e., their parents also being stateless and therefore having no nationality to pass to the child,¹¹² or due to the nature of the nationality laws in the parents' country of origin, such as where a state uses only the *jus soli* principle to determine nationality or does not allow single

¹¹⁰ Immigration Act op cit note 100, section 31(2)(b).

¹¹¹ Section 31(2)(b) states that permanent residence can be granted for a specified period of time, and section 31(2)(b)(ii) states that the right can be withdrawn if good cause is shown.

¹¹² See *Centre for Child Law v Director General, Department of Home Affairs and others* 2020 (6) SA 199 (ECG).

mothers to pass their nationality on to a child.¹¹³

In theory, if section 2(2) of the Citizenship Act were applied perfectly and consistently, there would be no children born stateless in South Africa. Once it is identified that the child would otherwise be stateless, they should be granted South African citizenship. In other words, if a child is born in South Africa with no right to any other nationality, that child must be given South African nationality, otherwise, that child would be stateless. Section 4(3) bolsters this protection by providing for the acquisition of citizenship at the age of eighteen, where it was not acquired at birth. The letter of the law is therefore in compliance with South Africa's international obligations and constitutional duty to prevent and reduce statelessness. However, as is evidenced by the Jose case discussed above, these sections are not successfully applied in practice. One reason for this, in the case of section 4(3) specifically, is that there are no regulations which have been promulgated that may assist officials from the Department of Home Affairs to implement the provisions of section 4(3), thereby processing these applications. In 2018, the SCA in the case of *Minister of Home Affairs v Ali* ordered the Minister to make regulations in relation to section 4(3), and that pending promulgation applications for citizenship be accepted in affidavit form, but at the time of writing this article, no regulations have yet been promulgated.¹¹⁴ Furthermore, with regards to section 2(2), in the case of children born to refugees, for example, no consideration is given at the time of birth to whether these children could be stateless. They are simply assigned the nationality of their parents. This does not amount to a formal assigning of citizenship or nationality that will be recognised by the child's supposed home country, as South African officials cannot grant nationality of another country. This practice is also contrary to the provisions of section 2(2) because it prevents these children from acquiring South African citizenship, when under section 2(2) they should be able to do so. In sum, while the legislation in South Africa does go some of the way towards preventing and reducing statelessness, it does not go far enough.

(iii) Recommendations

The first and most obvious step South Africa could take towards reducing statelessness and protecting stateless persons would be to accede to both Statelessness Conventions. Acceding to the 1954 Convention in particular, will oblige South Africa to adopt a status determination procedure, which it does not currently have, to legally classify individuals as stateless. It will also provide minimum standards of treatment or rights due to these individuals. For those who are displaced across borders due to climate change, and do not qualify as refugees, this is a vital safeguard of their human rights. South Africa has pledged several times over the decades to

¹¹³ Such as is the case with Somalian nationals, although there is a Citizenship Amendment Bill which, if passed, will allow both mothers and fathers with Somalian nationality to pass this nationality on to their children.

¹¹⁴ *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169 (30 November 2018).

accede to both statelessness conventions.¹¹⁵ There is therefore at least some political will supporting this step.

Another step the legislature can take is to clarify the requirements for refugee status under the Refugees Act. Section 3(b) could be amended to explicitly include persons displaced across borders due to the impacts of climate change. Alternatively, an entire new sub-section could be included under section 3 dealing with these persons specifically. Again, while this will not solve the statelessness problem, it will provide interim protection, and can eventually lead to citizenship through naturalisation.¹¹⁶

In relation to preventing and reducing statelessness, the legislature could promulgate regulations for the various sections of the Citizenship Act, which are aimed at preventing statelessness and which currently do not have regulations. This would enable the Department of Home Affairs officials to better understand what is required of them and may lead to a reduction in statelessness for those born in South Africa to parents who were displaced by the impacts of climate change.

Unfortunately, both amending the Refugees Act and promulgating regulations to sections of the Citizenship Act require political will to welcome and provide a safe haven to foreign nationals in a protracted displacement. Such political will would be required at a time when xenophobic sentiment is high within the country and policy seems to be steering towards a stance of rejecting rather than accepting refugees and other people of concern. It may therefore be necessary for NGOs or other civil society bodies to conduct strategic litigation in the hopes of achieving these goals.

Finally, the Minister could, in terms of section 31(2)(b) of the Immigration Act designate stateless persons displaced as a result of climate change as a category of persons who, due to special circumstances, should be granted temporary residence, and if the situations persist, permanent residence. Any such decision should be accompanied by a specific application procedure with required evidence and regulations. This process would also remove these persons from the asylum system, which could assist in reducing the backlog in applications for refugee status.

(b) Mozambique

(i) Current legal framework

Unlike South Africa, Mozambique has acceded to both the 1954 and 1961 Statelessness Conventions. However, it has yet to domesticate either convention into its national legislation. It is also a party to the 1951 UN Refugee Convention and 1969 AU Refugee Convention, both of which have been domesticated into its national legislation.

¹¹⁵ An example of this are the pledges made by South Africa at the Ministerial Intergovernmental Event on Refugees and Stateless Persons that took place in Geneva from 7 to 8 December 2011. Here South Africa pledged to accede to or take steps to accede to both Statelessness Conventions.

¹¹⁶ By means of s27(c) of the Refugees Act and s5 of the Citizenship Act.

These Conventions have been domesticated in Mozambique's Refugee Act.¹¹⁷ Like South Africa, Mozambique's Act uses the same definition of refugee as the 1951 Convention, with the extended definition from the 1969 AU Convention, which includes events seriously disturbing the public order.¹¹⁸ It could therefore be argued that this legislation protects those displaced across borders due to climate change, if they satisfy the extended definition of the term refugee. While not directly dealing with the issues of statelessness, this will provide displaced individuals with protection, and can lead to permanent residency, and citizenship through the naturalisation process. Article 12 of the Refugee Act states that the Republic of Mozambique may authorise the acquisition of citizenship through naturalisation for persons with refugee status who seek to acquire such nationality, as long as the requirements of legislation concerning nationality have been met.

Mozambique's 2004 Constitution is the primary law on nationality.¹¹⁹ This is supplemented by the 1975 Nationality Act and Regulations (as amended). The legislation and regulations apply to the extent that they do not contradict the provisions of the Constitution. The 2004 Constitution provides for gender equality in nationality laws and aims to reduce childhood statelessness by providing for Mozambican nationality for all persons born on Mozambican territory. This is consistent with Mozambique's obligations under the ACRWC to which it is also a party. Article 27 of the Constitution also provides for the acquisition of citizenship through naturalisation, for persons who have been legally and habitually resident in Mozambique for at least ten years. This implies that displaced persons, who have become stateless persons, must wait for at least ten years, to apply for a new nationality.

(ii) Does the current framework offer sufficient protection?

First, does the legal framework protect those displaced across borders and thereby rendered stateless? For those stateless persons who qualify as refugees, such as those fleeing conflict or violence induced by climate change, or those fleeing sudden-onset disasters, they are protected by international and national refugee law. They also may potentially become citizens through naturalisation and will no longer be stateless. However, there is a major practical obstacle to refugees who are also stateless making use of the naturalisation laws and regulations. The regulations to the Refugee Act require certain information and documentation for an application for the acquisition of citizenship by naturalisation, such as a birth registration certificate, identity document or passport.¹²⁰ Clearly, for stateless persons, providing some of

¹¹⁷ Mozambique: Act No. 21/91 of 31 December 1991 (Refugee Act), available at <https://www.refworld.org/docid/3ae6b-4f62c.html>, accessed on 05 May 2022.

¹¹⁸ Ibid. Art 1.

¹¹⁹ The Constitution of the Republic of Mozambique 2004.

¹²⁰ Ibid. Art 14.

these items is simply not impossible. Therefore, while they may enjoy the protection of refugee law, they are likely to remain stateless. Many refugees, too, cannot meet these requirements because they may not have these documents, in particular, the passport.

For those persons who were displaced from foreign territories by slow-onset disasters, there is currently no protection in place. Domesticating the Statelessness Conventions would provide some level of protection for those persons rendered stateless due to climate change. This is equally as important for Mozambican nationals, as a major issue specific to Mozambique is the return of Mozambican nationals from foreign countries, who have no means of proving their nationality on return to Mozambique. Whether due to violent conflict or weather-related disasters, thousands of Mozambican nationals have crossed borders to escape these events. This is likely to continue due to Mozambique's vulnerability to disasters and the ongoing violence in the Cabo Delgado province.¹²¹ When these persons return to Mozambique after fleeing such events, due to the inconsistent nationality laws and application thereof within Mozambique, which is discussed below,¹²² these persons may find it difficult to realize their rights as citizens and have no protection under refugee law, leaving them particularly vulnerable.

Secondly, does the legal framework protect those born stateless within Mozambique? Both the 2004 Constitution and 1975 Nationality Act provide for Mozambican citizenship to be acquired at birth when a child is born on Mozambican territory to parents who are stateless, of unknown nationality or whose parents are unknown.¹²³ It would seem then that children born to foreign nationals on Mozambican territory are therefore protected from being stateless, as they acquire citizenship at birth. There are, however, practical obstacles to this. Mozambique's nationality laws are based on the existence of a comprehensive network of civil registries ensuring universal birth registration and issuance of identity documents.¹²⁴ Despite this, birth registration rates remain low, largely due to the inaccessibility of these civil registers.¹²⁵ Between 2000 and 2009, only 31 percent of children under the age of five years old had their births registered in Mozambique.¹²⁶ As of 2019, birth

¹²¹ OCHA 'Mozambique key message update: Attacks in northern Mozambique continue to displace households as the rainy season nears' (September 2022), available at <https://reliefweb.int/report/mozambique/mozambique-key-message-update-attacks-northern-mozambique-continue-displace-households-rainy-season-nears-september-2022>, accessed on 10 October 2022.

¹²² UNHCR 'Fighting Statelessness' available at <http://citizenshiprightsafrika.org/wp-content/uploads/2016/07/UNHCR-Mozambique-Statelessness-Project.pdf>, accessed on 04 May 2022. UNHCR 'Fighting Statelessness' available at <http://citizenshiprightsafrika.org/wp-content/uploads/2016/07/UNHCR-Mozambique-Statelessness-Project.pdf>, accessed on 04 May 2022.

¹²³ Constitution of Mozambique, Art 23; and the 1975 Nationality Act, art 8.

¹²⁴ Patricia Jerónimo 'Report on Citizenship Law: Mozambique' GlobalCit May 2019 at 2, available at https://cadmus.eui.eu/bitstream/handle/1814/62966/RSCAS_GLOBALCIT_CR_2019_06.pdf?sequence=1, accessed on 18 May 2022.

¹²⁵ UNHCR 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Mozambique' 2010 at 10, available at <https://www.refworld.org/pdfid/4c3abd512.pdf>, accessed on 18 May 2022.

¹²⁶ Bronwen Manby 'Statelessness in Southern Africa' UNHCR 2011 at 13, available at <https://www.refworld.org/pdfid/50c1f9562.pdf>, accessed on 18 May 2022.

registration rates were still below 50 percent.¹²⁷ Therefore, these legal protections may not be realized in practice.

For children born to Mozambican parents in a foreign country, the situation is even less certain. As discussed above, Mozambique is no stranger to disasters or extreme weather events. It is therefore likely that Mozambican nationals who have fled to a neighbouring country due to the impacts of climate change will give birth in that country, especially during periods of prolonged displacement. According to Article 24 of the 2004 Constitution, for a child to have Mozambican nationality, a declaration must be made by the child's parents, within a year of birth, that the parents wish the child to have Mozambican nationality. If this is not done, the child is able to make the declaration themselves, within a year of attaining majority. It is important to note that in this scenario, nationality is not automatically acquired. A process must be followed. For some children born across the border, whether it be due to lack of access to civil registry offices or lack of knowledge, a declaration may never take place, rendering such children at risk of statelessness. Furthermore, when making the declaration, a person, either the child or their parents, depending on the scenario, is required to provide certain information and documentation, such as proof of birth registration.¹²⁸ For vulnerable persons displaced due to climate change, it may not be possible to obtain these documents, putting these children at further risk of statelessness.

(iii) Incoherent legal framework

The main issue with Mozambique's legal framework on nationality is that it is incoherent and inconsistently applied. The 2004 Constitution did not repeal the 1975 legislation and regulations. Rather, as stated above, these continue to exist as supplementary to the Constitution and will apply in so far as they do not contradict the Constitution.¹²⁹ However, it is not always straightforward to determine whether a provision is contradictory or supplementary. For example, the 2004 Constitution provides for a list of grounds for attribution of citizenship, which is shorter than the list contained in the 1975 Act. While the wording of the Constitution indicates that the intention was for the list to be exhaustive, it could be interpreted in a way that the list in the Act supplements the list in the Constitution.¹³⁰ There has been no clear guidance provided on these rules, leaving state officials to decide for themselves what rules apply and when. This leads to inconsistent application of nationality laws at the provincial and national levels.¹³¹

¹²⁷ Patrícia Jerónimo op cit note 124.

¹²⁸ Constitution of Mozambique, Art 23(3).

¹²⁹ Patrícia Jerónimo op cit note 124.

¹³⁰ Ibid.

¹³¹ UNHCR op cit note 125.

(iv) *Recommendations*

First and foremost, Mozambique should domesticate the provisions of the Statelessness Conventions to ensure maximum protection for stateless persons and to reduce further instances of statelessness.

Like South Africa, Mozambique should amend the current definition of refugee in its Refugee Act to explicitly provide for refugee status where persons are displaced across borders due to the impacts of climate change. This will ensure that such persons, when stateless, at least enjoy the rights and protections afforded to refugees.

To prevent confusion with regard to nationality laws, Mozambique should repeal the 1975 Nationality Act and Regulations and enact new nationality legislation that is in line with the 2004 Constitution and should provide detailed guidance on how the rules are to be applied in practice. This is a step that the UNHCR has been recommending for several years.¹³²

With regards to children born in foreign territories to Mozambican parents, considering that Mozambique already has a nationality law framework with a combination of *jus soli* and *jus sanguinis* principles, it may be worth including in the new legislation a provision to the effect that children born to Mozambican parents abroad are automatically considered Mozambican citizens. The provision can include something to the effect that such children must affirm their wish to *retain* their Mozambican nationality within a certain period following the age of majority.

Finally, for stateless persons looking to naturalise as Mozambican citizens, should their application for citizenship be denied, the only option is for them to appeal to the Minister of Justice.¹³³ This is a limited and potentially time-consuming avenue for stateless persons to be forced to take, and will likely result in an extended period of statelessness. Therefore, for a state that has acceded to the 1961 Convention, it may be advisable to provide for an alternative form of review, such as a judicial review of naturalisation application decisions.

(c) *Tanzania*

(i) *Current legal framework*

Unlike Mozambique, Tanzania has not acceded to either the 1954 or the 1961 Statelessness Conventions. Yet, Tanzania is a State Party to a number of international and regional human rights treaties.¹³⁴ Tanzania is also among the States Parties to the 1951 UN Refugee Convention and 1969 AU Refugee Convention, both of which

¹³² Patrícia Jerónimo op cit note 124.

¹³³ Patrícia Jerónimo op cit note 124.

¹³⁴ The 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1989 Convention of the Rights of the Child (CRC), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the 1990 African Charter on the Rights and Welfare of the Child (ACRWC).

have been domesticated into its national legislation. The Refugees Act No. 9 of 1998 was promulgated to repeal its predecessor Refugees (Control) Act of 1966. Although the Refugees Act is silent on how refugees can be naturalised, however, the country has a comprehensive solution strategy policy commonly known as the Tanzania Comprehensive Solutions Strategy (TANCOSS) of 2017 that granted citizenship to refugees and asylum seekers from Burundi in 2020, but also refugees from Rwanda, Somalia, were granted citizenship before in 1982.¹³⁵ Tanzanian group naturalisation for refugees has been commended as one of the durable solutions to end the refugee situation and, by extension, statelessness.

Tanzania ratified the ACRWC of 1990, and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which all contain provisions on the right to a nationality. For that reason, Tanzania is under the obligation to protect the right to a nationality and the rights of stateless persons, including taking action to prevent statelessness. Article 6 of the ACRWC confirms that every child has the right to a nationality and the States Parties have an obligation to grant nationality to otherwise stateless children born on the territory.

In Tanzania, the right to nationality is provided for under the Citizenship Act, 2002 (Cap 357 R.E.2002). This Act states that there are three ways in which nationality can be acquired in Tanzania: by birth, descent, and naturalisation. However, the Citizenship Act does not guarantee the right to a nationality for stateless persons. Since Tanzania is not a party to the 1954 and 1961 Statelessness Conventions, the protection of stateless persons remains uncertain. For example, the African Court on Human and People's Rights in the case of *Anudo Ochieng Anudo v United Republic of Tanzania*¹³⁶ indicated that under Tanzanian law, the acquisition of nationality by birth does not have recourse to a judicial remedy where such nationality cannot be recognised.¹³⁷

The Tanzania Citizenship (Amendments) Regulations 2017 brought some changes to grant citizenship to persons who would be otherwise stateless. Despite these changes, there is still a significant number of persons who are at high risk of being stateless. These include persons who are displaced due to climate change and cross-border migration, like refugees.

Furthermore, the legal framework in Tanzania provides an example of how unequal or discriminatory nationality laws, when applied in the context of climate-induced displacement, can be particularly unjust and contribute to statelessness. For example, the Citizenship Act has been viewed as discriminatory in nature because it does not afford equal rights to women and men to pass on citizenship to their spouses. A married woman cannot pass nationality to her foreign/stateless spouse on an equal basis as a married man. Section 11(1) states that:

¹³⁵ Amelia Kuch 'Naturalization of Burundian refugees in Tanzania: The debates on local integration and the meaning of citizenship revisited' (2017) 30 *Journal of Refugee Studies* 468–87.

¹³⁶ African Court on Human and Peoples' Rights, App No 012/2015, Judgement of 22 March 2018 116, available at <http://www.african-court.org/en/index.php/56-pending-cases-details/877-app-no-012-2015-anudo-ochieng-anudo-v-united-republic-of-tanzania-details>, accessed on 19 May 2022.

¹³⁷ A Kuch op cit note 135.

a woman who is married to a citizen of Tanzania shall at any time during the lifetime of the husband be entitled, upon making an application in the prescribed form, to be naturalised as a citizen of the United Republic.

This implies that non-citizen women are entitled to naturalisation once they are married, but non-citizen men do not qualify for automatic naturalisation. Such discriminatory laws have an increased effect on vulnerable populations, such as those displaced by climate change. For instance, should a stateless male from a foreign country find himself in Tanzania as a result of climate-induced displacement, and find himself in a scenario where he is marrying a Tanzanian woman, he would not be able to receive his wife's nationality and would remain stateless. Therefore, gender inequalities in the Tanzanian nationality laws can lead to and exacerbate statelessness, including that induced by climate change.

(ii) Does the current framework offer sufficient protection?

Stateless persons who qualify as refugees, such as those fleeing conflict induced by climate change, or those fleeing sudden-onset disasters, are protected by international and national refugee law. They are likely to become Tanzanian citizens through naturalisation. However, gender inequalities and limitations imposed under the Citizenship Act as mentioned above, are among the obstacles that can prevent stateless refugees and other types of stateless persons from benefitting from the naturalisation laws, regulations, and policies. In essence, there is no legal framework in place to effectively protect the rights of stateless persons or people who are at risk of becoming stateless, like the offspring of refugees in protracted displacement and those who are displaced due to the impact of climate change in Tanzania.

The law in Tanzania allows a woman who renounced her Tanzanian nationality due to marriage to a man of a different nationality, to reclaim her citizenship after divorce; however, the same protection is not afforded to men. Likewise, gender discrimination exists in the aspect of the acquisition of nationality by descent. Although a person can become a citizen by descent if either the father or mother is a citizen of Tanzania, this does not apply if the parent's citizenship was solely descent-based. This discrimination becomes an issue since it may lead to statelessness if nationality was acquired by descent. The Citizenship Act provides that where a person's father was a citizen by descent, the child can acquire citizenship through naturalisation. This revokes what would be a gender-neutral aspect of the acquisition of nationality by descent, since a person born outside Tanzania to a Tanzanian mother who is a citizen by descent, would not be covered under this provision. Accordingly, citizenship of Tanzania does not transmit to the second generation born outside the country; this can create risks of statelessness if the children are unable to acquire the citizenship of the country in which they were born.

Moreover, a naturalised citizen can be deprived of citizenship on various grounds, including: obtaining citizenship by fraud; demonstrating disloyalty towards the state;

and residing abroad for more than five years without communicating an intention to retain their Tanzanian citizenship. Before the deprivation decision is made, the Minister must determine that a continuation of citizenship is 'conducive to the public good' in the broad sense. However, this provision on deprivation of citizenship does not apply to citizens by birth. This creates a hierarchy of citizenship whereby birth citizenship is less perilous than naturalised citizenship. The Immigration Act, CAP 54 (R.E. 2016), which amended the previous Immigration Acts of 1995, 1997, 2002, 2004, 2008, and 2015, puts the burden of proof of citizenship on the person alleged to be a non-citizen, instead of the state.¹³⁸ In the landmark decision in the Anudo's case in 2018 on the revocation of Tanzanian nationality, the court held that Tanzania had arbitrarily deprived Anudo of his nationality, by violating Article 15(2) of the Universal Declaration of Human Rights and Article 13 of the ICCPR.

What is important to note about Tanzania, unlike South Africa, the Constitution of 1977 as amended, does not clearly state the right to a nationality. Instead, it refers to the 'citizen or citizenship' in terms of 'citizenship law' in several sections, such as sections 5, 47, and 67. This is a *lacuna* in law that undermines the universal norm of the supremacy of the Constitution and favours parliamentary sovereignty. Under President Jakaya Kikwet's regime, Tanzania started the constitutional review processes. The Constitutional Review Act was enacted in 2011. But such an Act underwent three amendments to improve and broaden public participation. The first amendment was approved by the Parliament on 10 February 2012 and urged the Tanzanian Mainland and Island (Zanzibar) to engage and agree on fundamental matters pertaining to the constitutional review process, that included having representatives from both sides of the Tanzanian Union (Tanzania Mainland and Island or Zanzibar).

Since the promulgation of the Constitutional Review Act in 2011, there has been a call to amend the Constitution. The Draft Constitution sets out provisions that address some of the shortcomings in the national laws, which include citizenship acquisition for foundlings under seven years of age; and providing that any person who marries a Tanzanian citizen may apply for citizenship by registration. However, the Draft Constitution contains no provisions against the deprivation of nationality. Although the Draft Constitution was submitted in December 2013, the Referendum to adopt the Constitution was postponed, and following the presidential elections of 2015, the Draft Constitution is still pending a referendum.

(iii) Does Tanzania's legal framework protect those displaced across borders due to climate change?

Answering this question requires that recognition be given to the large portion of the Tanzanian population that originates from other states. Since most African countries gained independence, protracted armed conflicts or violence have encouraged cross-border migrations. Conflicts in countries like Mozambique, Rwanda, Burundi, the

¹³⁸ The Immigration Act, 2016 s44(b).

Democratic Republic of the Congo, Congo-Brazzaville, Uganda, Ethiopia, Somalia, Angola, and South Africa during apartheid, led to many people seeking asylum in Tanzania. In line with its pan-African spirit and support for liberation struggles, Tanzania welcomed refugees to reside and settle in rural refugee settlements.¹³⁹ Some of the refugees eventually left the settlements where they were required to stay and mixed with the local communities.¹⁴⁰ While some of these persons may have been able to naturalise and acquire Tanzanian citizenship, many are in a situation where they do not have Tanzanian nationality, nor can they prove the nationality of their country of origin, especially, of their offspring. Some may no longer have the nationality of their country of origin due to the relevant state's nationality laws pertaining to long absence and passing on nationality to children. This population is therefore already at severe risk of statelessness.

(iv) Does Tanzania's legal framework protect those born stateless within its territorial boundaries?

Under municipal law, there are principles that guide nationality acquisition, which means, nationality by birth or *jus soli*,¹⁴¹ by blood or *jus sanguinis*, or a combination of two principles.¹⁴² The immigration and/or nationality laws in Tanzania have created a class of persons who can register as citizens but never did despite continued residence in Tanzania. Put clearly, there is no political will to implement the nationality laws. Therefore, the *jus soli* provision had been interpreted and applied literally, while some persons can be viewed as Tanzanian citizens by birth.¹⁴³ In this context, the persons who cannot be categorised as Tanzanians by birth or blood can be expelled or deported to another country but will be unable to prove their nationality and in some instances, such expulsion may result in stateless status.

The authors argue that the basic principle for nationality recognition and acquisition must always be mindful of the genuine and strong link between a given state and individuals. Such a link is a fundamental one in determining the claim of nationality since the state in a practical sense is not always ready to grant nationality to all individuals. Hence, there are requirements that must be met to prove the linkage between an individual and the state. For example, the common law principle of *jus soli* requires that nationality must be acquired by virtue of being born on a country's territory.¹⁴⁴ However, some states apply *jus soli* in a limited form of acquiring nationality and set conditions for individuals who are born on the territory to meet certain conditions to obtain nationality, if Tanzania can be cited among other

¹³⁹ Caroline Nalule & Anna Nambooze 'Report on citizenship law: Tanzania' GlobalCit April 2020 at 22, available at <http://hdl.handle.net/1814/66748>, accessed on 18 May 2022.

¹⁴⁰ Peti Siyame 'Tanzania: Nchemba tells former refugees – behave, else you forfeit citizenship' *Tanzania Daily News* 24 August 2017, available at <https://citizenshiprightsfr.org/tanzania-nchemba-tells-former-refugees-behave-else-you-forfeit-citizenship/?lang=fr>, accessed on 25 May 2022.

¹⁴¹ Hudson Report on nationality, including statelessness, A/CN.4/50 (1952), available at <https://digitallibrary.un.org/record/1299414?ln=en>, accessed on 25 May 2022.

¹⁴² *Ibid.*

¹⁴³ Caroline Nalule & Anna Nambooze op cit note 139.

¹⁴⁴ Laura van Waas *Nationality Matters: Statelessness under International Law* (2008) at 52.

examples.

Occasionally states use what Vela calls a conditional form of *jus soli*, which tends to limit the right to nationality and other fundamental human rights.¹⁴⁵ Some countries apply a limited form of *jus soli* and set out conditions for individuals born on their territories to obtain nationality or be recognised as their citizens. Likewise, the *jus sanguinis* principle recognises descent or parentage as the indication of a genuine link.¹⁴⁶ Also, some issues arise due to the application of the *jus sanguinis* principle, which plays a critical role in the continuation of statelessness.¹⁴⁷

(v) Incoherent legal framework

Like Mozambique's legal framework on nationality, the Tanzanian legal framework is incoherent and inconsistently applied. In many instances, the limitations imposed under the Citizens Act, the Immigration Act, and the Refugee Act, tend to limit the application of *jus soli* and violate the basic human rights of stateless persons, especially children of undocumented refugees, cross-border migrants like Comorians who have lived in Zanzibar for many years, the Makonde tribe that migrated from Northern Mozambique, and Burundians, Rwandese, Congolese, Kenyans, and Ugandans who migrated to Tanzania due to the massive labour recruitment during colonial rule, who came to work in the sugar, tea and coffee plantations. Similarly, the children of displaced persons, due to the impacts of climate change, are likely to face statelessness challenges because they may not benefit from *jus soli* and *jus sanguinis* or may even not be granted citizenship by naturalisation.

(vi) Recommendations

Like Mozambique, Tanzania should accede to both Statelessness Conventions and domesticate the provisions of the Statelessness Conventions to ensure the protection of stateless persons and to reduce further instances of statelessness. We recommend that, like South Africa, Tanzania should amend the current definition of refugee in its Refugee Act and extend it to include refugee status when persons are displaced across borders due to the impacts of climate change. This will ensure that such persons can still enjoy the rights and protections afforded to refugees under the refugee conventions and other human rights instruments. Such protection can deter them from becoming stateless persons.

To prevent confusion with regards to nationality laws, Tanzania should amend the Constitution and Citizenship Act and clearly provide for the right to nationality to be in line with the international human rights law by providing practical guidelines in ensuring that stateless persons who are displaced across borders due to the impacts of climate change are fully protected. The Tanzanian government should also provide detailed guidance on how the rules are to be applied in practice.

¹⁴⁵ María José Recalde Vela op cit note 2 at 17.

¹⁴⁶ Ibid.

¹⁴⁷ Laura van Waas op cit note 144 at 52.

Statelessness situations that occur in cross-border migration result in persons losing or being deprived of their nationality without having a habitual residence.¹⁴⁸ Also, Tanzanian nationals can become stateless within Tanzania or if they are displaced across borders. Furthermore, in Tanzania, like South Africa and Mozambique, stateless persons may remain in their respective countries but still become stateless in the long term due to inadequacies in the national law and policy frameworks or implementation of nationality laws. We recommend that children born in foreign countries to Tanzanian parents automatically benefit from the application of *jus soli* and *jus sanguinis* principles. The laws should be amended to allow children born to Tanzanian parents outside of Tanzania to automatically become Tanzanian citizens. For example, children born to foreign parents must acquire Tanzanian citizenship, and then children of Tanzanians born outside Tanzania should also acquire citizenship of the country in which they were born to the unfair discrimination in acquiring nationality. If children of Tanzanians born outside Tanzania must acquire Tanzanian citizenship, likewise, the children born to foreign parents in Tanzania must acquire citizenship of their foreign parents to avoid the possibility of becoming stateless. This can be among the solutions to reduce statelessness in Tanzania.

Finally, for stateless persons who wish to naturalise as Tanzanian citizens, should their application for citizenship be denied — like in the Anudo's case — alternative remedies of review and judicial review of naturalisation applications must be utilised to limit the powers of the Minister of Home Affairs, who is currently empowered to grant nationality while his/her decisions cannot be challenged.¹⁴⁹

IV. CONCLUSION

There are currently two related crises affecting nations of Southern Africa: statelessness and climate change. The UNHCR has recognised that there are potentially millions of stateless persons in the Southern African region, as they are not, or would not be, considered nationals of any state under the operation of law. When the broader definition of statelessness is considered, where all persons who are unable to establish a nationality are considered stateless, this number is likely to be even greater.

These numbers are likely to continue to rise while widespread displacement continues to ravage the region. Much, if not most of this displacement, is caused by climate change and the impacts thereof. The African continent and the Southern African region are particularly vulnerable to these impacts. These impacts, such as slow- and rapid-onset disasters are only likely to increase in both frequency and intensity. When these disasters lead to permanent cross-border displacement and are combined with issues such as low birth registration, lack of documentation, protracted situations of displacement, and inconsistent or unequal nationality laws, the result can be a catastrophic worsening of the current statelessness problem in the

¹⁴⁸ UNHCR *Handbook on Protection of Stateless Persons Under the 1954 Convention Relating to the Status of Stateless Persons* (2014) at 3.

¹⁴⁹ The Citizenship Act, s23.

region.

International and regional legal instruments have highlighted the problem of statelessness and provided a roadmap to prevent it and protect those who are already stateless. Unfortunately, at the national level, Southern African countries have been slow to implement similar legal developments. States such as South Africa and Tanzania should immediately take steps to accede to both Statelessness Conventions. States such as Mozambique, which have already acceded to the Statelessness Conventions, should take steps to domesticate these instruments and implement statelessness determination procedures. All states should ensure that their current nationality laws are implemented effectively and amended where necessary to avoid further situations of statelessness. These and further recommendations discussed in this article will go a long way towards preventing and reducing statelessness in general.

To prevent climate change-induced statelessness in particular, more targeted steps are required. These can include humanitarian visas, special permanent residence exemption permits, or refugee status for those displaced by climate change and its impacts. All these options will provide a legal basis for remaining in the host country and must be accompanied by a naturalisation procedure. Legislative reforms are required in South Africa, Mozambique, and Tanzania in order to provide these rights and protections.

Both statelessness and climate change are problems that cannot be confined to any state's borders. Fighting both crises requires concerted efforts on a national level as well as regional cooperation. Southern African nations must start taking steps to respect and protect their people by ensuring the most basic and fundamental of human rights, the right to a nationality.

Challenging the Practice of Administrative Detention for Stateless Persons in South Africa

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Abstract

In South Africa, section 41 of the Immigration Act requires any person approached on reasonable grounds by a police officer or immigration officer to identify themselves either as a citizen or as a person lawfully present in the Republic. Anyone unable to identify themselves as persons lawfully in South Africa will be deemed to be illegally present and hence subject to an arrest, detention, and possible deportation. This detention can go on for a period of 120 days. This 'unlawful' status automatically entitles immigration officials to arrest and detain such persons, but with the caveat that if such persons express an intention to apply for refugee status their asylum application must be permitted and facilitated. Stateless persons are, by definition, unable to demonstrate their legal presence or provide a valid identity document. They would therefore be deemed to be unlawfully present and therefore detained. This section of the Immigration Act is especially prejudicial to stateless persons since South Africa has no status determination procedure for stateless persons. This paper intends to demonstrate the unlawfulness of the laws regarding the immigration detention of stateless persons and seek an alternative approach or a remedy that could be implemented for stateless persons arrested without the means to identify themselves as legally present in South Africa.

Keywords: statelessness, arbitrary arrest, non-refoulement, status determination, Southern Africa

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I. INTRODUCTION

South Africa has long viewed cross-border movements through the lens of national security, social instability and criminality.¹ The Department of Home Affairs' (DHA) 2017 White Paper on International Migration² (hereafter, the 2017 White Paper) underscores that South Africa is a 'destination for irregular migrants (undocumented migrants, border jumpers, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country.'³ This position was reinforced in the Border Management Authority Act, adopted in July 2020.⁴ Although the DHA's 2017 White Paper recognises the role of migration in development such as the need to provide protection for refugees and the benefits of visa-free travel, these seemingly progressive plans are framed within the context of threats to national security posed by migration and refugee movements. It emphasises the adoption of policies that can improve enforcement and as a result, detention, and deportation, feature prominently in the 2017 White Paper. The inherently punitive nature of detention is reinforced by the language used by the 2017 White Paper which is steeped in notions of criminality. The use of terms such as 'repeat offenders' and 'illegal migrants' rather than undocumented persons in the 2017 White Paper contributes to the unnecessary criminalisation of migrants because the arrests and detention envisaged by the Immigration Act are administrative rather than criminal.⁵ As a result of the evident punitive nature of the detention of migrants in practice, South Africa's migration-related detention policies have drawn criticism for many years. In particular, the operations and conditions at the only long-standing dedicated immigration detention centre — the privately-operated Lindela Repatriation Centre — have been criticised, along with its use of police stations (not listed as legitimate places of detention) and prisons to hold people for immigration purposes, the endemic corruption in the police and immigration bureaucracies that operate detention sites as well as administer the asylum process.⁶ 'Numerous reports over the years have highlighted allegations of abuses at detention facilities, prolonged detention periods and repeated accusations of arbitrary detention, as well as overcrowding and poor sanitation, among other problems.'⁷ Clearly, South Africa has disregarded a protection-based approach to managing vulnerable non-citizens in favour of a risk-based approach, as seen in its latest 2017 White Paper and Border

¹Global Detention Project Country Report *Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration*, 28 June 2021, available at <https://www.globaldetentionproject.org/immigration-detention-in-south-africa-stricter-control-of-administrative-detention-increasing-criminal-enforcement-of-migration>, accessed on 18 June 2022.

²The White Paper on International Migration (GN 750 in GG 41009 of 28 July 2017).

³Ibid at 35.

⁴The Border Management Authority Act 2 of 2020.

⁵Op cit note 2.

⁶Lawyers for Human Rights 'Monitoring immigration detention in South Africa' September 2010, available at http://www.lhr.org.za/sites/lhr.org.za/files/LHR_2010_Detention_Report.pdf, accessed on June 2022.

⁷See South African Human Rights Commission Investigative Reports Volume 4 *Médecins Sans Frontières and others — The Department of Home Affairs and others* complaint number GP/2012/0134 (2012); Solidarity Peace Trust and PASSOP *Perils and Pitfalls – Migrants and Deportation in South Africa* 5 June 2012.

Management Authority Act.⁸

South Africa's securitisation and punitive approach are particularly worrisome in the cases where individuals are unable to identify themselves as stateless persons. In the simplest form, it can be said that a stateless person is a person without a nationality. It is trite that with a nationality most nationals enjoy the protection of their governments. By means of their nationalities, they will have the right to documentation, access to courts and various civil and social rights. Stateless persons who are not nationals of any country will therefore clearly lack legal protection⁹ and may never be able to identify themselves and satisfy the DHA that they are legally in South Africa. The question thus arises whether the administrative detention for the purposes of deportation of a stateless person is lawful.

This paper argues that it is necessary to establish a protection mechanism for stateless persons who are arbitrarily arrested in South Africa, and that such a proposed protection mechanism must be tethered to the international protection framework. This paper furthermore draws attention to the injustices of applying immigration law indiscriminately to all persons who are not South African. It lays plain the inefficiencies of a system that promotes arrest and detention for the purposes of deportation against persons who cannot practically be removed and illustrates the human suffering that often results when they are kept in immigration detention. This paper also explains how South Africa's immigration law is ill-suited to provide the necessary protection for stateless persons and emphasises a call for complementary protection. It proposes first and foremost a way to identify persons as stateless as expeditiously as possible and thereafter a remedy for the administrative detention of stateless persons.

II. INSUFFICIENT PROTECTION FOR STATELESS PERSONS IN SOUTH AFRICA NOTWITHSTANDING A HUMAN RIGHTS APPROACH

A recent United Nations High Commissioner for Refugees (UNHCR) report indicates that statelessness in Southern Africa is driven primarily by colonial history, border changes, migration, poor civil registry systems and discrimination based on gender, ethnicity and religion.¹⁰ Gaps in nationality laws, low birth registrations and forced displacement are some of the causes of statelessness.¹¹ Even where the legal provisions are in place to protect against statelessness, there are often practical impediments.¹² While many legal gaps remain in Southern Africa, effective civil registration is almost as important as the laws themselves. The practicalities of

⁸Op cit note 2; Op cit note 4.

⁹See Laura van Waas *Nationality Matters: Statelessness under International Law* (2008); Katia Bianchini 'The "stateless person" definition in selected EU member states: Variations of interpretation and application' (2017) 36(3) *Refugee Survey Quarterly* 81; Paul Weis *Nationality and Statelessness in International Law* 2 ed (1979).

¹⁰Bronwen Manby 'Statelessness in Southern Africa' (2012) Briefing paper for the UNHCR, available at <https://www.refworld.org/pdfid/50c1f9562.pdf>, accessed on June 2022.

¹¹Aimée-Noël Mbiyozo 'Statelessness in Southern Africa: Time to end it, not promote it' (2019) Institute for Security Studies: Southern Africa Report 32, available at <https://issafrica.org/research/southern-africa-report/statelessness-in-southern-africa-time-to-end-it-not-promote-it>, accessed on July 2022.

¹²Ibid.

obtaining documents are more common barriers than a legal denial of nationality.¹³ According to Bronwen Manby, statelessness can have a terrible impact on the lives of individuals.¹⁴ She states, ‘possession of a nationality, and official recognition of that nationality, is essential for full participation in society and the enjoyment of the full range of human rights’. She highlights further in her recent analysis of the impact of target 16.9 of the United Nations sustainable development goals (SDGs) on the issue of a legal identity for all, the importance of the possession of nationality.¹⁵

Even though the grant of nationality is not an international law issue and that there is recognition that it is the prerogative of individual states to decide how to regulate nationality, it is also evident that states cannot disregard international conventions. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930 Hague Convention) did not create an individual right to nationality; states alone grant and withdraw nationality. Article 1 provides that it is ‘for each State to determine under its own law who are its nationals’. However, Article 1 also provides that ‘[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.’¹⁶

Since South Africa has ratified various international human rights treaties, the South African Constitution¹⁷ allows for only some rights to be limited to nationals, including the right to vote and stand for public office, but most human rights are to be enjoyed by ‘everyone’.¹⁸ In practice, however, many rights of stateless people are violated; they may be detained because they are stateless, they can be denied re-entry to or expelled from the country where they live, they can be denied access to education and health services, or blocked from obtaining employment.¹⁹ The above treatment of stateless persons in South Africa is best summed up in David Owen’s paper when he states that

[T]he momentous development of the international system for protection of human rights since World War II, the citizenship of a person determines how she is treated by this system; the rights people effectively have are still generally

¹³Ibid.

¹⁴Manby op cit note 10.

¹⁵Bronwen Manby “‘Legal identity for all’ and statelessness: Opportunity and threat at the junction of public and private international law (2020) 2(2) *Statelessness and Citizenship Review* 248–271, available at <http://dx.doi.org/10.2139/ssrn.3783310>

¹⁶Michelle Foster and Timnah Rachel Baker ‘Racial discrimination in nationality laws: A doctrinal blind spot of International Law? (2021) 11(1) *Columbia Journal of Race and Law*.

¹⁷The Constitution of the Republic of South Africa, 1996.

¹⁸Note all the rights in the Bill of Rights that refer to everyone. Rights in the Constitution that refer to ‘everyone’ include the rights to: Equality at section 9; Human dignity at section 10; Life at section 11; Freedom and security of the person at section 12; Privacy at section 14; Freedom of religion, belief and opinion at section 15; Freedom of expression at section 16; Assembly, demonstration, picket and petition at section 17; Freedom of association at section 18; Freedom of movement and residence at section 21; Labour relations at section 23; Environment at section 24; Housing at section 26; Health care, food, water and social security at section 27; Education at section 29; Language and culture at section 30; Access to information at section 32; Just administrative action at section 33; Access to courts at section 34; and Arrested, detained and accused persons at section 35

¹⁹Manby op cit note 10.

determined with a reference to the country they belong to.²⁰

The two international conventions dealing with statelessness are the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention)²¹ and the 1961 Convention on the Reduction of Statelessness (1961 Convention).²² The 1954 Convention was adopted pursuant to the events of the Second World War when many persons lost their right to live as citizens in the territories that they had once considered home. The purpose of the 1954 Convention was to increase international awareness of the plight of stateless people who were not refugees and to provide for their rights in the absence of formal state affiliation.²³ Such rights include the freedom to practice religion, freedom of association, free access to courts and freedom of movement, to name just a few. The obligations of the stateless persons toward their state of residence and the standards of treatment that are due to the stateless are also delineated in the 1954 Convention. In addition, the 1954 Convention provides a definition of statelessness. It states at Article 1 that a stateless person is 'a person who is not recognised as a national by any state under the operation of its laws.'²⁴ The 1961 Convention arose to provide solutions to statelessness, which the 1954 Convention did not provide. It does this by outlining measures to diminish the incidence of statelessness at birth and by demarcating the boundaries within which statelessness could occur.²⁵ Goodwin-Gill, a leading scholar on statelessness, points out that the 1961 Convention places an obligation on states to grant nationality in certain instances, even though it does not recognise an outright right to a nationality.²⁶

Both treaties, however, are silent on whether and what kind of procedures should be adopted to recognise a person as stateless. Considering the implementation problems that this creates at the national level, the UNHCR, which is the UN agency mandated to protect stateless persons, has provided guidance in its Handbook on the Protection of Stateless Persons regarding the adoption of specific stateless determination procedures (SDPs) and their essential elements.²⁷

In South Africa, stateless persons do not have the protection of the 1954 or the 1961 statelessness conventions as South Africa has not ratified either. In the absence

²⁰David Owen 'On the right to have nationality rights: Statelessness, citizenship and human rights (2018) 65 *Neth Int Law Rev* 299–317, available at <https://doi.org/10.1007/s40802-018-0116-7>.

²¹UN General Assembly, Convention Relating to the Status of Stateless Persons 28 September 1954 United Nations Treaty Series 360 at 117, available at <https://www.refworld.org/docid/3aefb3840.html>, accessed on 21 July 2022.

²²UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961 United Nations Treaty Series 989 at 175, available at <https://www.refworld.org/docid/3aefb39620.html>, accessed on 21 July 2022.

²³1954 Convention Relating to the Status of Stateless Persons.

²⁴*Ibid.*

²⁵1961 Convention on the Reduction of Statelessness.

²⁶Guy S. Goodwin-Gill 'The rights of refugees and stateless persons' in KP Saksena (ed) *Human Rights: Perspective and Challenges (in 1990 and beyond)* (1994) 378–401; Fatima Khan 'Exploring childhood statelessness in Southern Africa' (2020) 23 *Potchefstroom Electronic Journal* 2 at 7.

²⁷UNHCR *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (2014). The Handbook, for instance, provides the following guidelines: sharing the burden of proof between the applicant and the decision-maker (para 89); the standard of proof shall be that of establishing the case to a 'reasonable degree' (para 91); a decision shall be taken within a reasonable time, normally six months (para 75); access to legal counsel shall be ensured and legal aid shall be offered to applicants, if available (para 28); and a right of appeal to an independent body shall be provided (para 76).

of any international recognition of statelessness, this paper intends to answer the important question of how stateless persons can be protected in South Africa in the case of arbitrary arrest and detention of persons when they are unable to identify themselves as legally present in South Africa.

III. THE LAWFULNESS OF ADMINISTRATIVE DETENTION FOR STATELESS PERSONS IN SOUTH AFRICA

A great number of countries resort to administrative detention of irregular migrants in connection with violations of immigration laws and regulations, including staying after the permit has expired, non-possession of identification documents, using somebody else's travel documents, not leaving the country after the prescribed period has expired, etc. In such cases, including in South Africa, the purpose of administrative detention is clear. It is to guarantee that another measure, such as deportation or expulsion, can be implemented.²⁸ Sometimes administrative detention is also admitted on grounds of public security and public order, among others.²⁹

Administrative detention is also allowed by the Immigration Act.³⁰ However, detentions for the purpose of deportation are discretionary administrative detentions authorised by the Immigration Act³¹ and subject to the Bill of Rights³² and the Promotion of Administrative Justice Act.³³ However, it is the practice of the DHA immigration officials and police to enforce a general policy of detaining all suspected illegal foreigners pending deportation,³⁴ rather than employing a discretionary, case-by-case approach. According to the Lawyers for Human Rights (LHR) monitoring report, there is widespread disregard for the rules and regulations of the Immigration Act and the Refugees Act,³⁵ resulting in unlawful and prolonged arrests and detentions of foreigners, many of whom have, in fact, lodged applications for asylum or other statuses.³⁶

Because the majority of stateless persons are undocumented, they could get caught up in this detention frenzy due to their inability to prove legal presence in the country, their inability to qualify for most immigration permits and their lack of awareness of any pathway to attain lawful immigration status.

In South Africa, section 41 of the Immigration Act requires any person approached on reasonable grounds by a police or immigration officer to identify themselves either as a citizen or as a person lawfully present in the Republic.³⁷ Anyone

²⁸Daniel Wilsher 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' *The International and Comparative Law Quarterly* (2004) 53(4) 897-934.

²⁹Relief Web 'Immigration detention in South Africa: Stricter control of administrative detention, increasing criminal enforcement of migration' June 2021, available at <https://reliefweb.int/report/south-africa/immigration-detention-south-africa-stricter-control-administrative-detention>, accessed on July 2022.

³⁰The Immigration Act 13 of 2002.

³¹*Ude v Minister of Home Affairs and another* 2009 (4) SA 522 (SCA) para 7.

³²Op cit note 17 section 35.

³³The Promotion of Administrative Justice Act 3 of 2000.

³⁴Op cit note 31.

³⁵The Refugees Act 130 of 1998.

³⁶Op cit note 6.

³⁷Op cit note 30.

unable to identify themselves as persons lawfully in South Africa will be deemed to be illegally present and hence subject to arrest, detention, and possible deportation. This unlawful status automatically entitles immigration officials to arrest and detain such persons for the purposes of deportation, but with the caveat that if such persons express an intention to apply for refugee status, their asylum application must be permitted and facilitated.³⁸ Stateless persons are, by definition, unable to demonstrate legal presence or provide a valid identity document. They would therefore be deemed to be unlawfully present and vulnerable to detention. Section 41 of the Immigration Act states:

When so requested by an immigration officer or police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.³⁹

At first glance, the inclusion of a section on the arrest and detention of a person for the purposes of deportation who cannot identify as being lawfully in a country in the Immigration Act of any country can be seen as rational because a state is reasonably entitled to control the presence of foreigners in a country.

However, South Africa's identification clause has various limitations. First, it provides for a closed list of legal statuses that the arrested person can be identified as — either as a citizen, permanent resident, or foreigner.⁴⁰ It does not make provision for a stateless person. This section has either not considered the position of a stateless person or it makes the incorrect assumption that all stateless persons are foreigners (or all stateless persons are non-citizens) and therefore deportable if unlawfully present. Secondly, it assumes that everyone should be able to identify themselves. For most stateless persons, that will be an impossibility. This paper acknowledges that it is possible to encounter stateless persons who have some form of identity document or who gained legal residence or immigration status in another country.

Thirdly, this section has not considered the fact that someone may not be able to verify their legal identity or legal status. The Act requires the immigration officer or police officer to assist with verification.⁴¹ Once again, to verify presupposes the existence of a legal identity. The steps that an immigration official or police officer can take to assist in verifying their status are prescribed and they include: accessing

³⁸*Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC); *Nibigira v Minister of Home Affairs and others* (41265/2011) [2011] ZAGPJHC 178 (28 November 2011).

³⁹Op cit note 30.

⁴⁰Ibid.

⁴¹Ibid.

relevant documents that may be readily available; contacting relatives or other persons who could prove such identity and status; accessing departmental records in this regard or providing the necessary means for the person to obtain documents that may confirm their identity and status.⁴²

It should be noted that these steps are written in peremptory language, thereby creating a positive obligation on an immigration officer or a police officer to assist an individual in satisfying the official regarding the individual's immigration status.⁴³ When these steps do not produce a legal identity — which they are not likely to in the case of a stateless person — the question is whether it is by default then that the person is considered stateless.

What is lacking and what is therefore a further limitation in this section and in the Immigration Act generally, is that it has not considered how a person who is unable to identify themselves as a national of any state should be protected or dealt with in terms of South Africa's immigration laws.

It is evident that the plight of stateless persons has not been considered by the Immigration Act and by this section because it has not made provision for a status determination procedure that the person is in fact stateless and not a citizen or national of any country. This is ultimately the gap in the legislation; there is no provision that addresses the scenario where a person may not be able to identify themselves. This section is especially prejudicial to stateless persons since South Africa has no laws to protect stateless persons and no status determination procedure for stateless persons.

In my opinion, this section creates an opening for a remedy for stateless persons arrested arbitrarily and, hence, an opening for a remedy for stateless persons arrested for their so-called illegal presence if a stateless determination procedure could be read in for stateless persons. As harsh as the above section is for stateless persons, this category of persons who are unable to identify themselves as citizens, permanent residents, or foreigners will in the very least have access to justice as guaranteed by the Constitution.⁴⁴ But this requires a legal intervention,⁴⁵ which should in the first instance declare the arrest of a stateless person as arbitrary and therefore unlawful.

IV. CHALLENGING THE ARBITRARINESS OF ADMINISTRATIVE DETENTION

When considering whether the administrative detention of a stateless person is unlawful, the arbitrariness of the detention must be considered. The UNHCR, in its analysis of arbitrary detention, states that '[I]n accordance with international

⁴²The Immigration Act Regulations in GN 413 GG 37679 of 22 May 2014 Regulation 37.

⁴³*Zimbabwe Exiles Forum and others v Minister of Home Affairs and others* (27294/2008) [2011] ZAGPPHC 29 (17 February 2011) para 30.

⁴⁴Op cit note 17 sections 33 and 34.

⁴⁵Ashley Terlouw 'Access to justice for asylum seekers: Is the right to seek and enjoy asylum only black letter law?' in Carolus Grütters, Sandra Mantu, and Paul Minderhoud (eds), *Migration on the Move: Essays on the Dynamics of Migration* (2017).

standards, arbitrariness is to be interpreted to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability.⁴⁶ It thus provides for a broad interpretation of arbitrary detention in line with its protection-based approach of vulnerable persons. In addition, detention will be arbitrary when it is not lawful, when it is resorted to without a legitimate purpose, when it exceeds a reasonable time limit or when no less coercive or intrusive measures are available or appropriate in the individual case being considered.⁴⁷ The following additional criteria can be used in evaluating the arbitrariness of detention such as conditions of detention and the availability of access to an effective remedy while in detention.⁴⁸ Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for the detention of such persons. Furthermore, for detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory.⁴⁹ Indefinite as well as mandatory forms of detention are intrinsically arbitrary. Detention should be used as a measure of last resort and can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective. Once it has been established that a person is stateless and cannot be removed from the territory, their continued detention automatically becomes arbitrary. To hold otherwise would be to condone the potential of indefinite detention which would certainly be unconstitutional if the person has committed no crime.

The unlawfulness of arbitrary detention and arrest is also considered in various international human rights documents. It is considered unlawful, for example, by the Universal Declaration of Human Rights (UDHR),⁵⁰ the International Covenant on Civil and Political Rights (ICCPR),⁵¹ the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMW)⁵² and the Convention on the Rights of the Child (CRC).⁵³ Arbitrariness, for the purposes of these provisions, is best summed up by Alice Edwards when she states that the lawfulness of the arrest and detention requires a consideration of the (insufficiency of) reasonableness, necessity, proportionality, and non-discrimination of the detention.⁵⁴

⁴⁶UNHCR *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) at 15, available at <https://www.refworld.org/docid/503489533b8.html>, accessed on 19 July 2022.

⁴⁷The Equal Rights Trust *Guidelines to Protect Stateless Persons from Arbitrary Detention* (2012), available at <https://www.equalrightstrust.org/ertdocumentbank/guidelines%20complete.pdf>, accessed on 17 July 2022.

⁴⁸UNHCR *Compilation of International Human Rights Law and Standards on Immigration Detention*, February 2018, available at <https://www.refworld.org/docid/5afc25c24.html>, accessed on 22 July 2022.

⁴⁹Alice Edwards 'Back to basics: The right to liberty and security of person and 'alternatives to detention' of refugees, asylum-seekers, stateless persons and other migrants' UNHCR Legal and Protection Policy Research Series PPLA/2011/01. Rev.1 of April 2011, at 20.

⁵⁰Universal Declaration of Human Rights, 1948, articles 3 and 9.

⁵¹International Covenant on Civil and Political Rights, 1966, articles 9 and 12.

⁵²International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 article 16.

⁵³Convention on the Rights of the Child 1989 article 37.

⁵⁴Edwards op cit note 49.

In South Africa, the immigration detention of stateless individuals is therefore inherently arbitrary due to the impossibility of their deportation. In terms of the Immigration Act, in cases where immigration detention lasts over 48 hours, it must be intended for purposes of deportation.⁵⁵ Therefore, where it is determined that a person is stateless and no country will accept them for deportation, their detention becomes a violation of their rights, in terms of the Bill of Rights, to freedom and security of person and to human dignity.⁵⁶

Problematically, no dedicated provision exists in South Africa's Immigration Act for the release of undocumented persons from detention. There are no reported judgments and hence, no reasons given by the judiciary in South Africa clarifying the question of whether a stateless person can lawfully be detained for deportation after it has been determined that they cannot be deported. There are, however, two instances where the judiciary declared the continued detention of stateless persons unlawful. The first is in the case of *Herbert Baluku v Minister of DHA* (Case number 35164/2013) in the North Gauteng High Court where the detention of the stateless person was declared unlawful because he had a pending application for permanent residence, and he was released. Unfortunately, there was no judgment and therefore no reasons provided by the judiciary. The second is in the case of *Mntambo v Minister of Home Affairs*, (Case number 20485/2015) in the Gauteng Local Division High Court, where, as a stateless person, he was detained and deported before the case was heard. His deportation was subsequently declared unlawful. Hence, the law as it stands makes very little provision for the protection from arbitrary detention of persons who cannot be deported, but who also do not qualify as legally present in the territory. This is an impasse, and it appears in the *Nibigira* case, where the judiciary does not appear to find the detention arbitrary, even when the judiciary recognised that deportation is not possible.⁵⁷ The judiciary in this case was focused on the time limits provided by the Immigration Act. In South Africa, the 120 days provided by the Immigration Act were not seen as being punitive and judges appear reluctant to release anyone before the expiration of the 120 days unless a ministerial exemption is granted, as in *Baluku and Mntambo*.⁵⁸

The judgment admitted that 'There is no country that is prepared to acknowledge [the applicant] as a citizen.'⁵⁹ Yet, it argues:⁶⁰

[76] Where would the applicant go if there was a need that he be released from detention? Would that court sanctioned release have meant that he should be

⁵⁵Op cit note 30 section 34(2).

⁵⁶Op cit note 17 sections 12 and 10, respectively.

⁵⁷*Nibigira v Minister of Home Affairs and others* (41265/2011) [2011] ZAGPJHC 178 (28 November 2011).

⁵⁸Ibid. To be noted — the initial period of detention is a maximum of 30 days, at which point one must be brought before a magistrate who may then extend the detention for no longer than 90 days. To be further noted — the court in *Lawyers for Human Rights v Minister of Home Affairs and others* (CCT38/16) [2017] ZACC 22 declared s34(1)(b) and (d) inconsistent with sections 12(1), 35(1)(d) and 35(2)(d) of the Constitution because it did not provide for automatic judicial oversight before the expiry of 30 calendar days; sections 34(1)(b) and (d) were. The challenge against section 34(1)(d) was based on the contention that it did not permit a detainee to appear in person before a court and impugn the lawfulness of their detention.

⁵⁹ Ibid.

⁶⁰Ibid paras 76–77.

allowed to roam South Africa despite the fact that he came in illegally and he has no right or papers to allow him to be here? Must the police or immigration officials not arrest and detain him for deportation again?

[77] Surely the above scenario is not what the legislature intended when this Immigration Law [sic] passed.⁶¹

The issue of time periods for administrative detention is deemed to be controversial in the United Kingdom (UK) law as well because of the absence of a statutory maximum time limit on administrative detention. Some general limitations on and guidance about the length of immigration detention can be found in Home Office policy and case law. According to the policy, immigration detention must be used 'sparingly' and for 'the shortest period necessary'.⁶²

In the *Hardial Singh* case,⁶³ the UK Supreme Court established the principle that the power to detain is limited to a reasonable duration and by circumstances consistent with its statutory purpose and reasonableness. The Supreme Court confirmed this principle in *R (Lumba) v Secretary of State for the Home Department*,⁶⁴ and it further established that migrants may be detained only for the purpose of removal for a reasonable period to achieve that purpose, and if the Home Office is acting with due diligence and expedition to remove them.

V. CHALLENGING THE IMMIGRATION DETENTION OF STATELESS PERSONS IN SOUTH AFRICA

Determining whether there are grounds for release for stateless persons in immigration detention is indeed a difficult task in the absence of their recognition as such in terms of South African law. Typically, release from immigration detention requires the detained individual to have a legal basis to remain in South Africa through a valid immigration status, or a pending application for citizenship status or permanent residence as a dependent child, parent or spouse of a resident or citizen⁶⁵ that can be pursued under the Immigration Act. The other basis is an asylum claim that can be pursued under the Refugees Act.⁶⁶ As stated above, this paper proposes a protection mechanism for stateless persons arbitrarily arrested in South Africa, and such a proposed protection mechanism must be tethered to a protection framework. The international protection framework recommends the reduction of statelessness where possible.⁶⁷ The international protection system also recommends preventing deportation to a place where stateless persons will not be granted citizenship.⁶⁸

South Africa has not ratified the statelessness conventions, but as a result

⁶¹Ibid.

⁶²UK Home Office 'Policy, Detention: General instructions', Version 2.0 of 14 January 2022 at 7.

⁶³*R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704.

⁶⁴*R (Walumba Lumba and another) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

⁶⁵Op cit note 30 section 26.

⁶⁶Op cit note 35 section 22.

⁶⁷1961 Convention on the Reduction of Statelessness.

⁶⁸Ibid Article 10.

of its own protection framework (its Constitution), it has already demonstrated its willingness to reduce the statelessness of children born in South Africa who would otherwise be stateless.⁶⁹ South Africa has also demonstrated that within its immigration laws a remedy can be found to regularise the status of a stateless person in terms of a ministerial exemption.⁷⁰ This section demonstrates that South Africa needs to incorporate the international protection mechanism available for stateless persons because the ad hoc measures such as a ministerial exemption have proven difficult without the protection of the statelessness conventions and the introduction of a statelessness determination process. It is evident that before any of the above-mentioned remedies can be accessed, it is imperative that such persons have access to justice.

(a) Access to justice

Both the national and international frameworks operational in South Africa allow for access to justice for ‘everyone’ present in South Africa.⁷¹ As a first step, stateless persons, whether documented or not, or recognised as such or not, must have access to justice. They should have the right to a fair solution. In this paper, access to justice is understood to mean ‘the ability to vindicate rights in an accessible way through a process that ensures an effective remedy.’⁷² This requires the detained person to have at the very least, access to a lawyer, a remedy, an independent adjudicator and all the elements of a fair trial as embodied in section 34 of the Constitution.⁷³

Katia Bianchini, in her paper on identifying the stateless in immigration detention, adopted an access to justice lens to explore aspects and legal challenges of the statelessness determination–immigration detention nexus in the United Kingdom.⁷⁴ In her study, she found that despite the adoption of a national statelessness determination procedure, stateless persons in immigration detention still experience a plethora of problems.⁷⁵ This is especially so, she states, where those in immigration detention who are stateless are generally not acknowledged as such due to gaps in the legal framework.⁷⁶ This situation sits uneasily with access to justice principles, which require the guarantee of an effective remedy and a fair solution to the legal problems of every individual. Her paper ultimately shows that access to justice requires a holistic approach, whereby the special problems and needs of the users must always be taken into consideration.⁷⁷

⁶⁹The Citizenship Act 88 of 1995, section 2(2); The Births and Deaths Registration Act 51 of 1992. See also Fatima Khan ‘Exploring childhood statelessness in Southern Africa’ (2020) 23 *Potchefstroom Electronic Journal* 2.

⁷⁰Op cit note 65 section 31 (2) b.

⁷¹Op cit note 17 section 34.

⁷²Katia Bianchini ‘Identifying the stateless in statelessness determination procedures and immigration detention in the United Kingdom’ (2020) 32(3) *International Journal of Refugee Law* 440 at 452.

⁷³S 34 Everyone has a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.

⁷⁴Op cit note 72.

⁷⁵Ibid.

⁷⁶Ibid.

⁷⁷Ibid.

If we apply this holistic approach to access to justice in South Africa where, even though theoretically such persons will have access to courts, it does not necessarily mean access to justice because, unlike the United Kingdom, South Africa has no statelessness legislation in place and no status determination procedure for stateless persons. Also, immigration detention is an administrative detention and not a criminal detention, which means that legal representation from the state is not a requirement.⁷⁸ In addition, the lack of status determination is especially prejudicial in South Africa because if the stateless are not acknowledged as stateless persons, the access to justice right in the Constitution is a hollow right. With such a lack of laws and procedures to determine whether the person is in fact stateless and with insufficient access to justice, it cannot be deemed to be fair to deport a stateless person, even if another country is willing to receive such a person.

(b) Preventing deportation to a place where they will not be granted citizenship

Article 10⁷⁹ of the 1961 Statelessness Convention states that States shall use their best endeavours to ensure that a person transferred to another territory shall confer its nationality if, because of the transfer, the person is likely to become stateless. On the face of it, it may appear that South Africa is not bound by this article because South Africa has not ratified this treaty. However, a broad interpretation of this article could be interpreted as a violation of the principle of non-refoulement.⁸⁰ Even though the above article does not directly address the principle of non-refoulement this paper argues that the principle of non-refoulement⁸¹ is embedded in this section, which means that South Africa must ensure that no one is deported to a country where they will likely become or remain stateless. This paper further proposes that article 10 should be read as a safeguard of the principle of non-refoulement, especially since the UN treaties on statelessness do not have any provisions for non-refoulement — that is to say, stateless persons, are not protected in terms of the treaties from deportation to a country where they will not be able to access citizenship. However, non-refoulement applies to all migrants regardless of their status. The UN Human Rights Committee (HRC) has clarified that the ICCPR applies to all migrants regardless of their status:

⁷⁸UN Office of the High Commissioner for Human Rights (OHCHR) *The right of anyone deprived of his or her liberty to bring proceedings before court, in order that the court may decide without delay on the lawfulness of his or her detention* - Background Paper on State Practice on Implementation of the Right 2 September 2014, available at <https://www.refworld.org/docid/553e2e944.html>, accessed on 22 July 2022.

⁷⁹Article 10 states:

‘1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless because of the transfer. A Contracting State shall use its best endeavors to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.’

⁸⁰Op cit note 35 section 2. See also the 1951 UN Convention Relating to the Status of Refugees, Article 33 and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Articles 2(3) and 5.

⁸¹South Africa is bound by the principle of non-refoulement because it is found in the Refugees Act as well as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3. The principle has also reached the status of customary international law. See GS Goodwin-Gill *The Refugee in International Law* 2 ed (1996) at 167–171.

[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers, and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.⁸²

The principle of non-refoulement, which represents a safeguard against the most flagrant violations of human rights, also applies to every person subject to the State's jurisdiction, including all migrants, irrespective of their status and regardless of whether the person has entered the State regularly or not. Most important in the South African context is for the State to recognise that the application of non-refoulement protection to migrants does not only depend on the migrants' ability to gain or maintain status as a refugee. The European Court of Human Rights (ECtHR) has on several occasions held the position that the principle of non-refoulement applies to all migrants.⁸³

In South Africa, the LHR has been advocating for diplomatic authorities to provide written assurance upon deportation that the individual qualifies as a national and will be recognised by the competent nationality authority upon arriving in the country in question. It has argued that deporting or accepting for deportation a person who would not be able to meet the administrative burden of proof for citizenship in the country is tantamount to refoulement for stateless persons.⁸⁴ It is a violation of their right to acquire citizenship and a violation of their fundamental right to human dignity. They could face prolonged and sometimes indefinite detention if deported to a country where they cannot obtain citizenship. And if the stateless person cannot be deported, what then are the legal tools that can be used to argue for the release of the stateless from detention and for the regulation of their stay in South Africa?

(c) Reducing statelessness

Even though South Africa has not ratified the statelessness conventions, it has demonstrated a willingness to reduce statelessness. This has been done in the case of children born in South Africa who would otherwise be stateless. South Africa maintains that its laws are sufficient to protect children born in its territory from statelessness. In accordance with its Constitution, South Africa must consider

⁸²UN Human Rights Committee (HRC), General comment no. 31, [80], The nature of the general legal obligation imposed on States Parties to the Covenant (26 May 2004), CCPR/C/21/Rev.1/Add.13 at para 10, available at <https://www.unhcr.org/4963237716.pdf>, accessed on July 2022.

⁸³ECtHR, *Ahmed v. Austria*, Application No. 25964/94, Judgment 17 December 1996, at 42 and 47, stating that the applicant lost refugee status because of a criminal conviction, but was granted non-refoulement. See also IACtHR, *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 135, stating that the inter-American system recognises the right of every foreign person regardless of legal or migratory status, and not only of asylum seekers and refugees, not to be returned to a place where their life, integrity and/or liberty risk being violated. See also Convention Against Torture (CAT), *Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, U.N. Doc. A/49/44, at 2.5, 9.7; CCPR, *Hamida v. Canada*, Communication No. 1544/2007, 11 May 2010, U.N. Doc. CCPR/C/98/D/1544/2007, at 8.7, 9.

⁸⁴Op cit note 6.

international law,⁸⁵ which demands respect for the human rights of all present in South Africa. There are multiple laws applicable to the protection of the stateless child in South Africa. Section 28 of the Constitution guarantees every child a right to a name and nationality,⁸⁶ and the Citizenship Act at section 2(2) promises citizenship to every child born in South Africa if they do not have the nationality of any other country.⁸⁷ While this may be the case, citizenship does not happen for such children by operation of law in South Africa; it requires an application, and the practice has revealed that the implementation of these generous laws has been met with great difficulty.

This paper proposes that such a safeguard be built into the Immigration Act, whereby those detained under the Immigration Act who are unable to identify themselves and who therefore face the risk of statelessness are allowed to regularise their stay in South Africa. Such a scenario requires that a stateless determination becomes a necessity.

Thus far, lawyers have made use of the ministerial exemption founded in section 31(2)(b) of the Immigration Act.⁸⁸ However, even with this application, a significant challenge in securing the release and protection from the further arrest of stateless persons is the lack of dedicated interim documentation available to section 31(2)(b) applicants. The regulation, which corresponds to section 31(2)(b) of the immigration Act, makes no mention of the status of applicants pending the outcome of their application.⁸⁹ The Form 20 — Authorisation for Illegal Foreigners to Remain in the Republic Pending an Application for Status — does not refer specifically to section 31(2)(b) but can be used to provide a document to exemption applicants pending a decision from the Minister.⁹⁰ The DHA has been reluctant to issue this Form 20 without which the stateless person may be vulnerable to re-arrest.

(d) Status determination

According to the LHR, even though the above remedy of a ministerial exemption is available, courts have largely disallowed its use before the expiration of the 120 days in immigration detention and without the Form 20 re-arrests have been made.⁹¹ In the rare cases of *Baluku* and *Mntambo* ministerial exemptions were considered prior to the expiration of the 120 days. It is therefore imperative that a status determination is made as soon as possible. Should the person be found to be stateless, their continued arrest will be arbitrary and therefore unlawful, as stated above.

Although it is important that a status determination procedure is put in place, it is also important to consider who should be in charge of status determination. The primary institutional question is which authority (immigration, nationality, asylum

⁸⁵39(1)(b)

⁸⁶Op cit note 17 section 28.

⁸⁷The Citizenship Act 88 of 1995.

⁸⁸Op cit note 30.

⁸⁹Ibid.

⁹⁰Op cit note 6.

⁹¹Ibid.

or other) ought to be in charge of identifying and determining the status of stateless persons. It is apparent that the answer can only be context specific. In the situation described in this paper where immigration detention is dealt with, there is the expectation that immigration officials should conduct this determination. However, where the applicant claims never to have lived anywhere else but in South Africa, then authorities in charge of nationality issues and citizenship appear to be the most appropriate bodies for statelessness determination (given the fact that the likely solution for statelessness will be reduction, instead of protection, by implementing the country's own nationality legislation).

Because asylum and statelessness share the same characteristic of being based on international protection obligations, asylum authorities specialised in this field may prove to be better able to accept and effectively deal with the specific procedural features resulting from the protection-oriented character of the procedure, such as a lower standard of proof, the scarcity of documentary evidence and the prevention of the violation of the principle of non-refoulement.

Irrespective of who conducts the status determination, it is important that a status determination is conducted as soon as possible. Currently, stateless persons will have to remain in detention for 120 days before the courts will even consider the release of such a person, as found in the *Nibigira* case. Hence, the sooner the person is confirmed as stateless, the sooner the detention will be recognised as arbitrary because the person is not deportable, and their continued arrest will be deemed to be arbitrary.

VI. CONCLUSION

Even though South Africa has not ratified any of the international treaties that deal with statelessness, there is still a strong constitutional obligation to ensure that everyone is granted the opportunity to enjoy the rights that come from belonging to a state. This constitutional obligation means that South Africa must be diligent in ensuring that it is working on protecting the rights of vulnerable immigrants. The ministerial exemption is not an effective solution to the issue of statelessness because there are other issues that need to be addressed first, such as access to justice, which immigrants are often not granted equal access to. The immigration law in South Africa needs to be developed so that it can be better suited to provide the necessary protection for stateless persons. To protect the rights of those in this vulnerable position, it is imperative that a solution is created to identify persons as stateless as expeditiously as possible and to then create a remedy for the administrative detention of stateless persons.

Statelessness in Protracted Refugee Situations: Former Angolan and Rwandan Refugees in Zambia

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Abstract

The risk of statelessness in protracted refugee situations has not received much attention both in academic literature and policy discussions. Yet evidence suggests that for refugees in protracted situations, the bond with their country of origin can become weak while pursuing local integration as a durable solution in the host country, leading to an increased risk of becoming stateless. This can occur depending on the requirements that refugees have to meet in order to become locally integrated in a host country especially when their refugee status ceases. These requirements largely revolve around the issue of citizenship and national identity documents. Many are unable or unwilling to acquire national identity documents from their country of origin for different reasons, including: fear of persecution by the government of their country of origin; criteria that exclude a large number of them from accessing local integration opportunities; and nationality laws that do not automatically grant citizenship by birth. In this paper, I argue that there is need to extend the definition of stateless persons to include de facto stateless persons since they are in effect stateless. This would enable them to access the necessary assistance, chief among which is the regularisation of their legal status. I base my argument on the case of former refugees from Rwanda and Angola in Zambia.

Keywords: local integration, de facto statelessness, protracted refugee situations, Angolan refugees, Rwandan refugees

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I. INTRODUCTION

In spite of the risk that refugees in protracted situations run to become stateless as they seek to become integrated in the host country, academic literature and policy discussions do not dwell much on statelessness in the context of local integration as a durable solution. Yet evidence suggests that once the cessation clause has been effected, former refugees may find themselves at risk of becoming stateless depending on the requirements that they have to meet to become locally integrated in a host country. Local integration refers to the granting of full and permanent asylum, membership, and residency status, by the host government. It takes place through a process of legal, economic, social, and cultural incorporation of refugees, culminating in the offer of citizenship.¹ Fielden² argues that the process becomes a durable solution only at the point when a refugee becomes a naturalised citizen of their asylum country. However, some scholars point out that it is possible to obtain social and economic integration without ever being offered citizenship. This applies to self-settled refugees — those who become integrated in a host community without official assistance.³ Hovil and Maple⁴ refer to this type of integration as *de facto* local integration. They argue that although it is possible that naturalisation and/or citizenship may be part of the process of local integration, citizenship means little if former refugees are not accepted by the local communities in which they are living.

In this paper, I understand local integration as a process that leads to citizenship or at least safeguards the citizenship of refugees trying to regularise their stay by facilitating their access to identity documents. Regarding protracted refugee situations, I apply the definition used by Milner and Loescher,⁵ as “one in which refugees have been in exile ‘for 5 years or more after their initial displacement, without immediate prospects for implementation of durable solutions’”.

The process of integration can be seen as largely revolving around the issue of national identity documents. For instance, in Zambia refugees whose status has ceased are required to provide a national registration card and passport to be considered for local integration.⁶ With these documents, refugees, can get residence permits, employment permits, business permits and other permits. Ultimately, it allows them to apply for citizenship after ten years of being ordinarily resident in Zambia.⁷ In spite of this, many refugees from Rwanda seeking to become locally integrated are unable to acquire national identity documents from their country of origin for various reasons, including fear of persecution by the government of

¹ Karen Jacobsen ‘The forgotten solution: Local integration for refugees in developing countries’ (2001) New Issues in Refugee Research Working Paper No. 45.

² Alexandra Fielden ‘Local integration: an under-reported solution to protracted refugee situations’ (2008) UNHCR.

³ Jacobsen op cit note 1.

⁴ Lucy Hovil & Nicholas Maple ‘Local integration: A durable solution in need of restoration?’ (2022) 41(2) *Refugee Survey Quarterly*.

⁵ James Milner & Gil Loescher ‘Responding to protracted refugee situations: Lessons from a decade of discussion’ (2011: 15) Forced Migration Policy Briefing No. 6

⁶ Government of the Republic of Zambia (GRZ) ‘The Refugees Act of 2017’ available at <https://www.refworld.org/docid/5a97c5154.html>, accessed on 15 August 2022.

⁷ Government of the Republic of Zambia (GRZ) ‘The Immigration and Deportation Act No.18 of 2010’.

their country of origin, and administrative challenges in issuing the documents. For former Angolan refugees, the Zambian government had also offered to locally integrate those who arrived between 1966 and 1986. This excludes those who arrived in Zambia after 1986, the majority of whom are without any form of identification.⁸

Without any form of national identity document, both groups risked having a weak bond with their country of origin and subsequently risked becoming stateless. They faced several challenges in accessing livelihood opportunities, including employment and social services such as education and healthcare. This risk extended to children born to refugees not only because of their parents' weak link with their country of origin,⁹ but also because Zambian laws do not automatically grant citizenship to children born to foreign parents on Zambian territory. I argue that people in such circumstances are in effect stateless and should be considered and treated as such by providing them the necessary assistance and protection. It is important to examine protracted refugee situations because more than two-thirds of refugees in the world today are trapped in such situations.¹⁰ I analyse this from the political theory perspective that argues that, as suggested by authors, examining exclusions arising from migration provides a useful basis for thinking about statelessness.¹¹

I start by examining the issue of statelessness in the context of local integration in the literature. This is followed by an overview of protracted refugee situations in Zambia and the government's attempts to provide local integration as a durable solution with a focus on the case of Rwandan and Angolan refugees. In the next section I demonstrate how large sections of the two refugee populations are in effect stateless due to their refusal to acquire national identity documents (as in the case of Rwandans), and as a result of being excluded from the local integration process (as in the case of post-1986 Angolan arrivals). I also show the impact of the laws concerning the assistance and protection of refugees in Zambia, especially the Zambian Constitution¹² and the Citizenship Act¹³ with regard to children born to refugee parents. Moreover, I compare Zambia's experience with other countries in the Southern African Development Community (SADC) region with particular interest in how the latter have resolved protracted refugee situations through naturalisation. Thereafter, I consider the policy implications of the protracted refugee situation in Zambian in relation to statelessness, including broadening the definition of statelessness to de facto statelessness.

II. STATELESSNESS IN THE CONTEXT OF LOCAL INTEGRATION

⁸ US State Department 'Development and Training Services' (2014).

⁹ United Nations High Commissioner for Refugees (UNHCR) 'Statelessness and issues relating to nationality in Zambia Final Report (21 November 2016) UNHCR Lusaka.

¹⁰ Milner and Loescher (2011) op cit note 5.

¹¹ Kristy A Belton 'The neglected non-citizen: statelessness and liberal political theory' (2011) 7 *Journal of Global Ethics* at 59-71.

¹² Government of the Republic of Zambia (GRZ) 'The Constitution of Zambia (Amendment) Act of 2016' Lusaka Zambia.

¹³ Government of the Republic of Zambia (GRZ) 'Citizenship Act No. 33 of 2016' Lusaka Zambia.

Local integration has great potential as a durable solution in protracted refugee situations, especially where repatriation or resettlement are not viable options. It becomes even more critical given that early return is not possible for most refugees.¹⁴ Protracted refugee situations can lead to loss of connection with the country of origin, which in turn increases the risk of statelessness. It must be noted that being undocumented does not equate to being stateless, but it makes it challenging to prove nationality, thereby increasing the risk of statelessness particularly for children born and raised in asylum. In spite of this, statelessness is rarely perceived in the context of local integration, both in the literature and policy discourse on protracted refugee situations. Instead, what has dominated discussions are concerns about security challenges;¹⁵ resource burdens on the host country;¹⁶ changing approaches in the provision of assistance to refugees in protracted situations in countries of asylum, for instance from long-term 'care and maintenance' programmes to approaches focused more on self-reliance.¹⁷

Notwithstanding the above observation, it must be noted that the link between protracted refugee situations and statelessness is slowly emerging. For instance, from the policy view point, governments in Sub-Saharan Africa (SSA) are beginning to consider the possibility of resolving protracted refugee situations through naturalisation and integration of refugees in countries such as Sierra Leone, Liberia, and Tanzania.¹⁸

In the academic literature, similar developments can be observed. For example, Hovil and Lomo¹⁹ examine citizenship in the context of local integration, though not from the perspective of statelessness. Hovil and Maple²⁰ acknowledge that refugees face the risk of statelessness while trying to find ways to become integrated in a policy environment that denies them assistance to integrate. They argue that this is the case particularly when refugee status is withdrawn through a cessation agreement. The case of protracted refugee situations in Zambia sheds more light on this issue. It revolves around the issue of citizenship and national identity documents.

III. FORMER REFUGEES AT RISK OF STATELESSNESS IN ZAMBIA

Zambia has experienced a number of protracted refugee situations in its history of providing asylum. As of February 2022, Zambia hosted 105,868 persons of concern (76,093 refugees, 4,874 asylum seekers and 24,901 others of concern, including self-settled refugees). Of these, 19,660 were from Angola; 9,194 from Burundi; 6,080 from Rwanda; 4,152 from Somalia; and 758 from other countries. During the same

¹⁴ Milner and Loescher (2011) op cit note 5.

¹⁵ Gil Loescher, J. Milner, E. Newman & G.G. Troeller 'Protracted refugee situations: Political, human rights and security implications' (2014); Milner & Loescher (2011) op cit note 5.

¹⁶ Jacobsen op cit note 1.

¹⁷ Milner and Loescher (2011) op cit note 5.

¹⁸ Ibid.

¹⁹ Lucy Hovil & Zachary Lomo 'Forced displacement and the crisis of citizenship in Africa's Great Lakes Region: Rethinking refugee protection and durable solutions' (2015) 31 *Refuge: Canada's Journal on Refugees* at 39-50, available at <https://doi.org/10.25071/1920-7336.40308>.

²⁰ Hovil & Maple op cit note 4.

period, there were 438 new arrivals mostly from the Democratic Republic of the Congo (DRC), Burundi, Somalia, and other countries.²¹ A large portion of these refugees are self-settled or spontaneously settled, meaning they are settled among the local community without direct official (government or international) assistance²² — 8,253 from Angola²³ and 914 from Rwanda.²⁴

Many of these refugees have been in protracted situations, where they have been in exile for five years or more after their initial displacement, without immediate prospects for implementation of durable solutions.²⁵ For instance, the first flow of Angolan refugees took place in 1966 as a result of the independence struggle from Portuguese rule. This means that this group of refugees has been in Zambia for over fifty years. Rwandan refugees have been in Zambia for a relatively shorter period with the first arrivals happening in 1994 in the wake of the genocide in their home country. Others followed in 1997 and 1998 due to armed clashes in the northwest of the country.²⁶ Most of these refugees have been repatriated over the years. For instance, between 2004 and 2017, it is estimated that over 132,000 Angolan refugees voluntarily repatriated back to their country of origin.²⁷ In spite of this, many remained and became integrated in Zambia. For example, out of the more than 5,000 Rwandan refugees in Zambia targeted for voluntary repatriation in the early 2000s, very few returned to Rwanda.²⁸

Several attempts have been made to regularise the status of refugees who opted to become integrated within the host communities. These include the Zambia Initiative Development Programme (ZIDP), which was introduced in 2002 in the Western Province of Zambia, home to one of the largest refugee settlements in the country — Mayukwayukwa. The programme had a two-pronged approach of facilitating self-sufficiency among refugees while contributing to the development of the host community. In total, the ZIDP targeted over 450,000 beneficiaries, of whom up to 150,000 were refugees.²⁹ Another attempt was the Strategic Framework for the Local Integration (SFLI) of Former Refugees in Zambia introduced in 2013/2014.³⁰ It

²¹ United Nations High Commissioner for Refugees (UNHCR) 'Zambia: UNHCR Operational Update' (February 2022), available at: <https://reliefweb.int/report/zambia/zambia-unhcr-operational-update-february-2022>.

²² Jacobsen op cit note 1.

²³ US State Department op cit note 8.

²⁴ Global Compact Digital Platform (15 March 2021), available at: https://globalcompactrefugees.org/article/zambia_accessed_on_10_May_2022.

²⁵ Milner & Loescher (2011) op cit note 5.

²⁶ Global Compact Digital Platform op cit note 24.

²⁷ Mushiba Nyamazana Grayson Koyi Patricia Funjika & Edward Chibwill 'Zambia refugees economies: Livelihoods and challenges' (2017) UNHCR Lusaka.

²⁸ Jesuit Refugee Service (JRS) 'Is Rwanda safe?: An inquiry into the reluctance of the Rwandan refugee community to repatriate' (2004), available at: <https://reliefweb.int/report/rwanda/rwanda-safe-inquiry-reluctance-rwandan-refugee-community-repatriate#:~:text=One%20such%20tripartite%20agreement%20between,Rwandans%20have%20elected%20to%20repatriate.&text=After%20the%20tripartite%20agreement%20was,a%20go%2Dand%2Dsee>, accessed on 16 January 2023

²⁹ Commissioner for Refugees (CoR) 'The Zambia initiative: In pursuit of sustainable solutions for refugees in Zambia (2004) CoR Lusaka; UNHCR 'Citizenship and statelessness in the member states of the Southern African Development Community' (December 2020), available at: <https://www.refworld.org/docid/6012a0d44.html>, accessed on 16 January 2023.

³⁰ Government of the Republic of Zambia 'Strategic framework for the local integration of former refugees in Zambia' (2014) Ministry of Home Affairs & UNHCR Lusaka.

aimed to regularise the status of 10,000 former Angolan refugees who had settled in Zambia between 1966 and 1986, as well as 4,000 former Rwandan refugees following the cessation of refugee status of the two refugee populations in 2011.³¹ Through this initiative, the Zambian government offered to grant permanent residency status to the former refugees from the two countries.³²

All former refugees who wished to remain in Zambia were invited to apply for an appropriate immigration permit such as spouse permit, employment permit, and study permit at a reduced fee subsidised by the United Nations High Commissioner for Refugees (UNHCR). Under Zambia's Immigration and Deportation Act³³ former refugees are subjected to laws that apply to any other foreigner on Zambian territory. In line with this legislation, former refugees must acquire relevant permits to continue staying in Zambia and have access to livelihood opportunities and social services, including employment and education. A holder of any immigration permit in Zambia (such as employment permit, investors' permit, study permit, or spouse permit), is eligible to apply for a residence permit after a certain number of years (after ten years for a holder of an employment permit; after three years for a holder of an investor's permit, provided they are operating a viable business; and after five years for a spouse permit).³⁴ These former refugees would then be eligible for citizenship within a period of ten years. To be eligible for any of the above permits, they were required to be in possession of a passport of their country of nationality, like any other foreigner on Zambian territory.³⁵

The countries of origin also facilitated the process.³⁶ For instance, the Angolan government was going to provide at no cost to the former Angolan refugees, National Registration Cards (NRCs) and Angolan passports, which were required as part of the documentation process.

It is important to note that the period that someone was a refugee on Zambian territory was not considered as part of the period a person is ordinarily resident in the country. But as part of the alternative legal status pillar under the SFLI launched in 2014, this requirement was waived. Hence, for instance, former Rwandan refugees who arrived in Zambia between 1994 and 1998 were eligible to apply for a residence permit.³⁷ Similarly, former Angolan refugees who arrived in Zambia between 1966 and 1986 together with their children and had continuously lived in Zambia, were

³¹ Kaldor Centre for International Refugee Law 'What's behind Zambia's growing welcome to refugees?' (2018), available at: <https://www.kaldorcentre.unsw.edu.au/news/what%E2%80%99s-behind-zambia%E2%80%99s-growing-welcome-refugees>, accessed on 10 May 2022.

³² US State Department op cit note 8.

³³ GRZ (2010) op cit note 7.

³⁴ Nyamazana et al. op cit note 27.

³⁵ Government of the Republic of Zambia 'The Refugees Act No 1 of 2017' (2017) Lusaka Zambia.

³⁶ ZNBC 'Rwanda to issue IDs to former refugees in Zambia' (22 April 2022), available at <https://www.znbc.co.zm/news/rwanda-to-issue-ids-to-former-refugees-in-zambia/>.

³⁷ *Times of Zambia* 'Has Rwandan refugees integration hit snag?' (1 March 2016), available at <http://www.times.co.zm/?p=80675>, accessed on 27 November 2018.

eligible to apply for a residence permit.³⁸

On the one hand, the offer of local integration to Rwandan and Angolan refugees described above was laudable in terms of finding a durable solution to the protracted situation of the two refugee populations. On the other hand, some of the requirements that accompanied the offer created several challenges with regard to the legal status of refugees, potentially exposing them to statelessness. These requirements also posed a huge challenge to their livelihoods. Furthermore, refugees were obligated to acquire national identity documents from their country of origin — this was particularly challenging for Rwandan refugees. They were reluctant to acquire national identification, due to fear of exposing themselves to possible persecution by the government of their home country. “(I)f going to heaven will mean us passing through Rwanda, then we will miss heaven,” lamented one former Rwandan refugee.³⁹ Yet another expressed her trepidation and anguish to the *Times of Zambia*:

‘Personally, I am not ready for it. I know that when I get a (Rwandan) passport then I become a citizen. But I am not ready to disown my refugee status right now because I know that there are many things involved in the background that not many people know about...’ She ... fears that once the registration process is undertaken, the data collected may end up in wrong hands thereby endangering her life as some people may use the information to track her and other former refugees down.⁴⁰

Owing to these fears, only a few Rwandan refugees obtained national identity documents. As of March 2016, only 41 out of 4,200 former Rwandan refugees obtained national registration cards and passports. The response was so poor that the ministry of Home Affairs warned that former Rwandan refugees in Zambia risked being declared illegal immigrants and possibly being deported if they did not apply for integration by 5 February 2016.⁴¹ The poor response was also attributed to the cost of obtaining a Rwandan passport, which at the time was US\$100. In acknowledgement of the above challenges, a presidential decision was issued in December 2017 to lift the national passport requirement for Rwandan former refugees to enable them to apply for permits and remain in Zambia legally. This permit was temporary in nature with a validity period of three years (renewable). The permits expired in March 2021 leaving the former refugees at risk of arrest, imprisonment, and substantial fines. In 2021 the Government of Zambia pledged to extend the validity of the temporary

³⁸ *La Tribune Franco-Rwandaise* ‘Zambia: Public notice on the criteria and procedures for local integration of former Rwandan refugees’ (12 November 2015), available at <http://www.france-rwanda.info/2015/11/zambia-public-notice-on-the-criteria-and-procedures-for-local-integration-of-former-rwandan-refugees.htm>; Nyamazana et al. op cit note 27.

³⁹ *The Mast* ‘If going to heaven means us passing through Rwanda, we’ll miss it – ex-refugees in Zambia’ (7 April 2017), available at: <https://www.themastonline.com/2017/04/07/if-going-to-heaven-means-us-passing-through-rwanda-well-miss-it-ex-refugees-in-zambia/>, accessed on 27 November 2018.

⁴⁰ *Times of Zambia* op cit note 37.

⁴¹ *Ibid.*

permits from 3 years to 10 years and issue permits without national passports.⁴²

Consideration by the Zambian government to waive the requirement for passports must be equally applauded. Under international law, states have a duty to promote local integration of refugees where repatriation is not possible within a reasonable time. Article 34 of the 1951 United Nations Convention Relating to the Status of Refugees provides that states parties 'shall as far as possible facilitate the assimilation and naturalisation of refugees'⁴³ by such measures as expediting proceedings and reducing the costs of naturalisation. Article II.1 of the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa⁴⁴ requires that countries of asylum should use their best endeavours to 'secure the settlement' of refugees who are unable to return home, which in the long term would need to include citizenship rights.

The problem is that it was temporary. Not until refugees obtained a residence permit could they be considered for naturalisation after a period of ten years. At the time of writing this paper, about three years after the pledge, the extension and issuance of the permits (without passports) had not yet been actualised. Also, it must be noted that while commendable, the offer of temporary permits provided former Rwandan refugees with relief only for the period of validity of the permits. This is because the number of years one is in possession of a temporary permit does not count towards the period of being ordinarily resident in the country, neither does the period one has spent as a refugee in the country. Only the period that one has a full residence permit for counts towards being ordinarily resident in the country.

The Rwandan refugees' refusal to acquire national identity documents of their home country put their legal status in jeopardy because without national identity documents from their country of origin, they could not access a residence permit, which, according to Zambian law, was the entry point for securing one's legal status with the possibility of naturalisation. Section 20 of the Immigration and Deportation Act⁴⁵ provides that once a foreigner is in possession of a permit, they are eligible to apply for a residence permit, which in turn makes them eligible to apply for citizenship after ten years. Refugees married to Zambian nationals were eligible to apply for a spouse permit — initially for a two-year period, renewable for a further three years. After five years, the holder of a spouse permit qualifies to apply for a residence permit.

Ultimately, former Rwandan refugees remained at high risk of becoming stateless due to the lack of national identity documents of their home country. This had the potential to weaken their link with their country of origin and expose them to statelessness in the long run. Without meeting the requirements to access a residence permit in Zambia, their stay in Zambia would be illegal.

⁴² World Vision Zambia, the International Council of Voluntary Agencies, & UNHCR Zambia 'Meeting on advancing local integration in Zambia (17 June 2021).

⁴³ United Nations General Assembly '1951 Convention Relating to the Status of Refugees' United Nations New York.

⁴⁴ Organisation of African Unity (OAU) 'The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa' OAU Addis Ababa.

⁴⁵ GRZ op cit note 7.

As can be observed from the case of former Angolan refugees, even after so many years of residence in a host country, naturalisation could still be unattainable for former refugees. In spite of being in Zambia since the 1960s, some former Angolan refugees had not become formally integrated.⁴⁶ As Manby⁴⁷ explains:

While the laws of many countries in principle allow for the naturalisation of refugees and stateless persons on the same or similar terms as other foreigners, through the normal procedures, naturalisation can be very difficult to access in practice for refugees, leaving some at risk of statelessness.

For Angolan refugees, the major challenge was that only those who arrived in Zambia between 1966 and 1986 and had continuously lived in Zambia were eligible to apply for a residence permit. It excluded those who arrived after 1986 and in a way, compelled them to opt for 'voluntary' repatriation. For those who wanted to regularise their stay in Zambia, this was going to pose a huge challenge, since cessation of refugee status also applied to them. Without giving them an opportunity to get the necessary identity documents, immigration permits, and a residence permit, the legal status of former Angolan refugees lay in limbo. It also meant that their pathway to naturalisation was blocked. In the long run, there was a danger that their ties to Angola could be weakened, hence, putting them at risk of becoming stateless. As indicated above, a good number did not have identity cards and many were reluctant to acquire 'alien' cards, which they deemed inadequate in offering meaningful protection.

For both former Angolan and Rwandan refugees, children born in Zambia were also at risk of becoming stateless mainly because Zambia operates on the basis of *jus sanguinis* and therefore does not grant citizenship by birth. Article 35 (1) of the Constitution of Zambia⁴⁸ provides that a person born in Zambia is a citizen by birth if, at the date of that person's birth, at least one parent of that person is or was a citizen by birth or descent. On the one hand, this provision reduces the risk of statelessness because it requires that only one parent should have been a citizen for the affected person to be recognised as a citizen. But it must be noted that children born in Zambia to parents who are both non-Zambian citizens are at risk of becoming stateless in the event that they fail to secure the nationality of their parents' country of origin. This is likely, given that their parents' link with their country of origin increasingly weakened without national identity documents. Such a system for granting citizenship at birth only on the basis of descent from a citizen, is in conflict with basic principles enshrined in the African Children's Charter and other human

⁴⁶ See World Vision et al. op cit note 42; and UNHCR Zambia (2022) op cit note 21.

⁴⁷ Bronwen Manby 'Citizenship and statelessness in the member states of the Southern African Development Community' (2020: 96) UNHCR Report; see also: Bronwen Manby 'Statelessness in Southern Africa' (2011) Briefing Paper for UNHCR Regional Conference on Statelessness in Southern Africa; Bronwen Manby *Identification in the context of forced displacement: Identification for development (ID4D)* (2016) The World Bank.

⁴⁸ GRZ op cit note 12.

rights treaties,⁴⁹ and places substantial numbers of children at risk of statelessness.⁵⁰ It is important to stress that this provision is not in line with the UN Convention on the Rights of the Child (CRC), which provides in Article 7 for every child to have ‘the right to acquire a nationality’,⁵¹ and for states to ensure the implementation of these rights, in particular where the child would otherwise be stateless.

It must be noted that Article 37 of the 2016 Constitution of Zambia provides for a person who has been ordinarily resident in Zambia for a period of at least five years and was born in Zambia to apply to register as a citizen. In spite of the existence of this provision, there is no evidence of any former refugee child having benefitted from this provision.⁵² As Boyden and Hart observe: in reality, the effective realisation of such rights is often difficult to achieve whether through neglect, design, incapacity, or legal complexity.⁵³ In the Zambian case, the challenge largely has to do with the issue of one being ordinarily resident in Zambia to be eligible. Just like the issue of permits, the period that one is a refugee is not considered as ordinary residence.

For both groups, the risk of statelessness is also high among those who have settled among the local host community without official assistance (self-settled or spontaneously settled refugees) because they are undocumented. Their livelihoods are severely restricted because they are in constant danger of detention, imprisonment, or deportation.⁵⁴

Compared to other countries, the Zambian local integration process is similar in many respects. In many SADC countries, prospects of refugees acquiring citizenship are limited. Citizenship is generally accessible by birth, registration, or naturalization, but in many cases, there are legal obstacles. Citizenship by birth is accessible only on the basis of inheritance (*jus sanguinis*) and not on the basis of birth in the country (*jus soli*). As a result, citizenship cannot be extended automatically to the children of refugees, even if several generations are born in exile.⁵⁵ Hovil and Lomo note that while it is possible to access citizenship through either registration or naturalization, in practice this rarely happens. For instance, in the Democratic Republic of the Congo (DRC), naturalisation requires approval by the National Assembly, and the applicant must have performed ‘major services’ to the country. These are criteria that Hovil and Lomo argue that very few, let alone refugees, are likely to meet. In Rwanda, applicants for nationality must be free of ‘genocide ideology’, a provision that Hovil and Lomo regard as vague and argue that it has been used to persecute opponents. Other obstacles include requirements for very long periods of residency to apply for

⁴⁹ See, for example, Organization of African Unity (OAU) African Charter on the Rights and Welfare of the Child 11 July 1990 CAB/LEG/24.9/49 (1990).

⁵⁰ African Union (AU) ‘ACERWC General Comment on Article 6 of the Charter on the Rights and Welfare of the Child’ — Adopted by the Committee at its twenty-third Ordinary Session (07–16 April, 2014), available at <http://citizenshiprights-africa.org/wp-content/uploads/2016/01/ACERWC-General-Comment-Article-6-Eng.pdf>, accessed on 10 January 2023.

⁵¹ United Nations General Assembly ‘Convention on the Rights of the Child’ (20 November 1989).

⁵² Kelly Kapianga ‘Report on Citizenship Law: Zambia — RSCAS/GLOBALCIT-CR 2020/’ (14 November 2020) Global Citizenship Observatory (GLOBALCIT).

⁵³ Jo Boyden & Jason Hart ‘The statelessness of the world’s children’ (2007) 21 *Children & Society* at 237–248, available at <https://doi.org/10.1111/j.1099-0860.2007.00105.x>.

⁵⁴ Nyamazana et al. op cit note 27.

⁵⁵ Hovil & Lomo op cit note 19.

naturalisation and filing fees that place the process out of reach of most refugees, even when they would otherwise qualify.⁵⁶

Among the states that have been generous in hosting refugees in protracted situations and offering naturalisation in SADC, is Tanzania.⁵⁷ The government issued several invitations for the mass naturalisation of refugees, including approximately 25,000 Rwandan refugees who were granted Tanzanian citizenship in 1981; and approximately 3,000 Somali refugees offered permanent settlement in 2003 with the possibility of naturalisation. The government also reduced naturalisation fees from US\$800 to US\$50. In 2008 the Tanzanian authorities began the naturalisation of 171,600 'old caseload' of Burundian refugees who had expressed their wish to become naturalised Tanzanian citizens.⁵⁸

Around 2008 Angola, which has a large population of its people in protracted refugee situations in Zambia and other SADC countries, was also host to 13,000 refugees who fled the violence of a secessionist movement from the DRC in 1977. The refugees had attained a considerable degree of socio-economic integration, and were largely self-sufficient. In 2006, Angolan authorities offered legally secure local integration possibilities in the form of a permanent residence permit under the Immigration Act or naturalisation under the Nationality Act to those who choose to remain indefinitely in Angola.⁵⁹

Namibia offers a good example of how to address the risk of statelessness among undocumented immigrants, including refugees. In 2010, the government undertook an exercise to register undocumented long-term residents at risk of statelessness, including those in its border regions. Under this programme, a total of 3,012 people who could show they were living in the country before 1977 were registered as Namibian nationals by the end of 2016. Most of those registered were of Angolan and South African origin.⁶⁰ The case of former Rwandan and Angolan refugees in Zambia and the examples of action taken to address the risk of statelessness among migrant populations in Southern Africa have several implications, which I discuss below.

IV. EXTENDING THE DEFINITION OF STATELESSNESS

There is need to consider extending the definition of statelessness to include de facto statelessness. First, de facto stateless persons are in effect stateless. Second, as recommended in paragraph 3 of the 1954 UN Convention's Final Act, those affected can then receive the necessary assistance and protection.⁶¹ Although there is no international instrument or treaty that specifically defines de facto statelessness, the concept is recognised, as evidenced by the reference in the Final Act of the UN's 1961

⁵⁶ Ibid.

⁵⁷ Fielden op cit note 2.

⁵⁸ Ibid.

⁵⁹ Hovil & Lomo op cit note 19.

⁶⁰ UNHCR (2020) op cit note 29.

⁶¹ United Nations General Assembly 'Convention Relating to the Status of Stateless Persons' (28 September 1954) United Nations New York.

Convention and an implicit reference in the Final Act of the UN's 1954 Convention to 'de facto' stateless persons.⁶² I use the definition of 'de facto' statelessness recommended by Section II.A. of the UNHCR Expert Meeting regarding the Concept of Stateless Persons under International Law as "persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country".⁶³ Applying this definition, many former refugees from Rwanda and Angola could be considered stateless. This is because they had valid reasons that caused them to be unable or unwilling to avail themselves of the protection of their country of origin.

For former Rwandan refugees, this can be demonstrated by their refusal to acquire passports from their home country. They were also outside the country of their nationality, but in addition to that, I argue that they were unable to acquire citizenship of the host country. Therefore, the benefits of the 1954 Convention should be extended to them. It must be stressed that although they have not formally or categorically renounced their Rwandan nationality, they have to some extent done so by questioning their country's willingness to protect them. Besides, it is on the same basis that they were granted refugee status in the first place. For former Angolan refugees (post-1986 arrivals), the primary issue is their inability to avail themselves of the protection of their country of origin given that they have been excluded from the offer to become locally integrated in Zambia.

Those who are in a more precarious situation, are the self-settled former refugees from both countries, given that they were undocumented. This made it very difficult to avail themselves of the protection of their country of origin, nor benefit from the offer of local integration with the possibility of permanent residence or naturalisation.

In light of the above, it can be argued that when it can be established that, with valid reasons, a person is unwilling to avail themselves of the protection of their country of origin and are unable to acquire citizenship of the host country, they should be considered and treated as stateless persons.

From this it is possible to sketch a profile of stateless former refugees in protracted situations. It includes adults who are unwilling, or unable to avail themselves of the protection of their country of origin, and unable to acquire citizenship of the host country. It also includes children born to refugee parents who are unwilling, or unable to avail themselves of the protection of their country of origin, and unable to acquire citizenship of the host country, in a country of asylum that does not automatically grant citizenship by birth.

The case of former refugees from Rwanda and Angola has several policy implications. To start with, their situation calls for the broadening of the definition of statelessness to include de facto statelessness. There are several lessons to be learnt

⁶² United Nations High Commissioner for Refugees (UNHCR) *Hand Book on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons* (1954) UNHCR Geneva.

⁶³ United Nations High Commissioner for Refugees (UNHCR) 'Expert meeting regarding the concept of stateless persons under international law' (2010) UNHCR.

with regard to how the original definition of the 1951 UN Convention definition of a refugee was expanded through the 1967 Protocol, the 1984 Cartagena Declaration on Refugees, and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.

The Zambian government should consider granting nationality to children born in Zambia who would otherwise be at risk of becoming stateless, as the cases described in this paper illustrate. Also, they should waive the requirement for refugees to produce national registration cards from their country of origin and passports for them to access residence permits and other immigration permits. In addition, the Zambian government should consider reducing the number of years one is considered to have been ordinarily resident in the country for refugees who have been in protracted situations, for instance, from ten to five years. Related to this is the need to reduce the fees attached to a resident permit and other related permits as they are prohibitive for an ordinary refugee.

The Zambian government should consider registering undocumented refugees in protracted refugee situations, including a possibility of access to naturalisation without imposing procedural requirements that are impossible to fulfil.⁶⁴

Given the difficulty that former refugees in protracted situations face, as outlined in this paper, as well as the precarity of their situation regarding their nationality, there is need for increased attention on statelessness as one of the risks associated with protracted refugee situations, among both academics and practitioners. It must be acknowledged that some efforts have been made to address issues concerning statelessness in Zambia since the Ministerial meeting held in Geneva in 2011, in commemoration of the 60th anniversary of the 1961 Convention on the Reduction of Statelessness. At this meeting, Zambia pledged to take all necessary measures to observe and ratify the 1961 Convention.⁶⁵ In 2015, the Zambian government, with support from the UNHCR commissioned a study to assess the root causes and extent of statelessness in Zambia. Despite being largely exploratory in nature, the study yielded three cases of potential statelessness. It also established that a large section of the Zambian population — both non-migrant and migrant populations — was at high risk of becoming stateless. Another important milestone in establishing an institutional framework for dealing with statelessness in Zambia was the appointment of the office of Commissioner for Refugees in the Ministry of Home Affairs and Internal Security to be the focal point regarding matters pertaining to statelessness in the country in 2017. Among its major tasks was to develop a mechanism for the identification of stateless people. These are quite commendable efforts, but more needs to be done, in relation to both the institutional and legal frameworks, for Zambia to have a fully functional regime for the protection and assistance of stateless

⁶⁴ UNHCR (2020) *op cit* note 29.

⁶⁵ UNHCR (2016) *op cit* note 9; United Nations High Commissioner for Refugees (UNHCR) 'Guidelines on statelessness No 4: Ensuring every child's right to acquire a nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness — 21 December 2012 (2014) UNHCR; United Nations General Assembly 'Convention on the Reduction of Statelessness (30 August 1961) United Nations New York.

persons. Disappointingly, by the end of 2022 the Zambian government had failed to honour its pledge to observe and ratify the 1961 Convention.

V. CONCLUSION

The extant literature does not pay sufficient attention to the threats and risks associated with protracted refugee situations. I acknowledge the efforts to sound the alarm by scholars such as Hovil and Lomo who emphasize citizenship in the context of local integration; however, they do not examine it from the perspective of the risk of statelessness. Additionally, Hovil and Maple acknowledge that refugees face the risk of statelessness while trying to find ways to become integrated in a policy environment that denies them assistance to integrate particularly when refugee status is withdrawn through a cessation agreement. As can be seen from the two cases of Rwandan and Angolan refugees seeking to regularise their stay in Zambia, a considerable amount of assistance has been provided by the host government, the UNHCR, and the country of origin to enable those wishing to stay, to regularize their status. But challenges have arisen because some refugees do not want to acquire national identity documents of their home country — a key requirement for refugees to be eligible for local integration — due to fear of renewed persecution by their government (as in the case of Rwandan refugees), while others have been excluded from the integration process (as in the case of Angolan refugees who arrived in Zambia after 1986).

The circumstances under which these former refugees find themselves render them effectively stateless; hence, they should be considered and treated accordingly and afforded the requisite assistance largely aimed at securing their legal status and prevention of loss of nationality. Also important is the need for an increased and heightened academic response to the risk of statelessness in protracted refugee situations, among both academics and practitioners. As can be observed from the cases outlined above, protracted refugee situations can lead to loss of connection with the country of origin (where there is lack of national identity documents) which in turn can lead to statelessness. It must be noted that being undocumented does not equate to being stateless, but it makes it challenging to prove one's nationality and increases the risk of statelessness. This is particularly the case as new generations grow up in asylum, especially where nationality laws in the host country do not automatically grant citizenship by birth.

This has several policy implications that national governments should consider, including granting nationality to children born on a country's territory — children who would otherwise be at risk of becoming stateless, as illustrated in this paper. Also, national governments should waive requirements that are difficult for refugees to meet, to become permanent residents and naturalised citizens. These include insistence on legal residence, even for refugees, with evidence of having lived in the host country for many years, before being considered for application for a resident permit. Also important is not to have prohibitive fees attached to immigration

permits. There is a wealth of best practices that Zambia and others in Southern Africa could learn from (notably Tanzania and Namibia) pertaining to the resolution of protracted refugee situations, without putting refugees at risk of statelessness, and instead devise and implement progressive policies governing naturalisation and integration of refugees.⁶⁶

⁶⁶ Milner & Loescher (2011) op cit note 5.

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