

Protecting stateless children in South Africa through nationality: A children's rights approach

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List of abbreviations

ACRWC: African Charter on the Right of the Child

CCL-Centre for Child Law

CRC: Convention on the Rights of the Child

ENS: European Network on Statelessness

Guidelines: UNHCR Guidelines on Statelessness Handbook: Handbook on Protection of Stateless Persons

HRC: Human Rights Committee

ICJ: International Court of Justice

ISI: Institute for Statelessness and Inclusion

LHR: Lawyers for Human Rights

LRC-Legal Resource Centre

SDP: Statelessness Determination Procedure

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNHCR: United Nations High Commissioner for Refugees

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Abstract

This study investigates the role of nationality in protecting stateless children. Under international human rights law, all individuals, including stateless persons, are entitled to certain rights by virtue of being human. Consequently, stateless children should theoretically have access to fundamental rights such as education, healthcare, and social security, even without nationality. However, this study challenges the assumption that stateless children can access these rights merely because they are human. The study reveals that, in practice, stateless children struggle to access essential rights like education, healthcare, and social welfare without nationality. The study asserts that nationality is crucial for stateless children to access basic rights in South Africa. The study examines various treaties related to nationality and concludes that none impose a binding obligation on South Africa to confer nationality on stateless children. The study then draws on international children's rights principles such as the best interest of the child, the right to life, survival and development, and the right to non-discrimination to demonstrate that despite a clear obligation on South Africa in terms of treaty law to grant nationality to stateless, these principles, place limits on South Africa's exercise of sovereign power. This, in turn, makes way for granting nationality to stateless children.

Keywords: citizenship, children, human rights, sovereignty, nationality, sovereignty

CHAPTER 1: INTRODUCTION AND BACKGROUND TO THE STUDY

1. Introduction

Statelessness is an age-old phenomenon¹ and continues to be a subject of discussion among scholars.² Often referred to as a silent pandemic,³ statelessness is a global human rights crisis⁴ and is detrimental to children's development.⁵ A person who is not recognised as a national of any state, in terms of the operations of national laws, is considered stateless.⁶ The condition of belonging to a particular state creates a legal relationship between an individual and the state. This legal relationship often translates to the protection and enjoyment of rights. Consequently, the lack of this legal relationship undermines access to several rights that include, education, health, movement, dignity, and equality.⁷ It is reported that 4.4 million people are stateless globally, however, this does not account for all potentially stateless people.⁸ The exact number of stateless people is difficult to quantify due to a lack of reliable

¹P Weiss *The Problem of Statelessness* (1944). "A Study of Statelessness" (1949) UN Ad Hoc Committee on Refugees and Stateless Persons, Lake Success. New York <https://www.refworld.org/pdfile/3ae68c2d0.pdf>. (accessed 3 June 2021). W Hanley "Statelessness: An Invisible Theme in the History of International Law" (2014) 25 (1) *European Journal of International Law* 321–327.

²A Mbiyozo "Statelessness: an old problem with new threats" <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats> (accessed 26 October 2021). L Van Waas "Are we there yet? The Emergence of Statelessness on the International Human Rights Agenda" (2014) 32 (4) *Netherlands Quarterly of Human Rights* at 342–346. N Kyaw "Unpacking the presumed statelessness of Rohingyas" (2017) 15 (3) *Journal of Immigrant & Refugee Studies* at 269–286.

³Quah "Pandemic in a Stateless Society" (2020) *Emerging Markets* IntechOpen. DOI: 10.5772/intechopen.93373. V Neluvhalani "Statelessness and COVID-19 in South Africa" (2022) 37 (1) *South-ern African Public Law* at 2–28.

⁴M Forster and H Lambert "Statelessness as a Human Rights Issue: A Concept Whose Time Has Come" (2016) 28 (4) *International Journal of Refugee Law* at 564–584. L Kingston "Conceptualizing Statelessness as a Human Rights Challenge: Framing, Visual Representation, and (Partial) Issue Emergence" (2019) 11 (1) *Journal of Human Rights Practice* at 52–72. L Kingston "A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence" (2013) 14 *Hum Rights Rev* at 73–87.

⁵J Chapman and N Marconn "Statelessness of Migrant Children in South Africa and the Impact and Opportunity for Social Workers" <https://sihma.org.za/Blog-on-the-move/stateless-of-migrant-children-in-south-africa-and-the-impact-and-opportunity-for-social-workers#:~:text=Statelessness%20puts%20children%20at%20risk,to%20health%20care%20etc.> (accessed 19 October 2021).

⁶The Convention on the Status of the Stateless Person 1964.

⁷D Weissbrodt and C Collins "The Human Rights of Stateless Persons" (2006) 28 (1) *Human Rights Quarterly* at 245–276.

⁸The United Nations High Commissioner for Refugees (UNHCR) concedes that there are potentially more stateless people that are not accounted for. See <https://www.unhcr.org/refugee-statistics/> (accessed 28 July 2024).

data and some states do not have identifying identifying-measures such as Statelessness Determination Procedures.⁹ It is estimated that there are 10 million stateless people who are not accounted for globally.¹⁰ South Africa is one of the numerous States that does not have concrete data on the number of stateless people within its territory.¹¹ Nonetheless, it is reported that South Africa has 15 million undocumented people (this figure includes South Africans and non-South Africans), 3 million of these being children, and a considerable number are considered to be stateless.¹² Admittedly, not all undocumented people are stateless, however, not having documentation to prove nationality or identity does put one at risk of becoming stateless.¹³

This study explores the prospects of nationality as a solution to the protection of stateless children in South Africa. Currently, the dominant narrative in the literature and other authoritative organs on statelessness matters such as the United Nations High Commission for Refugees (UNHCR),¹⁴ is that the right to nationality is recognised and protected under treaty law,¹⁵ and other international instruments such as the Universal Declaration on Human Rights 1948.¹⁶ In addition, the argument advanced by protectionist adherents¹⁷ as well as

⁹The World's stateless people Institute on Statelessness and Inclusion (2014) <https://files.institutesi.org/worldsstateless.pdf> (accessed 19 October 2021).

¹⁰UNHCR Statistical Reporting on Statelessness: Statistics Technical series 2019:1 <https://www.unhcr.org/5d9e182e7.pdf> (accessed 15 December 2021).
<https://www.unhcr.org/ibelong/statelessness-around-the-world/> (accessed 5 March 2023).

¹¹ "SA looks to biometrics innovation to curb problem of undocumented children" *Sunday Times* 24 September 2021 <https://www.timeslive.co.za/politics/2021-09-24-sa-holds-out-hope-to-biometrics-innovation-to-curb-the-problem-of-undocumented-children/> (accessed 29 October).

¹² See, Statelessness in SA; DHA Report back on Committee Resolutions: with Minister & Deputy Minister (2021) <https://pmg.org.za/committee-meeting/32487/> (accessed 17 October 2021), "15 million' people in SA are unregistered, and many are stateless children" *The Citizen* 14 November 2019 <https://www.citizen.co.za/news/south-africa/15-million-people-in-sa-are-unregistered-and-many-are-stateless-children/> (accessed 13 August 2023) "15m undocumented people in SA, says Lawyers for Human Rights" *Newsroom Africa* on 23 November 2022 <https://www.youtube.com/watch?v=RHs4JNmTrc4> (accessed 20 June 2023).

¹³ United Nations Human Rights Commissioner for Refugees <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf>. (accessed 27 October 2023).

¹⁴ UN High Commissioner for Refugees Global Action Plan to End Statelessness 2014-2024. United Nations Office of the High Commissioner About Nationality and Human Rights <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx> (accessed 27 October 2021). UNHCR Ending Statelessness <https://www.unhcr.org/ending-statelessness.html>. (accessed 19 October 2021)

¹⁵ Convention on the Rights of the Child 1989, African Charter on the Rights and Welfare of the Child 1990. See also, W Worster "The Obligation to Grant Nationality to Stateless Children Under Customary International Law" (2022) at 7 *Michigan State International Law Review* 98. W Worster "European Union Citizenship and the Unlawful Denial of Member State Nationality" (2020) 43 *Fordham International Law Journal* at 768-816.

¹⁶ See also, The Convention Relating to Status of the Stateless Person 1954. The Convention on the Reduction of Statelessness 1961. General Comment on article 6 of the African Charter on the Rights and Welfare of the Child: Right to birth, registration and nationality. Decision by the African Committee on the Rights and Welfare

UNHCR is that stateless children can enjoy human rights despite their lack of nationality.¹⁸ This study interrogates this narrative by assessing whether stateless children can access rights in South Africa. Therefore, the point of departure for the study is that nationality is linked to both access and the enjoyment of rights.¹⁹ Since the right to nationality has been conceptualised as a basis for the enjoyment of rights, the lack of access to rights by stateless children is worth interrogating. Without discounting the right to acquire nationality provided for by Treaty Law, the extent of this right and the obligation imposed on South Africa to grant nationality to stateless children warrants investigation. While a lack of access to rights is a challenge for both adults and children, the study focuses on children because of the direct link that access to rights has on children's survival and development. Moreover, statelessness among adults often commences during childhood, thus, further justifying the focus on childhood statelessness. This study also limits itself to children because, in terms of the Constitution of South Africa, the right to nationality only applies to children.²⁰

2. Structure of the thesis

The first component of this study aims to discuss the problem of statelessness. This will be done through an in-depth analysis of the history of statelessness to understand the problem of

of the Child in the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, Decision No 002/Com/002/2009. The Child's right to a nationality and childhood statelessness Institute on Statelessness and Inclusion (ISI) https://files.institutesi.org/crn_texts_materials.pdf (accessed 15 December 2021).

¹⁷ Protectionists promote the narrative that under international human rights regime, stateless persons can be protected and that they can in fact enjoy basic rights based on the fact that rights are entitlements that accrue to an individual by virtue of their being human. See A Schaap Enacting the right to have rights: Jacques Rancie`re's critique of Hannah Arendt (2011) *European Journal of Political Theory* 10(1) at 22–45. K Swider and M den Heijer "Why Union Law Can and Should Protect Stateless Persons" at 102.

¹⁹ Some of the proposed solutions provided by the UNHCR for the protection of stateless children include strengthening national child protection systems to ensure non-discriminatory access for stateless children. Implement campaigns for free, accessible and non-discriminatory birth registrations stateless children to enjoy basic rights, including those to housing, health and education, regardless of their sex, age or background, make long-term funding and resources available to prevent and reduce statelessness and protect stateless children UNHCR "The Urgent Need to Address Stateless Children's Rights" United Nation High Commissioner for Refugees (2012), https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf (accessed 13 August 2023).

¹⁹ UNHCR "Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless" A/HRC/31/29, <https://www.refworld.org/docid/56c42b514.html> (accessed 27 October 2021). *Chisuse v Director-General, Department of Home Affairs* 2020 (20) ZACC. M Gibney "Statelessness and the Right to Citizenship" (2009) 32 (50) *Forced Migration Review*. L Van Waas "Nationality and rights" (2011) In "Statelessness and Citizenship" Edward Elgar Publishing. N Sigona "Everyday statelessness in Italy: Status, rights, and camps" (2016) 39 (2) *Ethnic and Racial Studies* at 263-279. A Aggarwal Statelessness and 'right to have right'. Importance of citizenship in protecting human rights of statelessness communities (Masters thesis, University of Sheffield, 2014).

²⁰ Section 28 of the South African Constitution 1996.

statelessness. An analysis of South Africa's nationality laws will be done to demonstrate that South Africa still invokes a state-centric approach to the issue of nationality. This approach gives it the discretion to decide who its nationals are and often results in gaps in nationality laws and policies. It will be demonstrated that despite constitutional provisions that guarantee access to basic rights for every child in South Africa, stateless children still struggle to access basic rights. This will be done through an analysis of the legal and policy framework in South Africa on access to basic rights and the implication of lack of nationality for access to basic rights. The second component of this study is the exploration of the prospects of nationality for stateless children amidst a lack of a clear obligation on States to grant stateless children nationality. This analysis will be done by examining the various treaties that make provisions for nationality to assess whether they impose a clear obligation on South Africa to grant nationality to stateless children. The third component of the study will explore the prospects of various international children's rights principles and standards as an entry point for mandating South Africa and other similarly situated states to grant nationality to stateless children.

3. Childhood Statelessness and Access to Rights in South Africa

In terms of international human rights law, rights are guaranteed to all individuals without distinction to nationality.²¹ However, it is still debatable whether it is indeed possible for stateless children to access rights in South Africa without nationality. South Africa's legal framework envisages entitlement to basic rights by all children without discrimination based on nationality.²² However, access to these rights remains a challenge for stateless children in South Africa. Notably, South Africa guarantees some rights relevant to the protection of children regardless of nationality. For instance, section 28 of the Constitution guarantees rights for all children by making use of the words "every child". The South African Schools Act 84 of 1996 prohibits discrimination of any form in the admission of children into public

²¹ See for example, Article 2 of the 1948 Universal Declaration of Human Rights, article 3 of the International Covenant on Civil and Political Rights 1966. Article 2 of the Convention on the Rights of the Child 1989. Article 2 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990. Article 3 of the African Charter on the Rights of the Child 1990, article 2 of the African Charter on Human and People's Rights 1986. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination 1965.

²² The Constitution of South Africa 1996. Children's Act 38 of 2005. Child Care Act 74 of 1983. South African Schools Act 84 of 1996. National Child Care and Protection Policy 2019. The Children's Amendment Bill [B18-2020].

schools.²³ Moreover, the National Education Policy requires schools to assist a child to obtain documentation where there is none. In theory, the burden to comply with documentation requirements is shared between parents and the school.²⁴ Regarding health, Section 27 of the Constitution entitles everyone to access basic healthcare services and no one may be denied emergency medical treatment. This means that stateless children may not be denied access to healthcare or refused emergency medical treatment due to lack of nationality. Additionally, the National Health Act 61 of 2003, provides that children and pregnant or lactating women can access free healthcare services, irrespective of their documentation status or nationality.²⁵ Under the Children’s Act 38 of 2005, provision is made for the care and protection of all children with no distinction as to nationality.²⁶ The Children’s Act and the provisions contained in this Act aim, among others, to promote the protection, development, and well-being of children.²⁷

It is, however, questionable whether the current legal and policy framework ensures access to these rights by stateless children. For example, the Schools Act allows for undocumented children to be enrolled at public schools on the condition that they provide identifying documentation within three months of enrolment.²⁸ This requirement may be unattainable for stateless children. In some instances, stateless children are not able to enroll in school if they are unable to provide legal documentation.²⁹ In this instance, the lack of nationality is linked to the lack of documentation and this undermines access to basic rights.³⁰ Similarly, although undocumented and stateless people have a right to basic health services, in terms of the Gauteng Hospitals Ordinance Amendment Act 4 of 1999, the Chief Executive Officer (CEO) of a hospital may require identification documents before admitting a patient to a hospital except where deferring treatment may have “dangerous or detrimental consequences”. In reality,

²³ 84 of 1996 (hereinafter, the Schools Act).

²⁴ 27 of 1996.

²⁵ Section 4(3).

²⁶ Section 150.

²⁷ 38 of 2005. See also, *Centre for Child Law v Minister of Home Affairs* (2005) 6 SA 50 (T) where it was held that the right to legal representation extends to unaccompanied foreign children as informed by the principle of the Constitution para 10.

²⁸ Pertinent to note that there are proposed amendments to change this, see https://www.gov.za/sites/default/files/gcis_document/202102/44139gen39.pdf (accessed 28 October 2021).

²⁹ Jan Gerber 39% of migrant children entering SA run the risk of being stateless – research survey News 24, 7 July 2019 <https://www.news24.com/news24/39-of-migrant-children-entering-sa-run-the-risk-of-being-stateless-research-survey-20190707> (accessed 28 October 2021).

³⁰ See M Hlatshwayo & S Vally “Violence, resilience and solidarity: The right to education for child migrants in South Africa” (2014) 35 (3) *School Psychology International* at 266-279. L Chisholm Migration and education in Zimbabwe and South Africa” (2022) 48 (1) *Social Dynamics* at 170-183.

stateless children in South Africa struggle to access basic rights such as education, healthcare, and social security. This is a direct result of a lack of documentation and/or nationality, and yet access to basic rights by children is crucial to their survival and development.

This state of affairs supports Arendt's theory of the 'right to have rights.' Arendt argues that only people who have a legal connection to a state can access rights.³¹ While the legal framework on rights in South Africa uses inclusive language such as "everyone" in guaranteeing rights,³² access to these rights has often put this framework into question. For instance, a study conducted by the Centre for Education Rights and Transformation (CERT),³³ found that migrant children are often turned away from school because they do not have birth certificates and other forms of documentation.³⁴ Similarly, undocumented migrants struggle to access public healthcare facilities and are often denied treatment due to their inability to produce proper documentation.³⁵ Courts have also alluded to the difficulty that people without nationality status face when accessing rights. In the 2020 Constitutional Court case of *Chisuse v Director-General, Department of Home Affairs*³⁶, the Court noted that the "arbitrary and irrational distinction between nationals and non-nationals is inconsistent with the Constitution".³⁷ Despite this, Khampepe J. still observed that "in a Constitutional South Africa [nationality] is the gateway through which several rights in the Constitution can be accessed."³⁸ This latter part of Khampepe J.'s observation inadvertently acknowledges the barrier that a lack of nationality poses to accessing basic rights despite these rights being guaranteed to

³¹ H Arendt *The Origin of Totalitarianism* 2ed (1958). See also, *Trop v Dulles* 356 U.S. 86 (1958). 101-102 where Judge C Warren held that the deprivation of an individual's citizenship resulted in a loss of the 'right to have rights.'

³² See for example, sections 7,9-112 and 28 (1) of the Constitution 1996. *Khosa v Minister of Social Development CCT* (2003) para 42.

³³ M Hlatshwayo and S Vally "The right to education for child migrants in South Africa" (2014) *School Psychology International* 35(3) 272.

³⁴ *Ibid.*

³⁵ S Blessed-Sayah et al "A social psychological perspective on schooling for migrant children: A case within a public secondary school in South Africa" (2022) *Journal of Education* at143-163.

³⁶ (2020) ZACC.

³⁷ *Ibid* Para 24.

³⁸ Para 24.

everyone on paper.³⁹ Undoubtedly, there is a gap between the basic rights guaranteed and actual access to these rights by stateless children in South Africa.⁴⁰

In the case of *Centre for Child Law v Minister of Basic Education*,⁴¹ the issue of access to basic education by children without documentation was brought to light. In this case, the Department of Basic Education introduced a policy that required learners to provide documentation for administration. This resulted in learners being excluded from continuing with school at public schools unless they or their parents could provide identifying documentation in the form of either passports, permits, identity documents, or birth certificates. Needless to say, stateless children often lack all the foregoing documents, the implication of this being a lack of access to basic rights. In the case of *Mulowayi v Minister of Home Affairs*,⁴² exemplifies the practical challenges that stateless children encounter in accessing basic rights. In making a case for the child in question to acquire a nationality, the applicants framed their argument as follows:

“[The child], who was a newborn baby when his application for [nationality] was launched, was vulnerable to infections or accidents and as long as he remained undocumented no hospital would assist him. They further submitted that flights could not be booked for the minor child and he would not be able to attend school”.⁴³

As already alluded to, the international human rights framework guarantees rights to every child regardless of nationality. International human rights law recognises that these rights accrue to children by being human. However, based on the above overview, it is necessary to assess the extent to which stateless children can access basic rights in South Africa in the absence of nationality. The question rightly arises whether the notion of all children enjoying rights by merely being human is limited and whether nationality is a prerequisite to children accessing basic rights. If nationality is to be explored as a solution to childhood statelessness, there has to be a clear obligation on the part of South Africa in terms of international law to grant stateless children nationality.

³⁹ On access challenges, see also, *Khoza v Minister of Social Development* (2004) 6 SA 505 (CC); *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* case no CCT 39/06; *Soobramoney v Minister of Health* (1998) 1 SA 765 (CC); *Government of the Republic of South Africa v Grootboom* (2001) 1 SA 46 (CC).

⁴⁰ S Blessed-Sayah et al *Journal of Education*. L Chisholm “Migration and education in Zimbabwe and South Africa” (2022) 48 (1) *Social Dynamics* at 170-183.

⁴¹ (2020) 1 SA 711 (ECG).

⁴² (2019) (CCT249/18).

⁴³ Para 12.

3.2. Nationality Under International Law

Statelessness means that one is without legal nationality status. It would follow then that the acquisition of a nationality eliminates statelessness. However, for nationality to be advanced as a solution to statelessness, there must be an obligation on States to grant nationality to stateless people. It is thus important to consider whether such an obligation exists under international law. The commonly accepted position under international law is that it is for each state to determine, by operation of domestic law, who its nationals are. In the case of *Nottebohm, Liechtenstein v Guatemala*,⁴⁴ the International Court of Justice described nationality as “the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties.” The laws of most, if not all States, contain criteria for establishing such connection, amongst which are the place of birth, family ties, parentage, or place of residence.⁴⁵ Thus, in principle, the notion of nationality under international law falls within the purview of domestic jurisdictions. However, a state’s prerogative to decide who its nationals are is not unlimited. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, for example, states in Article 1:

“It is for each State to determine under its own law who its nationals are. This 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”.

In 1923, the Permanent Court of International Justice stated that the question of whether a certain matter is or not solely within the domestic jurisdiction of a state is essentially relative: it depends on the development of international relations.⁴⁶ In affirming the limitation of state sovereignty where nationality matters are concerned, the Inter-American Court on Human Rights has stated the following:

“Even though it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction”.⁴⁷

⁴⁴ (1955) ICJ (4) ICGJ 185.

⁴⁵ Citizenship Act 88 of 1995. Kenya Citizenship and Immigration Act 2012. Swaziland Citizenship Act 1992.

⁴⁶ 1923 PCIJ No 4.

⁴⁷ *The Girls Yean v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005) para 140.*

In the Inter-American Court of Human Rights case of the *Girls Yean and Bosico v Dominican Republic*,⁴⁸ a petition was submitted to the Inter-American Court on behalf of the Yean and Bosico children who were being denied their birth certificates and thus being denied the right to a name and nationality. This made it impossible for Yean and Bosico children to access basic rights such as education because, without a birth certificate, it is not possible to attend school in the Dominican Republic. In its judgment, the Inter-American Court of Human Rights affirmed that the issue of nationality cannot be considered merely from the perspective of the State's discretionary authority because States have a duty to protect.⁴⁹ Moreover, the Court held that although States have the sovereign right to regulate nationality, they are responsible for abiding by international human rights standards in protecting individuals against arbitrary state action. The Court held that States are particularly limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid and reduce statelessness.⁵⁰

At the African Regional level, the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, (the *Nubian case*)⁵¹ is notable. The *Nubian case* involved children of *Nubian* descent who had challenges obtaining identifying documentation. To qualify for an identity card, *Nubians* are required to provide additional documents in support of their claims to Kenyan nationalities, such as their grandparents' identification documents. They must be questioned by the "vetting committee" and given their approval, they must visit the Magistrates' Court to swear an affidavit in support of their claim and they must pay a fee to the Court. In paragraph 48, the African Committee of Experts on the Rights and Welfare of the Child stated:

"Although States maintain the sovereign right to regulate nationality, in the African Committee's view, State discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary State actions. In particular, States are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness".

⁴⁸ Ibid para 140.

⁴⁹ Ibid separate opinion by Judge A Trindade para 3.

⁵⁰ *The Girls Yean v. Dominican Republic* para 140.

⁵¹ Decision No 002/Com/002/2009.

Recent jurisprudence by various bodies including the African Committee of Experts on the Rights of the Child and the Inter-American Court of Human Rights seems to bring to the fore the view that issues of nationality cannot be left entirely to the discretion of states by state sovereignty. It is thus, critical to explore these developments to assess their implication for the general position under international law to the effect that it is for each state to determine, by operation of domestic law, who its nationals are. As far as childhood statelessness is concerned, the question rightly arises whether the obligation to abide by international children's rights standards obliges states, including South Africa, to grant stateless children nationality despite the discretion long established in the ICJ decision in the case of *Nottebohm, Liechtenstein v Guatemala*.

3.3. Nationality under Treaty Law and United Nations (UN) Instruments

Over the years, various human rights instruments have been adopted to guarantee the right to nationality including the Universal Declaration of Human Rights 1948 (UDHR), the International Covenant on Civil and Political Rights 1966 (ICCPR), the Convention on the Rights of the Child 1989 (CRC) and the African Charter on the Rights and Welfare of the child 1990 (ACRWC).⁵² In terms of Article 15 of the UDHR, “everyone has the right to a nationality.” As a Declaration, the UDHR is generally not binding on South Africa. However, recently (in 2018 and 2019), the African Court of Human and Peoples’ Rights held that the UDHR forms part of customary international law.⁵³ This Court relied on Article 15 of the UDHR to conclude that Tanzania violated the right to nationality.⁵⁴ Recent decisions on the African continent such as this cause confusion regarding whether the right to nationality under the UDHR is binding on South Africa too. In addition, the UDHR is silent on which state bears the obligation to grant nationality, thus, rightly raising the issue of whether the UDHR is a basis for imposing obligations on South Africa to grant stateless children nationality.

Article 24(3) of the ICCPR guarantees the right to nationality in more specific terms by referring to children. It provides that, “every child has the right to acquire a nationality.” One

⁵² Pertinent to note that South Africa has not ratified the treaties on statelessness.

⁵³ *Anudo Ochieng Anudo v Tanzania* 12/2015 para 132. *Robert John Penessis v Tanzania* 13/2015 para 85 and 103. However, because the UDHR was adopted as a non-binding United Nations General Assembly Resolution, some scholars have rejected it as a binding source of law. See E Schwelb “The influence of the Universal Declaration of Human Rights on International and national law” In Proceedings of the American Society of International Law at its annual meeting (1921-1969)” (1959) 53 *Cambridge University Press* at 217-229.

⁵⁴ 012/2015.

gleans from the provision in article 24(3) of the ICCPR that the right to nationality has been narrowed down to children, unlike the UDHR which refers to “everyone”. Thus, if nationality is to be advanced as a solution to statelessness in terms of the ICCPR, it appears to provide solutions to children only. But with that said, the ICCPR is silent on who bears the obligation to grant this nationality as it stops at mentioning that “every child has a right to acquire nationality.” Some commentators have argued that this silence suggests that there is, no obligation at all.⁵⁵ Therefore, the question rightly arises as to whether there is an obligation for states to grant children nationality in terms of the ICCPR (This question is addressed comprehensively in chapter five of the thesis).

Both the CRC and the ACRWC phrase the right in similar terms. Article 6(3) of the ACRWC guarantees the right to nationality as follows:

“Every child has the right to acquire a nationality. State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born, if, at the time of the child’s birth, he is not granted nationality by any other state in accordance with its laws.”

Both the CRC and the ACRWC appear to map out this right more precisely than the UDHR and the ICCPR. It seems like the challenge of a lack of clarity that crippled both the UDHR and the ICCPR is addressed by these two treaties. Notably, such obligation now rests upon The State of birth in that, “a State is required to grant nationality to a child if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”⁵⁶ It is, however, notable that both the CRC and the ACRWC use the terminology “right to acquire nationality” rather than “right to a nationality”. The phrasing of the right using the words “right to acquire nationality” as opposed to “right to nationality” was intended to guard against undermining the sovereignty of states on matters of nationality.⁵⁷ The provisions under the CRC and ACRWC on nationality therefore reinforce state sovereignty on matters of nationality. The implication that such phrasing has for the obligation to grant nationality by states like South Africa, which are party to these Treaties remains unexplored. It is, thus, critical to explore what such phrasing means for South Africa’s obligations regarding stateless children.

⁵⁵See M Ganczer “The right to nationality as a human right” (2014) 15 *Hungarian YB Int’l L. & Eur. L De Groot* “Nationality law” (2012) In *Elgar Encyclopedia of Comparative Law* (2ed).

⁵⁶ Article 6 (3) ACRWC.

⁵⁷ P Spiro “A New International Law of Citizenship” (2011) 105 (4) *The American Journal of International Law* at 694–746.

3.4. South Africa's discretion over nationality and childhood statelessness

South Africa is one of the very few countries that guarantees the right to nationality for children. Under Section 28(1) of the Constitution of South Africa, “every child has the right to a nationality from birth.”⁵⁸ A simple interpretation of the foregoing provision suggests that South Africa is under obligation to grant “every child” nationality from birth. However, the rules on how nationality is acquired and which child qualifies for this right are left to the Minister of Home Affairs. Questions, therefore, remain whether legislation in South Africa recognises the obligation to grant nationality to stateless children. In terms of the Citizenship Act 88 of 1995, South Africa has determined who its nationals are based on birth, naturalisation, and descent. Of importance is Section 2 (4) (b) (i) of the Citizenship Act⁵⁹ which provides that

“any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (2), shall be a South African citizen by birth if he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality and his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act”.

Despite the constitutional provision that confers the right to nationality to “every child from birth”, in terms of the foregoing provision, this right is only available to certain stateless children - only children whose birth was registered in terms of the Birth and Death Registration Act 51 of 1992 (BDRA). Significantly, a child born in South Africa who, for whatever reason, was unable to register their birth in terms of the BDRA does not qualify for nationality.⁶⁰ Additionally, a child who was not born in South Africa and has not had their birth registered in terms of the BDRA but is stateless does not qualify to apply for nationality. In 2010, the Citizenship Act was amended.⁶¹ It created avenues for nationality by naturalisation for children born in South Africa to parents who are not permanent residents or South African citizens.⁶² In terms of the amendments, such a child may apply for nationality when they turn 18 if they have lived in South Africa from the time they were born and their birth was registered

⁵⁸ 1996.

⁵⁹ 88 of 1995.

⁶⁰ Pertinent to note that in terms of the BDRA Regulations 2014, a parent who wants to register their child's birth must provide valid documentation in the form of an identity document, valid passport, permit or visa.

⁶¹ Citizenship Amendment Act 17 of 2010.

⁶² 17 of 2010.

in terms of the BDRA. Based on this amendment, stateless children who are under the age of 18 years are not able to acquire nationality and remain stateless during this period.

In *DGLR v Minister of Home Affairs*,⁶³ a child born in South Africa to Cuban parents was only entitled to South African nationality because she did not qualify for nationality under Cuban law. If this child had not registered her birth in terms of the BDRA and was still not entitled to nationality in Cuba, she would not have qualified for nationality in South Africa and would therefore have remained stateless. In *Mulowayi v The Minister of Home Affairs (Mulowayi case)*,⁶⁴ a married Congolese couple who initially came to South Africa as refugees and were subsequently granted South African nationality. The couple had three children born in South Africa. Two of these children obtained South African nationality, however, the Department of Home Affairs refused to grant the third child South African nationality. The third child was born in 2017 after the amendments to the South African Citizenship Act came into force.⁶⁵ These amendments removed the right to allow children born to South African permanent residents to qualify for nationality at birth.⁶⁶ Congolese nationality was not an option for this child because as a requirement for attaining South African nationality, his parents had renounced their Congolese nationality.⁶⁷ The amendments meant that he would continue to be stateless until the age of 18. It does appear that South Africa's approach to nationality reinforces the state-centric approach to nationality advanced in the ICJ case of *Nottebohm, Liechtenstein v Guatemala*, with results in many categories of stateless children not qualifying for nationality because South Africa exercises discretion to decide who qualifies to be a national and who does not. In as much as the Constitution guarantees the right to nationality from birth, the question remains whether there is an obligation for South Africa to grant nationality to every stateless child. Assuming there is no clear obligation, it also remains unexplored whether international children's principles such as the best interest of the child can be used as tools to limit the discretion of South Africa as far as nationality for stateless children is concerned.

Precisely, in the absence of a clear obligation on South Africa to grant nationality to stateless children, the question that this study seeks to answer is whether international children's rights

⁶³ 38429/13.

⁶⁴ (2019) ZACC 1.

⁶⁵ Section 3(2)(a) of the Regulations on the South African Citizenship Act 1995.

⁶⁶ Ibid.

⁶⁷ The Department of Home Affairs official informed the *Mulowayi* couple that in order to be considered for South African citizenship they must renounce their Congolese citizenship. They did so in 2015.

principles place an obligation on South Africa to grant stateless children nationality to ensure they access basic rights.

4. PROBLEM STATEMENT

In South Africa, stateless children face significant barriers to accessing fundamental rights such as education, healthcare, and social security due to their lack of nationality. Despite international human rights laws that theoretically guarantee these rights to all individuals, including stateless persons, the practical realities reveal a stark contrast. Stateless children are often unable to enjoy these basic rights, highlighting a critical gap in protection.

This study addresses the urgent need to protect stateless children in South Africa by exploring the role of nationality through a children's rights approach. The study highlights the need to address childhood statelessness because of the vulnerable position that stateless children find themselves in and the potential cycle of childhood statelessness. It examines how nationality can serve as a crucial mechanism to ensure that stateless children can fully access and enjoy their rights. The study also investigates the limitations of international law, which respects state sovereignty in determining nationality, and how this affects the status and rights of stateless children in South Africa.

The problem lies in the absence of a binding obligation for South Africa to grant nationality to stateless children, despite international treaties and principles advocating for their protection. This study argues that principles such as the best interest of the child, the right to life, survival and development, and the right to non-discrimination should guide South Africa's policies. These principles can provide a pathway for granting nationality to stateless children, thereby ensuring their access to essential rights and protections. The study seeks to reconcile the tension between state sovereignty and children's rights, proposing that international children's rights principles limit South Africa's sovereignty, thereby creating a framework by which stateless children acquire nationality.

2 AIM AND OBJECTIVES OF THE RESEARCH

This study aims to explore the prospects of nationality as a solution to childhood statelessness in South Africa amidst a lack of clear obligation on South Africa to grant nationality to stateless children. The objectives of the research are:

1. To examine the extent of accessibility to basic rights by stateless children. whether stateless children in South Africa are able to access basic rights without nationality.
2. To demonstrate the need for nationality as a solution for the protection of stateless children.
3. To examine the extent to which the laws and policies in South Africa entrench or seek to eliminate childhood statelessness.
4. To analyse whether South Africa has an obligation to grant nationality to stateless children in terms of International Treaty Law.
5. To explore the prospects of selected international children's rights standards to impose limits to South Africa's sovereignty as far as nationality for stateless children is concerned.

6. METHODOLOGY

The research used the doctrinal method of research to develop an understanding of childhood statelessness. A doctrinal study, also known as black letter law research, involves a detailed and systematic examination of legal rules, principles, and doctrines within a specific area of law.⁶⁸ This research relied on both primary and secondary sources. The sources that were analysed include textbooks, journal articles, and sources of international and regional law, soft law, domestic legislation, case law, reports, and General Comments of the relevant international and regional bodies. This analysis identified the key issues, common provisions, and areas where there are gaps and weaknesses in the law pertaining to the protection of stateless children in South Africa. It was of vital importance that nationality under international law be analysed. Against this backdrop, this thesis analysed the various sources of international law such as the UDHR, ICCPR, CRC, and ACRWC. Other sources that were used in this regard include policies of organs such as the UNHCR. In addition, analysis of the current legal framework relating to the statelessness of children in South Africa was undertaken. This analysis explored South Africa's laws and policies as a means of identifying how the framing of laws and policies causes barriers to accessing basic rights for stateless children.

⁶⁸ T Hutchinson & N Duncan *Defining and Describing What We Do: Doctrinal Legal Research* (2012) 17 *Deakin Law Review* 83.

To address the problem posed, it was important to anchor the research in applicable theoretical frameworks. On this basis, the thesis discussed and analysed the work of various philosophers, in particular, those who question universality as a basis for the enjoyment of rights. The analysis was anchored in theoretical frameworks such as Arendt's right to have rights and the rational choice theory. Arendt's assertion that rights are acquired through nationality or citizenship status was examined to understand the inability of stateless children to access rights without nationality. The rational choice theory is another theoretical framework that was analysed. The writings of philosophers such as Adam Smith⁶⁹ were used to analyse states' approaches and motivation to solving certain issues including statelessness. The rational choice theory was unpacked to understand how legal obligations and global agendas influence state behaviour when there is some benefit attached to such compliance. Furthermore, the rational choice theory was unpacked to establish State behaviour if non-compliance to legal obligations comes with serious consequences. The rational choice theory was, therefore, used to assess South Africa's posture regarding addressing childhood statelessness, particularly, the lack of benefits and absence of consequences for non-compliance to addressing childhood statelessness.

7. LAYOUT OF CHAPTERS

This research study is divided into seven chapters. Chapter One constitutes the general introduction and states the problem. This chapter aims to introduce the research topic and the background of the research. This chapter underscores the legal gaps warranting research.

Chapter Two unpacks the problem of statelessness. The chapter aims to trace the history of statelessness, its causes, and its effect on the rights of stateless children. The discussion generally focuses on South Africa but with some insights on statelessness globally and within the Southern African region.

Chapter Three examines South Africa's laws in order to identify gaps in legislation and the challenges resulting from the discretion of policymakers and how that impacts childhood statelessness. The chapter analyses South Africa's Constitution of 1996, the Citizenship Act 88 of 1995, the Birth and Death Registration Act 51 of 1992, and the Regulations of the De-

⁶⁹ See A Witztum "Social Circumstances and Rationality: Some Lessons from Adam Smith Why We May Not All Be Equally Sovereign" (2005) 64 (4) *The American Journal of Economics and Sociology* at 1025–47. A Smith "An inquiry into the nature and causes of the wealth of nations"(2007). https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf (accessed 20 June 2021).

partment of Home Affairs (the custodian and the gatekeeper for the implementation of nationality laws in South Africa). The analysis demonstrates that despite constitutional and legislative provisions on the right to nationality at birth for every child born in South Africa, South Africa is invoking the state-centric approach to nationality which leaves it with the discretion to grant or withhold nationality from some children. In exercising this discretion, some children are left stateless despite the strong constitutional and legislative guarantees on nationality for stateless children born in South Africa. Drawing on the rational choice theory, the chapter underscores that South Africa's failure to prioritise nationality for stateless children as evident in its laws and policies is aligned with its state interests. The chapter also demonstrates how childhood statelessness is perpetuated in South Africa as a result of the discretion given to policymakers and the gaps in nationality laws. Chapter Four examines access to basic rights by stateless children in South Africa. The chapter does this by analysing selected laws on basic rights including health, education, and social security, to demonstrate the non-viability for stateless children to access basic rights amidst a lack of nationality. In conducting this analysis, Arendt's renowned "right to have rights" is used as a lens through which to advance the argument that nationality, which Arendt has conceptualised as "the right to have rights", is a condition precedent to accessing basic rights in South Africa despite the glamorous notion of the universality of human rights. The rational choice theory is also discussed to explore how states decide on which matters to resolve and pay attention to. This analysis serves to determine whether the framing of legislation and policies sometimes has the effect of limiting access to rights for stateless children.

Chapter Five discusses South Africa's obligation or lack thereof to grant nationality to stateless children under international law. This chapter discusses nationality and how it has been conceptualised under international law. This chapter aims to demonstrate that in terms of international law, states have the sovereign power to regulate nationality laws. The chapter examines treaty law on the subject of nationality to demonstrate that despite literature and policies on a universal acquisition of nationality, there is no binding international treaty or norm that imposes an obligation on South Africa to grant nationality to all stateless children. Effectively, granting nationality remains state-centred, with states exercising the discretion to grant or withhold nationality.

Chapter six proposes a framework that can be used to protect the rights of stateless children. This chapter discusses international children's rights as a basis for curtailing South Africa's discretion on issues of nationality. This chapter aims to discuss international children's rights

principles and standards that reinforce the obligation of states including South Africa, to exercise their discretion on issues of nationality in a manner that ensures that stateless children are granted nationality. It demonstrates that despite the absence of an obligation in terms of treaty law to grant stateless children nationality, there is an obligation for states to exercise their discretion in agreement with international children's rights standards despite state sovereignty. The chapter underscores that States are obliged to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised, among others, in the Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child 1990. The chapter also emphasises that adhering to international children's rights standards including the best interest of the child, the right to life, development, and survival, non-discrimination, and the global agenda on the reduction and elimination of childhood statelessness lends support to the view that states should grant stateless children nationality despite there being no clear obligation in terms of international law on this issue.

Chapter Seven is the concluding chapter. It provides a summary of the findings of the thesis. This chapter also provides recommendations regarding the protection of stateless children in South Africa. Having demonstrated the lack of a clear obligation on South Africa to grant nationality to stateless children under the treaty law, the recommendations in this chapter focus on South Africa's obligation to grant nationality to stateless children based on international children right's standards and principles.

CHAPTER TWO: UNDERSTANDING AND DEFINING THE PROBLEM OF STATELESSNESS

1. Introduction

With the overall aim of this study being to underscore the role of nationality in protecting stateless children's access to basic rights, a vital starting point to resolving this issue is understanding the history, scope, and nature of statelessness globally, on the African continent and more specifically, in South Africa. Against this backdrop, this chapter aims to discuss the history of statelessness. The chapter also unpacks the cross-cutting causes of statelessness in South Africa and Africa more generally. To have an in-depth discussion on the history and causes of statelessness, it is necessary to draw insights from other countries in the African region⁷⁰ and some notable examples globally. Despite the focus of this thesis being South Africa, drawing on examples beyond South Africa is critical because statelessness does not exist in a vacuum. Notably, the laws, regimes, and policies in other countries directly impact statelessness in South Africa. The specific African countries were chosen for comparison based on how they chose to deal with the issue of nationality at independence.

2. The history of statelessness

The literal translation of the word 'statelessness' means 'to be without a state'. The word statelessness gives the impression that a person can live in any part of the world but have no connection to any state. The official definition of a stateless person is provided for in Article 1 of the Convention Relating to the Status of Stateless Persons 1948, which defines a stateless person as a person who is not considered a national of any state under the operation of its laws.⁷¹ This idea is not only an enigma but it also raises a few questions such as, how is it possible for a person may find themselves stateless? How is it possible to be born stateless? Moreover, how is it possible to be born with a nationality and then have that nationality taken away, thereby rendering a person stateless? Remarkably, statelessness is not a new issue. It is a phenomenon as old as the concept of nationality.⁷² Dating back to as early as the 1920s, the courts have grappled with the concept of statelessness and comprehending the idea that one could be without a state.

⁷⁰ Countries to be examined include, Botswana, The Kingdom of ESwatini, Kenya, Sierra Leone, and Algeria.

⁷¹ The Convention Relating to the Status of the Stateless persons 1954.

⁷² L. Siegelberg *Statelessness: a modern history* (2020).

The case of *Stoeck v Public Trustee*⁷³ best underscores this challenge. In this case, the Court of Chancery in England had to address the concept of statelessness and the anomaly surrounding it. The issue before the Court was whether Mr. Stoeck had been a German national in January of 1920. The Court needed to establish Mr. Stoeck's nationality to determine whether he had violated the Treaty of Peace Act of 1919. The facts of this case can be summarised as follows; Mr. Stoeck was born in Prussia and in October 1895, he moved to Germany. In 1896, he denounced his Prussian nationality. While living in Germany, he never applied to obtain German nationality. Therefore, at this point, he neither possessed a Prussian nationality nor a German nationality. He was therefore without a state. In November 1896, he moved to England, however, he never naturalised as an English citizen. This meant that he did not belong to any state and in 1916 he was deported back to Germany.

The Court had to address the concept of statelessness particularly as it was understood under English law because contrary to German law which recognised the status of being without a state,⁷⁴ English law, on the other hand, did not recognize the condition of being without a state.⁷⁵ In terms of German law, a stateless person was anyone who did not possess the nationality of any state. The matter of statelessness was foreign to English law as the courts were not able to find evidence of a situation where English law considered a person as having no nationality.⁷⁶

The Court acknowledged the fact that German law recognised and dealt extensively with the issue of statelessness.⁷⁷ Furthermore, the Court held that an individual could lose their nationality knowingly or unknowingly, intentionally or through no fault of their own. Additionally, the Court recognised that a person can also lose their nationality after birth in a situation where they lose their original nationality and do not acquire a new nationality, as the case was for Mr. Stoeck. This case illustrates that the phenomenon of statelessness is by no means new, it has rather taken different dimensions over the years. Whilst in the past, individuals could be given a document recognising them as stateless and allowing them to move freely between states, the situation is completely different now in most states.

⁷³ Annotated Law Reports version (1921) 2 Chapter 67.

⁷⁴ The German authorities issued Stoeck with an identifying document that indicated that he was stateless. See also; article 29 of the German Introductory Statute 1896.

⁷⁵ Siegelberg *Statelessness: a modern history*.

⁷⁶ Para 79.

⁷⁷ See Section 1 of the Military Law of 1913. Referred to as '*staatenlos*' in German. See also, Art. 29 of the German Introductory Statute, 1896 which recognised the position of stateless persons.

Statelessness is an issue of time immemorial and this is because it has existed for the longest time.⁷⁸ The reason it may seem like the emergence of statelessness is a new problem may be attributed to the attention that the international community has given to it in recent times. A discussion on the history of statelessness would not be comprehensive without discussing the events that led to a sharpened focus on the issue of statelessness. The discussion that follows will briefly refer to World War I and World War II to show a link between these two Wars and statelessness. It will also delve into the notion of colonialism and how statelessness in Africa can be linked to this history.

Although not a new phenomenon,⁷⁹ statelessness rose to huge proportions after the end of World War I.⁸⁰ People were evacuated in mass proportions and lost their identification and legal documentation in the process.⁸¹ This made it difficult and almost impossible for people to later prove their citizenship which resulted in them becoming stateless. Likewise, the end of World War II saw an increased number of people who were displaced as a result of the creation of new borders, international movement, forced displacement, and resettlement.⁸² This resulted in the Economic and Social Council commissioning a study in 1945.⁸³ The study aimed to conduct research and establish the situation regarding the status of stateless persons to make recommendations as to how stateless persons could be protected. One of the significant findings of this study was that after World War II, statelessness rose to unprecedented proportions.⁸⁴ What exacerbated the situation during that time was the displacement of millions of people. In addition, there were only a few conventions that either prevented or protected the rights of stateless persons.⁸⁵ Following the completion of the study, the United Nations Ad Hoc Committee on Refugees and Stateless Persons recommended that stateless persons should be traced and afforded better protection. This resulted in certain conventions⁸⁶

⁷⁸ The oldest group of stateless people can be traced back to 1919 when Austria-Hungary dissolved and new states were created. See H Arendt *The origins of totalitarianism* (1958).

⁷⁹ For example, The Convention on the Protection of literary and artistic works, The Berne Convention of 9 September 1886 article 3 and the Berlin Convention of 13 November 1908, article 6.

⁸⁰ UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/para 2, <https://www.refworld.org/docid/3ae68c2d0.html> (accessed 3 June 2023).

⁸¹ Ibid.

⁸² Ibid.

⁸³ Sixth session, the Economic and Social Council adopted resolution 116 (VI) D, dated 1 and 2 March 1948.

⁸⁴ UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations, August 1949, Lake Success - New York, 1 August 1949.

⁸⁵ Ibid.

⁸⁶ The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

being adopted and for the first time, an official definition of statelessness was established. The first convention that directly addressed stateless persons was the Convention Relating to the Status of Stateless Persons 1954, which, defines a stateless person as someone who has no legal connection with any state by the operation of its laws.⁸⁷

In the particular context of Africa, many of Africa's problems relating to the struggles of citizenship and nationality can be traced back to colonialism, which was the practice of a powerful and resourceful country acquiring full or parastate control over a less resourceful and weaker country.⁸⁸ This involved occupying it with settlers and exploiting the country economically.⁸⁹ Colonialism entailed the creation of new borders which often resulted in the displacement and separation of people based on their ethnicity, race, and religion.⁹⁰ The colonising State determined who belonged where and who acquired citizenship.⁹¹ The migration of labourers was a huge marker of colonisation. For example, many people migrated from other African territories to work in South African mines and others were moved to work in Congo plantations.⁹² When the colonial period ended and new States were created, there was a need for the new States to enact nationality laws.⁹³ However, newly independent States often struggled to rebuild their nations because of the fragmentation created by colonisers.⁹⁴ Colonisers divided borders and separated people based on ethnicity, religion, and race. This created divisions among people and a substantial number of newly independent states continued with this practice when enacting and applying nationality laws.⁹⁵ Some newly independent States made provisions for how nationality could be acquired,⁹⁶ however, other states made no such transitional provision.⁹⁷ The transition to independence was a critical period and some States abused this newly found independence through the enactment of exclusionary

⁸⁷ Article 1 of the Convention on the Status of the Stateless Persons 1954.

⁸⁸ R Horvath "A definition of Colonialism current Anthropology" (1972) 13 (1) at 45-57.

⁸⁹ Ibid.

⁹⁰ B Manby Statelessness in South Africa Briefing paper for UNHCR Regional Conference on Statelessness in Southern Africa November 2011 <https://www.refworld.org/pdfid/50c1f9562.pdf> (accessed 3 May 2021).

⁹¹ B Manby "Struggles for Citizenship in Africa Empire to Independence: the evolution of citizenship law in Africa" (2009) 26-36.

⁹² Manby *Struggles for Citizenship in Africa* at 28.

⁹³ Ibid.

⁹⁴ Ibid at 28-29.

⁹⁵ At independence, most Commonwealth countries whose constitutions were drafted according to the standard "Lancaster House" template adopted rules that created three ways of becoming a citizen of the new state: some became citizens automatically; some became entitled to citizenship and could register as of right; while others who were potential citizens could apply for naturalisation..

⁹⁶ Manby *Struggles for Citizenship in Africa* at 29.

⁹⁷ Ibid.

nationality rules.⁹⁸ The colonising States often moved people among different territories and gave privileges to certain groups of people. People obtained certain privileges based on race and ethnicity and this resulted in resentment among the different groups of people. This resentment became the underlying basis on which most nationality laws were based.⁹⁹ Arguably, colonisation resulted in a ‘blood-and-soil’ mentality, sometimes referred to as the concept of ‘us against them’ or ‘first-comers and late-comers’.¹⁰⁰ This concept became a threat that informed the nationality laws of most newly independent African states.¹⁰¹ Africans became so obsessed with the idea that – ‘we were here first and thus we have the prerogative to either accept or deny newcomers’ especially if they did not belong to one of the known tribes.

The case of a tribe in Kenya known as the Nubians provides a classic example of how the concept of ‘first-comers’ and ‘late-comers’ has been used to deprive people of nationality. The Nubians are originally Sudanese people who were moved from Sudan to Kenya during colonisation.¹⁰² The Nubians were taken from Sudan to Kenya to form part of the British armed struggle known as the King African’s Rifles (KAR).¹⁰³ Following the dismantlement of KAR, the colonial authorities refused to allow the Nubians to return to Sudan.¹⁰⁴ The Nubians eventually settled in the outskirts of Kenya and were not given British nationality but were instead referred to as ‘aliens.’ When Kenya gained independence in 1963, the practice of referring to the Nubians as ‘aliens’ and not recognising them as nationals continued, thereby rendering them stateless.¹⁰⁵ Although Nubian children qualify for nationality in terms of the Children’s Act of Kenya Act 8 of 2001,¹⁰⁶ they still do not have the same rights as other Kenyan children who have citizenship. Nubian children have difficulty registering their birth and even when their birth is registered, the birth certificate indicates that it is not proof of citizenship. Therefore, they are denied the right to acquire a nationality. Nubian children can apply for a national identity document upon reaching the age of 18, however, they have to go

⁹⁸ Ibid.

⁹⁹ Manby *Struggles for Citizenship in Africa* at 7.

¹⁰⁰ Z Bauman “Soil, Blood and Identity” *The Sociological Review* (1992) 40(4) at 675-701.

¹⁰¹ Manby *Struggles for Citizenship in Africa* at 7.

¹⁰² J de Smedt *The Nubis of Kibera: a social history of the Nubians and Kibera slums* (PhD-thesis, Leiden University, 2011).

¹⁰³ Ibid.

¹⁰⁴ *Nubian Community of Kenya v Kenya* 317/2006 para 64.

¹⁰⁵ Ibid.

¹⁰⁶ Section 11 states that every child shall have a right to a name and nationality.

through a long vetting and discriminatory process.¹⁰⁷ Their right to movement is restricted by the fact that they are denied Kenyan passports.¹⁰⁸ This systematic practice of denying Nubians crucial identification documents perpetuated statelessness in Kenya. The effect of this is that Nubians remain un-educated, unemployed, subject to forced displacement, and receive no assistance from the state.

The 'blood-and-soil' mentality is problematic for numerous reasons. Firstly, many people were moved around the different territories. A person might have been born in one territory but was moved by a colonising state to a different territory. Therefore, upon independence, most people had been shuffled around different territories. This put many groups of people in an unfortunate position, with many finding themselves far from the land of their birth. As noted, during British rule, a group of Nubian people were taken from Sudan and sent to Kenya as part of an armed force struggle regime. Following the disbandment of the armed forces regime, the Nubians asked to be returned to Sudan and their request was denied by the British rule.¹⁰⁹ Thus, the Nubians were forced to settle in a foreign land where they had not been pleasantly welcomed in the first place. Secondly, the 'blood-and-soil' mentality is problematic because it places emphasis on the notion that nation-building and solidarity can only be achieved when people are categorised and grouped according to their ethnicity, race, and religion. In Sierra Leone, for example, the constitutional¹¹⁰ provision of nationality was amended to insert a requirement that one must be of 'African negro descent' to be eligible for citizenship. This requirement can be traced back to the country's colonial history. In the 1980s, a group of 'non-African negro descent migrants' arrived in Sierra Leone, and this added another dynamic to the country's colonial history. This group of migrants was perceived as being economically superior. After obtaining independence, Sierra Leone's nationality laws¹¹¹ excluded these non-African migrants. Evidently, the long-standing discrimination and division among non-African descent on the one hand and indigenous people¹¹² of Sierra Leone on the other informed nationality rules in Sierra Leone – a way of redemption

¹⁰⁷ Specific application days are set for Nubians who want to apply for citizenship, vetting also includes appearing before a vetting panel. See *Nubian Community of Kenya v Kenya* para 5.

¹⁰⁸ Ibid 5.

¹⁰⁹ E Durojaye and E Foley "Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication" (2012) 12 *AHRLJ* 564-578.

¹¹⁰ Section 2 of the Citizenship Act of Sierra Leone 1973.

¹¹¹ The Citizenship Act of Sierra Leone 1973. The Constitution of Sierra Leone 1991.

¹¹² The word 'indigenous' refers to the notion of a place-based human ethnic culture that has not migrated from its homeland and is not a settler or colonial population. G Stewart. *What does 'indigenous' mean, for me?* (2017) 50(8) *Educational Philosophy and Theory* 740–743. Univers

for the black race, so to speak.¹¹³ Thirdly, the ‘blood-and-soil’ mentality is problematic because it can be used to deprive people of their nationality. Arbitrary deprivation of nationality strips people of their nationality and effectively puts them at risk of becoming stateless. Minorities are often ‘legislated out’ or expelled from a particular country. For example, in 1972, Ugandan President, Idi Amin, gave the order that Asian people living in Uganda had 90 days to leave the country.¹¹⁴ This triggered the mass movement and loss of citizenship of almost 80,000 Ugandan Asians.¹¹⁵ Other mass expulsions are noted in the case of Ghana and Nigeria. In 1969, Ghana issued what was known as the Aliens Compliance Order of 18 November. This resulted in the expulsion of 2.5 million undocumented African migrants, half of whom were Nigerians.¹¹⁶ Nearly 14 years later, Nigeria expelled two million undocumented migrants, about half of those expelled were Ghanaians.¹¹⁷ The ‘blood-and-soil’ mentality continues to be problematic post-independence and states, including South Africa often use it to inform policies and laws that alienate groups of people.¹¹⁸

One cannot overstate the fact that colonisers left nasty traces of division and discrimination in most African states. The colonisers placed much emphasis on belonging and access based on one’s race, language, religion, culture, and ethnicity.¹¹⁹ The idea of ‘first comers and late comers’ was reinforced by the colonisers in the way that they divided territories and migrated people both forcefully and voluntarily. Though not as extreme as the case of Apartheid in South Africa, in most colonies White people were always treated more favourably than Black people.¹²⁰ It is against this colonial background that most states enacted nationality laws. This is perhaps one of the most devastating effects of colonialism. Colonisers came to Africa and divided territories, with some being split based on languages. Groups of people who shared the same ethnic background but different languages were divided. Groups of people were shuffled and migrated for labour and purposes. Consequently, the end of colonisation left a bitter thread of division which influenced the nationality laws of most states and continues to

¹¹³ B Ludwig “A Black Republic: Citizenship and naturalisation requirements in Liberia Migration Letters” (2016) 13(1) at 99.

¹¹⁴ R Nogel “Human Rights and Uganda’s expulsion of its Asian minority” (1973) 3(1) *Denver Journal of International Law & Policy*.

¹¹⁵ H Patel “General Amin and the Indian Exodus from Uganda” (1972). 2(4) *A Journal of Opinion* at 12-22.

¹¹⁶ A Adjepong “The implementation and effects of Ghana’s 1969 Aliens Compliance Order, Master’s thesis, 2009, University of Cape Coast.

¹¹⁷ Manby *Struggles for Citizenship in Africa*.

¹¹⁸ See, Migration Policy in South Africa Lessons from Africa’s Migration Magnet for European Policymakers (2021) <https://dgap.org/en/research/publications/migration-policy-south-africa> (accessed on 23 May 2022).

¹¹⁹ Manby *Citizenship Law in Africa* at 10.

¹²⁰ *Ibid.*

do so as evident in migration and nationality laws and policies. This concept of ‘we were here first’ and ‘you came after’, thus you do not belong here, remains a constant backdrop that informs the nationality policies of most States in Africa.

3. The causes of Statelessness in Africa

The causes of statelessness in most African countries are multi-faceted and often overlap within the region. The laws and policies of one African State have the potential to contribute to statelessness in another African State. Therefore, the discussion on the causes of statelessness will draw examples from other African States to provide a holistic overview of the problem of statelessness in the region. Reference to other African States is also important because of the cross-border migration that takes place within the African region. This makes it clear that understanding statelessness in South Africa requires a holistic understanding of the problem in the African Region because the laws on nationality in other African states may have implications for statelessness in South Africa. Factors that require a continent-wide understanding of statelessness (despite the focus on South Africa) include the challenge of discrimination in nationality laws, state succession, forced displacement, arbitrary deprivation of nationality and forced migration, child abandonment, child trafficking, and cross-border adoption.¹²¹

The causes of statelessness particularly in Africa go beyond the colonial history of Africa. To be fair, the issue of statelessness has multifarious causes that differ from region to region and from state to state. It has been argued that the two main causes of statelessness in Africa are the failure to integrate historical immigrants and discrimination based on gender, ethnicity, and religious affiliation.¹²² In most African countries for example, one of the prevalent causes of statelessness is policies and laws that prohibit women from transferring their nationality status to their children. Statelessness in some African countries can also be caused by factors such as discrimination in nationality laws, state succession, administrative oversights, arbitrary deprivation of nationality status, and forced displacement and migration.¹²³ Other risk

¹²¹ The world's stateless children Report (2017) at 21 <http://www.institutesi.org/worldsstateless17.pdf>. (accessed 14 April 2022).

¹²² Manby Statelessness in South Africa Briefing paper for UNHCR Regional Conference on Statelessness in Southern Africa November 2011.

¹²³ The World's Stateless Children Report (2017) at 7.

factors include child abandonment, child trafficking, and cross-border adoption. These factors are discussed in greater detail in this section.

3.1. Discrimination in Nationality Laws

Discrimination in nationality laws is one of the most avoidable causes of statelessness. In this regard, it can be argued that statelessness is man-made because policies and nationality laws are man-made. Discrimination in nationality laws is not only an avoidable cause of statelessness, it can also play a significant role in preventing, reducing, and ending statelessness. The UNHCR has underscored that discrimination based on ethnicity, race, religion, age, sex, gender, disability, language, sexual orientation, gender identity, gender expression, and sex characteristics is a cause of statelessness.¹²⁴ The practice of discriminating against people through nationality laws was continued by most states even after independence.¹²⁵ In most cases, women were unable to transmit their nationality to their foreign spouses, or their children if the father was not a citizen.¹²⁶ In other instances, nationality laws are used to discriminate based on ethnic background. Discrimination in nationality laws is arguably one of the most avoidable causes of statelessness.¹²⁷ This is because all it takes is an amendment of legislation to abolish the discrimination or legislation that prohibits women from being able to pass on their nationality status to their children. The unfortunate part of nationality laws that discriminate based on gender is that they not only cause statelessness but also perpetuate the statelessness pandemic. This is unfortunate because the mere act of eliminating discriminatory laws will contribute to the elimination of statelessness. It not only avoids statelessness but also prevents its perpetuation. To provide an extended discussion on the extent and effects of discrimination in nationality laws, it is necessary to refer to a few case studies from within the African region.

3.1.1. Discrimination in Nationality Laws in Algeria

¹²⁴Background Note on Discrimination in nationality laws and statelessness (October 2021)<https://www.refworld.org/pdfid/616fda104.pdf> (accessed 19 May 2022).

¹²⁵ See The Sierra Leone Citizenship Act 1973 which, discriminated on the grounds of ethnicity.

¹²⁶ The Swaziland Citizenship Order of 1974.

¹²⁷ 25 States have nationality laws that prevent women from conferring nationality status to their children on an equal basis with men. See UNHRC Gender Discrimination in Nationality Laws <https://www.unhcr.org/ibelong/gender-discrimination-and-stateless-children/>. UNHCR Global Campaign for Equality Nationality Rights <https://equalnationalityrights.org/the-issue/the-problem> (accessed 1 February 2022).

Following Algeria's independence from France in 1962, the country's Nationality Code was enacted in 1963. Like most former colonies, the law was based on the nationality law of the former colonial power and therefore retained discrimination that was embedded in the French Nationality Code. In this regard, Algerian men could confer their nationality on children in all circumstances and also retained the right to confer nationality on foreign spouses. However, the law denied Algerian women the right to confer nationality to their children by descent, unless their child's father was unknown or stateless. Consequently, a child born to an Algerian mother and a foreign father was unable to acquire their mother's Algerian nationality.¹²⁸ Algeria became a party to the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) in 1996, it entered a reservation to Article 9(2), which calls on all states parties to ensure the equal right of women and men to confer nationality onto their children. Through the combination of mounting civil society calls for reform, engagement by international human rights bodies including CEDAW, and the championing of this issue by leaders within the government, Algeria's parliament passed a new nationality law in February 2005. This law guarantees the equal ability of citizens, regardless of gender, to confer nationality on their children and spouses. Since 2005, Algeria's citizens and the country at large have benefitted from the Nationality Code's embrace of equality and inclusion.¹²⁹ However, despite these reforms, the consequences of the discriminatory law before 2005 still leave unresolved issues of statelessness in Algeria.¹³⁰

3.1.2. *Discrimination in Nationality Laws in Botswana*

The Botswana Citizenship Act of 1982 and the Citizenship Amendment Act of 1984 eliminated women's previous right to confer nationality on their children born within the country. According to both Acts, Botswana women could only confer nationality on children at birth if the child was born out of wedlock.¹³¹ In contrast, children born of Botswana women who were married to foreign men were not conferred nationality.¹³² The discrimination here was attributed to the fact that a Botswana woman chose to get married to a non-Botswana man. A

¹²⁸ Article 6 and 7 Nationality Law No.1970-86 of the Republic of Algeria.

¹²⁹ Global Campaign for equality rights "Achieving Gender-Equal Laws in Africa: For equality, for families, for the future" <https://equalnationalityrights.org/reports/document/1285-achieving-gender-equal-achieving-gender-equal-nationality-laws-in-africa> (accessed 6 April 2022).

¹³⁰ Ibid.

¹³¹ Section 4 and 5 of the Botswana Citizenship Act of 1982.

¹³² Section 2 (a) of the Citizenship Act of 1982.

child born to a foreign father could only apply for naturalisation upon reaching the age of 21.¹³³ This is an often-lengthy process with an uncertain outcome as the application for naturalisation does not guarantee a positive outcome. This also meant that these children remained stateless until the age of 21, as only then could they apply for naturalisation. Perhaps, what is most detrimental to this distinction is the fact that nationality differs largely from naturalisation. Naturalisation limits a person's participation in political engagements. Notably, a naturalised person cannot run for political office or vote. Children of Batswana men born inside or outside the country were automatically recognised as citizens. However, this was not true for children born to Batswana women in and outside the country. In addition, these Acts also reaffirmed the right of Batswana men to confer nationality on foreign spouses, without providing the same right to Batswana women.

Due to these laws, children born in wedlock to Batswana women and non-national men could remain in the country only if they obtained a residency permit, which was based on the father's permit. This limited women's right to freely travel in and out of the country with their children. It also compromised women's right to freely determine their place of residence. By denying women the equal right to confer nationality on non-national spouses and only permitting women to confer nationality on children born out of wedlock, the Citizenship Act also violated women's right to freely choose a spouse. Women were thus forced to choose between marrying their foreign partner and having children who would be denied nationality or having children out of wedlock to secure the children's status as citizens. Moreover, children and spouses of Batswana women were denied various rights¹³⁴ and services that were granted to the children and spouses of Batswana men married to foreign women.

The discriminatory provisions in Sections 4 and 5 of the Botswana Citizenship Act came under scrutiny in the case of *Botswana Attorney General v Dow*¹³⁵ In this case, Mrs. Dow, a citizen of Botswana was married to a foreign spouse (who was a citizen of the United States of America) brought a case against the Botswana government challenging the constitutionality of Section 4 of the Botswana Citizenship Act 1982. The facts of this case can be summarised as follows; in 1984, before Mr. and Mrs. Dow's marriage, their first-born daughter was born in Botswana and because she was born out of wedlock to a Batswana woman, she ac-

¹³³ In terms of the Botswana citizenship Act 1982, a person born in Botswana to a Batswana woman does not automatically acquire citizenship.

¹³⁴ For example, Batswana women who have married alien men are unable to exercise their right to travel freely in and out of the country without leaving their children behind.

¹³⁵ 1994 (6) BCLR 1.

quired Botswana nationality by birth. However, Mrs. Dow's two other children, born in Botswana following Dow's marriage to Mr. Dow, were denied Botswana nationality. In terms of Section 4 of the Citizenship Act, the daughter born before the marriage obtained Botswana citizenship because she was born out of wedlock to a Botswana woman and a father who was a foreign national. The children born during the marriage were not recognised as citizens of Botswana, although they were children of the same parents, because they were born to a Botswana woman who was married to a foreign national (Mr. Dow). The two children were therefore considered aliens in the land of their birth. Mrs. Dow argued that the limitation placed on a woman's ability to transmit nationality status to her child based on the nationality status of the father or spouse was discriminatory based on gender. Conversely, Botswana men were able to pass the nationality status to their children without any limitations or conditions. The government argued that discrimination on the grounds of sex must be permitted in Botswana society as the society is patrilineal and therefore male-oriented. The government did not deny that the Citizenship Act discriminated against women but argued that this was intentional to preserve the male orientation of Botswana society. The Court held that Sections 4 and 5 of the Citizenship Act were against the Constitution of the Republic of Botswana 1966, as amended¹³⁶ It was only after this decision that the Citizenship Act was amended in 1995 to uphold women's right to confer nationality on their children and non-national spouses on an equal basis with men.

3.1.3. *Discrimination in Nationality Laws in Kenya*

At independence, Kenya's Constitution of 1963 made provision for citizenship to be granted to any child born in Kenya, with the common exception of those born of foreign diplomat fathers or fathers who were nationals of a country at war with Kenya.¹³⁷ Kenyan fathers automatically conferred citizenship to children born abroad, while Kenyan mothers were unable to transmit their nationality status to their children born abroad.¹³⁸ In this instance, the only option available was an application for naturalisation.¹³⁹ Additionally, though children born in Kenya were entitled to citizenship in terms of the Constitution, in practice, children born in the country to Kenyan mothers and foreign fathers were often denied citizenship documents

¹³⁶ Para 129.

¹³⁷ Constitution of Kenya 1963.

¹³⁸ Article 90 of The Constitution of Kenya Act 1968, as amended
<https://www.refworld.org/pd/fid/54f838564.pdf> (accessed 3 June 2023).

¹³⁹ Ibid 92 (2).

by authorities.¹⁴⁰ Additionally, the Constitution granted Kenyan men the ability to confer nationality on foreign spouses, while Kenyan women were denied this right.¹⁴¹

In line with Kenya's CEDAW commitments, certain provisions of the Kenyan Constitution were amended in 2010 to include non-discriminatory provisions. For instance, Article 14 (1) now allows all Kenyan citizens regardless of gender, the right to confer nationality on children born inside or outside the country. Importantly, this right was established retroactively, so families that had suffered from discrimination under the previous constitution could now avail themselves of the right to citizenship. Additionally, Article 15(1) of the Constitution makes provision for equality for all Kenyan citizens, regardless of gender. It follows then that women can now confer nationality on foreign spouses after seven years of marriage.¹⁴² Several other constitutional articles advanced gender equality in a range of spheres, including Article 27(3) enshrining "the right to equal opportunities in political, economic, cultural, and social activities" for Kenyan women and men, and Article 45(3) stating that "parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage." The Citizenship and Immigration Act 12 of 2011 was subsequently amended to reflect women's and men's equal rights to confer nationality and to provide greater clarity to authorities charged with ensuring citizens' access to these rights. In terms of the Kenyan Constitution, a stateless person can apply for citizenship if they meet certain requirements, one of those being an adequate knowledge of Kiswahili or a local dialect.¹⁴³

3.1.4 *Discrimination in Nationality Laws in Sierra Leone*

When Sierra Leone gained its independence from the United Kingdom in 1961, its nationality law was informed by the British Nationality Act of 1948. Persons born in the country after 1961 acquired citizenship according to the principle of *jus soli*¹⁴⁴ unless the child's father

¹⁴⁰ See UNHCR and the Kenya Human Rights Commission on Kenya Dialogue on Gender Equality, Nationality and Statelessness <https://www.refworld.org/pdfid/54f838564.pdf> (accessed 23 June 2023).

¹⁴¹ The Constitution of Kenya was amended in 2010 to allow for women to be able to pass on their nationality to children born abroad. See also s 7 of the Kenyan Citizenship and Immigration Act 2011.

¹⁴² See article 15 (1) Constitution of Kenya 2010.

¹⁴³ Section 15 of the Citizenship Act and Immigration Act 12 of 2011.

¹⁴⁴ Latin for "right of soil" refers to the practice of determining a person's citizenship by the place where they were born. See S Brown "Nationality: Jus Soli or Jus Sanguinis" (1930) 24 (1) *The American Journal of International Law* at 58–64.

was a diplomat and the mother was not a citizen. Men also had the right to pass citizenship to children born abroad. The Citizenship Act of 1973 resulted in greater discrimination in the nationality law, which significantly limited women's nationality rights and introduced new race-based restrictions on access to citizenship. Under this act,¹⁴⁵ citizenship was only acquired by children of Sierra Leonean men of "negro African descent". A person of 'Negro African descent' was defined as "a person whose father and father's father are or were negroes of African origin."¹⁴⁶ Therefore, Sierra Leonean men of African descent, on the paternal side, had the right to pass citizenship to their children regardless of the child's place of birth. Sierra Leonean women could only confer citizenship by birth on their children if the child would otherwise be stateless.¹⁴⁷ Under other circumstances, children born inside the country to Sierra Leonean women of African descent and men of another or mixed race could only apply to be naturalised citizens.¹⁴⁸ These children were not permitted to hold government offices, including local-level political positions. The Act also recognised the right of Sierra Leonean men, but not women, to pass citizenship to their spouses.¹⁴⁹

3.1.5 *Discrimination in Nationality Laws in the Kingdom of Eswatini*

The kingdom of Eswatini (formerly Swaziland) is the last absolute monarchy in Africa. King Mswati III, together with his mother, Queen Mother Ntombi, rule as monarchs, and are positioned above the constitution.¹⁵⁰ Thus, whatever constitutional rights that are in the constitution are limited because the constitution is not supreme law. The general law in Eswatini is that only a father who is a Swazi national is allowed to confer citizenship to his children.¹⁵¹ The caveat to this general law is provided for in Article 5 of the Eswatini Constitution of 2005. In terms of Article 5 of the Eswatini Constitution, a child who is born out of wedlock to a Swazi mother can confer her nationality to her child only if the father has not done the necessary customary rituals (paying damages to the mother's family) or if the father refuses to acknowledge the child. Consequently, a child born to a father who is a non-Swazi national is at risk of becoming stateless if he or she is unable to obtain the nationality of their father's

¹⁴⁵ Section 2.

¹⁴⁶ B Manby High Commissioner for Refugees (UNHCR), *UNHCR & IOM - Nationality, Migration and Statelessness in West Africa*, June 2015.

¹⁴⁷ Section 6.

¹⁴⁸ Section 7.

¹⁴⁹ Section 8 (5).

¹⁵⁰ See Eswatini Country Report 2022 <https://bti-project.org/en/reports/country-report/SWZ> (accessed 5 February 2022).

¹⁵¹ Section 41 of the Eswatini Constitution of 2005. See also, Section 5 (2) of the eSwatini Citizenship Act 14 of 1992.

country of origin. This is regardless of the child being born to a mother who is a Swazi national. In terms of Article 43 (1) of the Eswatini Constitution, a child born in Eswatini will only acquire nationality if, at the time of their birth, the father is a Swazi national.¹⁵² Accordingly, a child born to a foreign national father is unable to attain Swazi nationality.

This matter was recently challenged in the High Court of Eswatini in the case of *Ziphelele Machakata v The Minister of Home Affairs*.¹⁵³ The applicant, in this case, is a female Swazi citizen and has been legally married to a Zimbabwean national for 16 years. The couple have three children, who were all born in Eswatini; however, they are not eligible for a Swazi nationality and are thus not considered Swazi nationals because their father is not a Swazi. The other issue that is being challenged in this case is the fact that the Eswatini Constitution discriminates against Swazi women who are married to foreign spouses and thus are unable to confer nationality to their children. In contrast, unmarried Swazi women have a provision that allows them to confer citizenship to children born out of wedlock if the father is not present. The applicant, thus, contends that Eswatini's citizenship laws discriminate against children born out of wedlock and children born to married parents where the father is not a Swazi national. This case is yet to be decided by the court and it will be interesting to see how it deals with this matter.

It has been said that statelessness is man-made, and, in this instance, it is a definite fact. A state's decision to prohibit women from passing on their nationality status to their children is a man-made policy that can be changed. All it takes is a change in the wording of the legislation to allow women to pass on their nationality to their own children regardless of gender.

3.2 Forced Displacement

Discrimination in nationality laws is not the only cause of statelessness in Africa. Forced displacement also ranks high among the causes.¹⁵⁴ There are many reasons why people flee their homes and cross borders or find themselves displaced within their own countries. What has been referred to as a humanitarian crisis?¹⁵⁵ Forced displacement has become a prevalent

¹⁵² Eswatini Constitution 1989.

¹⁵³ 846/2023.

¹⁵⁴ A Warri and V Chikadzi, "Victor Statelessness, Trauma and Mental Well-being: Implication for Practice, Research and Advocacy" (2022) 8 (3) *African Human Mobility Review* at 41-55.

¹⁵⁵ See UNHCR Figures at a glance: 89.3 million people worldwide were forcibly displaced <https://www.unhcr.org/about-unhcr/who-we-are/figures-glance> (accessed 3 June 2023).

problem in the 21st century, with an estimated 32 million people being forcibly displaced in Africa.¹⁵⁶ Forced displacement can either be internal or external, however, the consequences are equally devastating. People are forced to flee from their homes for several reasons including war and mass evictions motivated by ethnic and cultural reasons.¹⁵⁷ Moreover, internal conflict, natural disasters, and political violence also contribute to the displacement of people.¹⁵⁸

Statelessness and forced displacement are separate humanitarian challenges, however, there is a connection between the two. Admittedly, not all people who flee their homes are stateless but a quarter of the total number of stateless people become stateless as a result of being forcefully displaced.¹⁵⁹ When a person is forced to flee their home, they run the risk of being stateless.¹⁶⁰ This is because proving a legal connection to a state often requires one to provide documentation such as a birth certificate, an identity document, or a passport. People who are forced to flee their homes often do so without having the time to take any personal items with them. As a result, a displaced person can become stateless. In addition, refugees who are forcefully displaced run the risk of becoming stateless if they lose their documents and can thus not prove their nationality to their host country. Children born on the move to forcefully displaced refugee parents are at a greater risk of being born stateless. The Lost Boys of Sudan is a notable example of how internal conflict can lead to the mass displacement of people. The ongoing armed conflict in Sudan has led to the displacement of thousands of people. The ‘Lost Boys of Sudan’ refers to the displacement of roughly 20 000 Sudanese boys between the age of 7-17 years, who were forcefully displaced and separated from their parents.¹⁶¹ These ‘lost boys’ attempted to escape the conflict and were forced to flee from Sudan to Uganda with some settling in Kenya.¹⁶² The ‘lost boys’ who settled in Kenya, settled as refu-

¹⁵⁶ African Center for Strategic Studies report June 2021 <https://africacenter.org/spotlight/32-million-africans-forcibly-displaced-by-conflict-and-repression/> (accessed 30 March 2022).

¹⁵⁷ UNHCR The State of the world’s refugees: A humanitarian Agenda <https://www.unhcr.org/3eb789912.pdf> (Accessed 30 March 2022).

¹⁵⁸ R Cohen and M Bradley “Disasters and Displacements: Gaps in Protection” (2010) 1 *Journal of International Humanitarian Legal Studies* at 1-35.

¹⁵⁹ Ibid.

¹⁶⁰ Norwegian Refugee Council “Statelessness and Displacement: A Humanitarian challenge” https://files.institutesi.org/stateless_displacement_brief.pdf (accessed 23 May 2022).

¹⁶¹ The lost boys of Sudan Rescue timeline 2001 (2 October 2014) <https://www.rescue.org/article/lost-boys-sudan> (accessed 3 June 2023).

¹⁶² M Bixler “The lost Boys of Sudan: An American Story of the Refugee Experience” (2001). *University of Georgia Press*. <https://www.perlego.com/book/839683/the-lost-boys-of-sudan-pdf> (Accessed: 3 April 2022).

gees at the Kakuma Refugee Camp.¹⁶³ Thus, those who settled in the Kakuma Camp are considered by the Kenyan government as refugees.¹⁶⁴

3.3 Conflict in Nationality Laws

Conflict in nationality laws is another notable contributing factor to statelessness. The preceding chapter discussed how different states apply different national policies when granting nationality to their citizens. There are two ways in which a state can decide to grant nationality to its citizens, either through *Ju soli* or *Jus sanguinis*. The *Ju Soli* rule confers nationality to children who are born within the territory of the concerned state. On the other, the *Jus sanguinis* is when the nationality laws of a state are such that nationality to citizens is based on descent or what is sometimes referred to as ‘right of blood’.¹⁶⁵

Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930 states that it is for each state to determine under its own law who its nationals are. States use sovereign power to decide how to confer nationality to its nationals; this is a well-known international law principle.¹⁶⁶ However, state sovereignty can be problematic when there is a conflict in nationality laws, with each state having the prerogative to grant nationality following its own rules. Statelessness may, thus, arise as a result of gaps between the laws on citizenship in different countries. For example, where a person residing in one country gives birth to a child who meets neither the criteria for the country’s citizenship nor the criteria under the law of either parent’s home country for acquiring the parent’s citizenship. A case in point is when a child is born in a country that grants citizenship only to children of citizens, but the home country of the child’s parents does not allow them to pass their nationality to a child who is born abroad. That child would be born stateless. An example of such a conflict can be seen in a situation where a child is born in South Africa to a mother who is a Swazi national and to a father who is neither a South African nor a Swazi national. In terms

¹⁶³ See T Luster et al “The Lost Boys of Sudan: An Ambiguous, Search for Family, and Reestablishing Relationships With Family Members” (2008) 57 (4) at 444-456. Loss Seeds of Sudan Lost Boys of Sudan <https://seedsofsouthsudan.org/lost-boys-of-sudan/> (accessed 2 August 2023). National Geographic *From Sudan to the United States* <https://education.nationalgeographic.org/resource/from-sudan/> (accessed 2 August 2023). Zipporah Musau “How South Sudan’s lost boy’ brought water to his village” 17 May 2017 <https://www.un.org/africarenewal/magazine/may-july-2017/how-south-sudan%E2%80%99s-%E2%80%98lost-boy%E2%80%99-brought-water-his-village> (accessed 2 August 2023).

¹⁶⁴ M Alexander *Belonging With the Lost Boys: The Mobilization of Audiences and Volunteers at a Refugee Community Center in Phoenix* (2014, PhD, Arizona State University) at 34.

¹⁶⁵ C Wong et al “Citizenship for Service. Transforming politics, transforming America: The political and civic incorporation of immigrants in the United States” (2006) *Jus Meritum* at 71-88.

¹⁶⁶ W Bisschop “Nationality in International Law” (1943) 37 (2) *The American Journal of International Law* at 320–25.

of Section 7(2) of the Eswatini Citizenship Act,¹⁶⁷ a child who is born abroad will be considered a Swazi national only if the father is a Swazi national. South Africa, on the other hand, confers nationality to a child born in South Africa to either a South African mother or father.¹⁶⁸ Consequently, a child who is South African to a mother who is a Swazi national and a father who is a non-Swazi national will not be granted Swazi nationality nor will such a child qualify for South African nationality.¹⁶⁹

3.4 State Succession

The transfer of power from one regime to another often poses unique challenges, some of which result in statelessness.¹⁷⁰ States that fail to adequately make the necessary nationality rules often cause huge fragmentation within the newly formed independent states. When pre-colonised states were given independence, they were left with no nationality.¹⁷¹ When new borders are created or when States go through a process of succession, numerous procedures must be followed to ensure that people acquire a nationality. State succession often involves numerous elements that impose burdensome procedures for the acquisition of citizenship including long lists of documentation.¹⁷² Race, religion, and ethnicity have often played a huge role in decisions on whether a person should be recognised under the old state or the new state if they are recognised at all. It is almost impossible to remove state succession from Africa's colonial history.¹⁷³ It could be assumed that state succession should have provided a means to ending statelessness, however, in most cases, it has exacerbated the problem. One of the biggest challenges regarding state succession is that when new states are created or when one state succeeds another, international law makes little or no provision for how States should deal with the nationality of the people who are caught up in such situations. Additionally, nationality becomes a huge challenge for persons who find themselves between the original state and the newly formed state. The consequence is that without adequate measures in

¹⁶⁷ 14 of 1992.

¹⁶⁸ Section 3 of the South African Citizenship Act 88 of 1995.

¹⁶⁹ The South African Citizenship Act in South Africa has a provision for a child who finds themselves in this kind of situation to be able to apply for nationality. However, the difficulty of acquiring nationality through this provision will be demonstrated in due case through case law.

¹⁷⁰ Manby *Citizenship in Africa* at 17.

¹⁷¹ Ibid.

¹⁷² P Spiro A new international law of citizenship (2011) 105 *The American Journal of International Law* 694-746.

¹⁷³ Ibid.

place to deal with the nationality of persons going through such a transition, they are bound to find themselves without a state. South Sudan provides a good example of this predicament.¹⁷⁴ For example, the law allows for a person to acquire the nationality of the new State provided that his or her parents, grandparents, or great-grandparents were born in South Sudan.¹⁷⁵ Application for nationality must be accompanied by civil documents and information such as birth certificates or identity papers and proof that a parent, grandparent, or great-grandparent was born in South Sudan before the commencement of the act.¹⁷⁶ This poses numerous challenges due to a lack of access to birth certificates and identity documents. Moreover, there are no explicit procedures in the Sudanese law that make provisions for individuals who want to renounce their right to South Sudanese nationality and retain Sudanese nationality.¹⁷⁷ Additionally, individuals of southern origin resident in Sudan are being deprived of their Sudanese nationality without any right to contest the decision.¹⁷⁸

3.5 Arbitrary Deprivation of Nationality

There have been instances where nationality has been used either for political gain or as a means of punishing political rivals by depriving people of nationality in an arbitrary manner. A prominent example of this is the case of the former president of Zambia, Kenneth Kaunda, who was stripped of his nationality status on this account.¹⁷⁹ He led Zambia to independence in 1964 and served as a Zambian president for 27 years. In 1991, the High Court of Zambia stripped him of his Zambian nationality and held that he had governed Zambia illegally because he was born before both his parents migrated from Malawi to Zambia and thus was not eligible to obtain Zambian citizenship.¹⁸⁰

In Botswana, the case of *John Modise v The government of Botswana*¹⁸¹ provides another example of the use of political rivalry to deprive opponents of nationality. Modise was born in

¹⁷⁴ Bronwen Manby “The Right to Nationality and the Secession of South Sudan: A Commentary on the Impact of the New Laws” Open Society Foundations, June 2012, and Bronwen Manby “International Law and the Right to Nationality in Sudan” Open Society Foundations, February 2011.

¹⁷⁵ Section 8 (3) The Law of South Sudan: The Nationality Act 2011.

¹⁷⁶ Section 43 of the South Sudan Nationality Regulations of 2011.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ *Dr Kenneth Kaunda & United National Independence Party v Central Chambers* (2020) ZMSC para 8.

¹⁸⁰ See, <https://face2faceafrica.com/article/how-zambias-first-president-had-to-go-to-court-in-1999-to-prove-he-was-not-a-malawian> (accessed 8 August 2023).

¹⁸¹ Comm. No. 97/93, African Commission on Human and Peoples' Rights, 6 November 2000.

South Africa to Batswana parents before Botswana gained independence. He grew up in Botswana and held Botswana citizenship. When he became the leader of the opposing party, his citizenship status came into question and the government decided that he did not qualify for citizenship based on descent. The President declared him an illegal immigrant and he was subsequently arrested and deported to South Africa with no opportunity to challenge this decision. He tried to re-enter Botswana on two different occasions but on both occasions, he was deported back to South Africa. Modise was then forced to live in the then Bophuthswana 'homeland' because South Africa did not recognise him as a citizen either. After seven years of living in the 'homelands,' Modise was again deported and for a few months, he lived in a no-man's-land until he was allowed back to Botswana on humanitarian grounds. He was allowed to stay in the country only on a temporal residence permit that needed to be renewed every three months at the discretion of a government officer. The arbitrary deprivation of Modise of nationality rendered him stateless and this was politically motivated. The African Commission on Human and Peoples Rights alluded to the political nature of his statelessness by emphasising that his political rival used power to try and destroy him financially, and mentally and to destroy his political will.¹⁸² This was done by depriving him of his Botswana nationality, meaning that he could not take any political office.¹⁸³ Botswana was found to have violated Articles 5 (the right to legal status) and 7 (right to be heard) of the African Charter on Human and Peoples' Rights and the recommendation was that Botswana should recognise Modise's citizenship by descent.¹⁸⁴ The African Commission on Human and Peoples' Rights found that while restrictions on holding public office may not seriously affect most individuals, it is apparent that for Mr. Modise, such deprivation amounted to a legal disability of grave consequence. The fact that his first deportation and declaration as a prohibited immigrant came soon after he founded an opposition political party suggested that there was a plan of action designed to hamper his political participation.¹⁸⁵ The government of Botswana had, therefore, gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives.¹⁸⁶ However, the Government of Botswana refused to follow the recommendation by the African Commission and Modise was left with no option but to become a citizen by naturalisation.

¹⁸² Ibid para 98.

¹⁸³ Ibid para 96.

¹⁸⁴ Ibid para 50.

¹⁸⁵ Ibid para 96.

¹⁸⁶ Ibid.

Over the years, Tanzania has attempted to strip different people of their citizenship on several occasions. The case of *Anudo v The Government of Tanzania*¹⁸⁷ is a notable example. Anudo was rendered stateless and was forced to live in ‘no man’s land’ between Tanzania and Kenya. Anudo who was born and raised in Tanzania, held a Tanzanian birth certificate and passport. The issue started in 2012 when he went to apply for a marriage license and the authorities accused him of misrepresenting his identity. An investigation into his identity was launched and authorities claimed that Anudo’s father was born in Kenya and that the woman he claimed was his mother denied that she knew him. Consequently, the authorities confiscated his documents, arrested him, and deported him to Kenya where he was arrested and convicted for being in the country illegally. In Tanzania, it is unconstitutional to strip an individual who holds citizenship by birth. Anudo was, however, unable to appeal the decision taken by the authorities in Tanzania since he had been expelled from the country.

In May 2015, Anudo sent an email to the African Court on Human and People’s Rights requesting them to intervene in his matter. He argued that he was expelled illegally, under inhumane, undignified, and degrading conditions. He alleged that he was beaten, tortured, and coerced into claiming that he was born in Kenya. He argued that his right to citizenship as guaranteed by the Tanzanian Constitution and International Law had been violated. The Court was in favour of Anudo and held that the government of Tanzania had a duty to avoid statelessness by limiting arbitrary deprivation and in the case of Anudo, they failed to adhere to this international principle.¹⁸⁸ In addition, the Court found that Anudo was deprived of Tanzanian citizenship and expelled without judicial process, in violation of international law protecting the rights of citizenship including Article 15 of the Universal Declaration of Human Rights, Article 12 (4) of the International Covenant on Civil and Political Rights ; (prohibition on arbitrary denial of entry to own country), and the African Charter on Human and Peoples’ Rights, Articles 12(2) (the right to entry and exit from own country) and 12(4) (the prohibition of expulsion without a decision taken in accordance with the law).¹⁸⁹

¹⁸⁷ No 012/2015.

¹⁸⁸ Ibid para 102.

¹⁸⁹ Ibid para 105-106.

African States are notorious for arbitrarily taking away nationality from people who criticise those in positions of power. For example, in the case of *Kenneth Goodman v The Government of Botswana*,¹⁹⁰ Goodman, an Australian lecturer at the University of Botswana and a resident of the country for fifteen years, presented a paper criticising presidential succession in Botswana. Shortly after this, Goodman was served with deportation papers in terms of Section 7 (f) of the Botswana Immigration Act of 1966 and declared an “undesirable inhabitant” of or visitor to Botswana. Goodman was given only 56 hours to plan for his departure from the country. He was neither told why he was being expelled nor allowed to contest his deportation. The High Court of Botswana found in favour of the President and Goodman was subsequently deported to South Africa. In July 2005, the Court of Appeal of Botswana ruled that the authorities did not act contrary to the law and that the declaration of Professor Goodman as a prohibited immigrant was valid. Goodman took the matter to the African Commission on Human and Peoples’s Rights. The Commission found in favour of Goodman and held that his expulsion had violated numerous sections of the African Charter On Human and People’s Rights 1986 such as the right of Goodman to work, the right to property, and his right to participate in political affairs.¹⁹¹

As discussed above, statelessness can occur due to arbitrary deprivation of nationality, which can sometimes be used as a political weapon to either punish political rivals or to hinder the progress of a rival political opponent. In most African states, people are arbitrarily deprived of their nationality based on irrational ethnic and discriminatory laws. This has been a major contributing factor to statelessness in Africa.

3.6 Lack of birth registration and administration barriers

The registration of a child’s birth does not automatically give a child nationality status.¹⁹² However, it does serve as an official record of the place of birth and identification of the child, which may aid in establishing a link between the child and a particular state.¹⁹³ A birth certificate is a key form of proof to confirm or acquire citizenship under a state’s domestic

¹⁹⁰ 313/05.

¹⁹¹ Para 202-205.

¹⁹² Ibid para 3.

¹⁹³ UNHCR Good Practice Paper Action 7 Ensuring Birth Registration for the prevention of statelessness <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2017/11/Good-Practices-Paper-on-Ensuring-Birth-Registration-for-the-Prevention-of-Statelessness.pdf> (accessed 21 May 2022).

laws because it contains key information to assert a child's right to nationality.¹⁹⁴ Birth registration is thus critical for the recognition of a child's identity and subsequent nationality. According to Article 6 of the African Charter and Welfare of the Child 1990, registration of the birth of the child is recognised as a fundamental right for every child.¹⁹⁵ It is however one of the rights that are mostly violated in various African states.¹⁹⁶ A lack of birth registration is a noteworthy cause of statelessness. In most cases, it becomes impossible for a child to acquire nationality if they are unable to produce a birth certificate or any other identifying documentation to prove their birth. This poses a huge challenge to children in numerous African countries where registration of births is not compulsory. This is significant because the UNHRC considers universal birth registration as one of the ways that childhood statelessness can be prevented.¹⁹⁷ For example, in 2004 in Southern Africa, registration of births was only compulsory for all children in South Africa, the kingdom of Eswatini, Zambia, and Zimbabwe; but not in Botswana and Malawi.¹⁹⁸ It is worth noting that by 2010, all countries in the SADC made birth registration compulsory, however, a lack of policy and implementation has hampered efforts to ensure universal birth registration.¹⁹⁹ Universal birth registration is especially challenging to achieve in countries that have a large number of undocumented migrant populations and where documentation is a requirement for birth registration.²⁰⁰ Some factors may contribute to a lack of birth registration in the African region. These include the inability to access registration facilities due to parents being situated in rural areas, fees required for the registration, a lack of understanding of the birth registration process by parents, and inefficient registration processes that often require parents to return to the registration centers repeatedly.²⁰¹ In some instances, a mother is not able to register the birth of her child without

¹⁹⁴ UNHCR Action to Address Statelessness: A Strategy Note (March 2010), p. 11f, at: <http://www.refworld.org/docid/4b9e0c3d2.html> (accessed 21 June 2022).

¹⁹⁵ Article 6 of The Rights and Welfare of the Child 1990. Also see Article 7 of the Convention on the Rights of the Child 1989.

¹⁹⁶ General comment 6 on the African Charter of the Rights and welfare of the Child.

¹⁹⁷ UNHCR Birth registration to prevent Statelessness <https://www.unhcr.org/ibelong/birth-certificates-to-prevent-statelessness/> (accessed 17 May 2022). See also: UNHCR Global Action Plan to end statelessness 2014-2021 <https://www.unhcr.org/ru/wp-content/uploads/sites/73/2019/09/End-Statelessness-GlobalActionPlan-2019-Final-web.pdf> (accessed 19 May 2022).

¹⁹⁸ A Beyer et al. in the member states of the Southern African Development Community *para* 17.2. <https://data.unhcr.org/en/documents/download/97772> (accessed 6 June 2023).

¹⁹⁹ Ibid.

²⁰⁰ For example, South Africa houses large populations of undocumented populations who are required to provide documentation in order to register a child's birth.

²⁰¹ See Media Statement and Transcript: Deputy Minister Fatima Chohan's address at the Home Affairs weekly media briefing, 26 March 2014 <http://www.dha.gov.za/index.php/statements-speeches/444-media-statement-and-transcript-deputy-minister-fatima-chohan-s-address-at-the-home-affairs-weekly-media-briefing-26-march-2014> (accessed 6 April 2022).

the father of the child being present.²⁰² Lack of birth registration puts children at risk of statelessness because such documentation provides important proof of elements that establish an entitlement to nationality, particularly where the nationality of the child's parents is uncertain. It is estimated that there are 91 million unregistered children in Africa.²⁰³ The Committee on the Rights and Welfare of the Child states that universal birth registration is directly linked to human rights. The marginalised, vulnerable, and poor often fall in the category of those who need special attention and focus when it comes to the protection of human rights.

The importance of birth registration is critical to achieving Goal 16 of the Sustainable Development Goals, which aims to achieve birth registration for all by 2030.²⁰⁴ The case of the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*,²⁰⁵ illustrates how failure to register children contributes to an increased risk of statelessness.²⁰⁶ Nubian children in Kenya struggle to have their birth registered and even where births are registered, nationality status is not conferred as the birth certificates clearly state that it is not proof of nationality. Birth registration does not guarantee that a child will enjoy and be able to access full socio-economic rights; however, failure to register the birth of a child exposes the child to greater risks such as human trafficking, sexual abuse, early marriage, child labour, and enrolment in armed forces.²⁰⁷ A birth certificate serves as proof of legal identity; it is also the basis by which children can obtain nationality and thus avoid statelessness.

4 The Case of Statelessness in South Africa

The discussion above has served to demonstrate that statelessness is not unique to South Africa but is a challenge that cuts across the continent and globally. A general understanding of the causes of statelessness in Africa has also helped to place the challenges and causes of statelessness in South Africa into proper perspective. The following section engages with the

²⁰² UNICEF Annual Report 2017 <https://www.unicef.org/reports/unicef-annual-report-2017> (accessed 6 April 2022).

²⁰³ UNICEF "A Statistical Update on Birth Registration in Africa" October 2022 <https://data.unicef.org/resources/a-statistical-update-on-birth-registration-in-africa/> (accessed 6 June 2023).

²⁰⁴ United Nations: Department of Economic and Social Affairs <https://sdgs.un.org/goals> (accessed 6 June 2023).

²⁰⁵ 2009.

²⁰⁶ E Fokala and L Chenwi "Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee" (2013) 6 *Afr. J. Legal Stud* at 357.

²⁰⁷ General Comment on article 6 of the African Charter on the Right and Welfare of the Child para 44.

causes of statelessness in South Africa since the focus of this thesis is childhood statelessness in South Africa.

4.1 Colonialism/ Apartheid and statelessness in South Africa

South Africa is not exempt from the influences and impact of colonisation. Moreover, South Africa's colonisation history is unique.²⁰⁸ The unique colonisation of South Africa makes for a compelling case study because of the different components that have contributed to the current statelessness situation in the country.

South Africa has three distinct colonisation features namely 'unofficial' colonisation, official colonisation, and internal colonisation.²⁰⁹ The unofficial colonisation of South Africa was characterised by a mass movement of the different Bantu-speaking groups of Africa. However, there is no written account of these movements, and the information available is based on oral communication passed on from generation to generation as well as the study of artefacts that tell a story of the movement of the different groups of people.²¹⁰ Subsequently, the Dutch colonised South Africa in 1652, which was followed by British colonisation in South Africa from 1806 until 1961 when South Africa obtained independence. The significance of the British colonisation of South Africa is that it introduced an emphasis on documentation as a means of identification.²¹¹ South Africa was subsequently colonised for a final time in the form of apartheid which resulted in people being separated and treated differently based on the colour of their skin.²¹² The fact that South Africans went through three distinct forms of colonisation phases makes for a unique and perhaps challenging case study that demonstrates how nationality laws have developed over the years.

A discussion of the contributing factors to the statelessness issue in South Africa would not be complete without discussing the role that the apartheid system played in South Africa. Apartheid was a system of segregation and discrimination based on race.²¹³ Even during the apartheid-era nationality played a huge role in that although all citizens had nationality, it did

²⁰⁸ E Olivier and W Olivier "The Colonisation of South Africa: A unique case" (2017) 73 (3) *Theological Studies* at 1-8.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

²¹³ South African History online <https://www.sahistory.org.za/article/history-apartheid-south-africa> (accessed 2 February 2021).

not entitle all nationals to the same rights.²¹⁴ Nationality laws were often used and misused for the benefit of the apartheid government. For example, in 1984, measures were put in place that made it easy for foreign nationals to obtain a South African nationality as a means to increase their eligibility to join military service.²¹⁵ However, some of the apartheid laws resulted in Black South Africans losing their nationality. A notable example of this is when families were forcefully relocated to homelands and stripped of their South African nationality in the process. In this instance, nationality was misused by the apartheid government to separate people based on their language and ethnicity. The Black Homeland Citizenship Act of 1970²¹⁶ was relied on to perpetuate apartheid by separating Black people from the white population. Some people lost their South African nationality and resorted to acquiring new citizenship while in exile. The post-apartheid era attempted to address the challenges created during the apartheid era by enacting the South African Citizenship Act 1995.²¹⁷ In terms of this Act, amnesty was granted to those who returned from exile without nationality including stateless children and those who had been arbitrarily deprived of their nationality during the apartheid era.²¹⁸

Perhaps one of the most heinous nationality laws aimed at the arbitrary depreciation of citizenship was the enactment of the Black Homeland Citizenship Act 26 of 1970²¹⁹ which was a law aimed at mass deprivation of Black people's citizenship.²²⁰ It required that all Black South Africans become citizens of one of the self-governing territories. The law declared Black people as aliens in urban areas and could only live there if they obtained special permission. It changed the status of Black people living in South Africa so that they were no longer citizens of South Africa but became citizens of one of the ten autonomous territories. The law provided as follows:

²¹⁴C Hobden Report on Citizenship law South Africa
https://cadmus.eui.eu/bitstream/handle/1814/51447/GLOBALCIT_CR_2018_01.pdf(accessed 2 February 2022).

²¹⁵ H D'Oleiveria "Nationality and Apartheid: Some reflections on the use of nationality law as a weapon against violation of fundamental rights" EU Working paper no 89/419.
https://cadmus.eui.eu/bitstream/handle/1814/65108/EUI_WP_1989_419.pdf?sequence=2&isAllowed=y (accessed 21 June 2021).

²¹⁶ Subsequently renamed the Black States Citizenship Act 1970.

²¹⁷ Amended in 2004, 2007 and 2010.

²¹⁸ Ibid.

²¹⁹ Subsequently renamed the Black States Citizenship Act, 1970 and the National States Citizenship Act, 1970,

²²⁰ See section 3 of the Bantu Homelands Citizenship Act 1970.

“No Black person will eventually qualify for South African nationality and the right to work or live in South Africa because they will all be aliens, and as such, will only be able to occupy the houses bequeathed to them by their fathers, in the urban areas, by special permission of the Minister”.²²¹

In enacting such a law, the apartheid government tightened its control over Black South Africans by using nationality to perpetuate the apartheid regime. Black people were forced to live in different homelands based on their language and ethnic background. Once they became part of one of these homelands, their South African citizenship was revoked and replaced with citizenship of their homeland. It becomes evident that the apartheid regime used nationality as a way to not only separate Black people from the White population but to also cause division among Black people by separating them into different groups based on language and ethnicity. This practice not only caused division among Black people in the past, but it also remains a trend that continues to separate Black people today with the issue of nationality by drawing the lines between who belongs and who does not. It is without a doubt that the apartheid government used nationality to advance its objectives of preserving the apartheid regime. This was done through the mass expulsion of Blacks to different homelands, which were not as modernised as the White urban areas.²²²

In terms of the Bantu Homelands Citizenship Act (National States Citizenship Act) No 26 of 1970, Black people were moved to different homelands based on their ethnicity, language, and culture. Before the recognition of the independent status of the so-called Homelands Black South Africans were referred to as ‘aliens’ and lost their South African nationality and therefore, effectively became stateless. It is pertinent to note that even after the recognition of the homelands, some of these who were referred to as ‘aliens’ remained stateless because they could not be classified as belonging to any group.²²³ When the Homelands were finally granted independence status, Black people lost their South African Citizenship and obtained the citizenship status of their assigned homeland. Effectively, the apartheid regime arbitrarily deprived Black South Africans of South African citizenship. This system of homelands had several implications. Besides blacks losing their South African citizenship, they were divided against each other, and the idea of tribalism was established through this system. This attitude

²²¹ Cited in South Africa History Online <https://www.sahistory.org.za/article/black-homeland-citizenship-act-1970> (accessed 1 August 2024). G "Indigenous language media and the onslaught of multimedia platforms and English language hegemony in South Africa: Industry roleplayers' perspectives Paper presented at a Conference on English and the Dynamics of Global Access, University of Botswana, Gaborone, June 19-21, 2019.

At 3.

²²² The Bantu Homelands Citizenship Act (National States Citizenship Act) No 26 of 1970.

²²³ D'Oleiveria "Nationality and Apartheid: Some reflections on the use of nationality law as a weapon against violation of fundamental rights" 14.

of belonging to a certain tribe instilled an attitude of ‘us against them’ which has spilled over to how the present-day Black South Africans view people from ‘outside’ South Africa as not belonging or not being entitled to the same rights.

4.2 Discrimination in South Africa’s Laws- Post-Apartheid

The statelessness problem in South Africa is not just attributable to the history of apartheid and colonisation, several other factors have exacerbated this challenge including discrimination in nationality laws and gaps in the implementation of legislation. South Africa has not been without its fair share of constitutional dilemmas when it comes to discriminatory laws that may contribute to statelessness. For instance, until recently, section 10 of the Births and Deaths Registration Act 51 of 1992 discriminated between married fathers and unmarried fathers. Section 10 of the Act did not permit a child born out of wedlock to be registered by the father without the mother’s consent. In addition, a child born out of wedlock would be registered under the mother’s surname unless the mother consented to the child being registered under the father’s surname. The effect of this provision was that an unmarried father did not have equal rights as a married father as far as conferring nationality to their child was concerned. This provision discriminated against children born out of wedlock and their fathers. In this instance, this discrimination contributed to statelessness in South Africa. This is because, under the legislation, an undocumented mother is unable to register the birth of their child. A father who has a child out of wedlock with an undocumented mother who refuses to give him consent to register his child has the potential to become stateless.

In *Centre for Child Law v Director General: Department of Home Affairs*,²²⁴ a South African father, who was stationed in the Democratic Republic of Congo for a peacekeeping mission, met and married a Congolese woman (Ms. Ndovya) in terms of Congolese customs. The couple then returned to South Africa permanently and tried to register their marriage with the Department of Home Affairs, however, the department refused to recognise nor register their customary marriage. Shortly before the birth of their second child, Ms. Ndovya’s visa expired and was, thus, in the country. Due to her advanced stage of pregnancy, she could neither renew her visa nor travel back to the DRC. Following the birth of the second child, the couple attempted to register the birth of the child, but the Department of Home Affairs refused to register the child’s birth because there was no proof of the couple’s marriage and the mother

²²⁴ 1051/2015 SCA.

did not have valid documentation since her visa had expired. The child was thus considered born out of wedlock to an undocumented mother. The court held that Section 10 of the Birth and Death Registration Act was unconstitutional because it infringed on the rights of both the biological father and the child in two main respects.²²⁵ First, it potentially violates the rights of the child born to parents who are not married, particularly their constitutional right to a name and nationality at birth. Second, it potentially violates the biological and unmarried father's right not to be unfairly discriminated against based on his marital status, sex, and gender which are listed grounds in terms of section 9(3) of the Constitution.²²⁶ This case highlights the potential that discriminatory laws have on the perpetuation of statelessness.

Despite a progressive Constitution, discrimination in nationality laws still plays a significant role in perpetuating statelessness in South Africa. While legislation is progressive, there are still instances of discrimination in nationality laws (whether based on gender or birth status).

4.3 Gaps in South Africa's Laws and their Implementation

In some instances, legislation that regulates nationality laws indirectly causes and contributes to statelessness. Effectively, a state may have fair and reasonable nationality laws on paper but in practice, the situation could be different. It is important to keep in mind that just as laws are man-made, so are the men and women who implement them. There are several instances where South Africa's legislation has made provisions for the acquisition of nationality but due to administration gaps and oversights, it was not properly implemented or applied.

In some instances, the legislation may be the very cause of statelessness. For example, Section 4 of the South African Citizenship Amendment Act 17 of 2010 (Citizenship Act) has the potential to contribute to statelessness. In terms of Section 4 of the Citizenship Act, children of permanent residents are eligible to apply for South African citizenship only once they reach the age of 18. This provision does not only contribute to childhood statelessness in South Africa but also lacks legal logic. It doesn't make sense why a child born to a permanent citizen should have to wait until the age of 18 to obtain citizenship. A child born to a permanent resident is thus potentially at risk of living the first 18 years of their life stateless. This is especially true for a child who is unable to obtain the citizenship of their parent's country of origin. In some instances, it is possible for a child born to permanent residents to acquire citi-

²²⁵ Para 34.

²²⁶ Ibid.

zenship from their parent's country of origin, however, this is not always possible if the parent's country of origin requires that the child must be born within their territory to acquire citizenship. For example, in the case of *Director of Home Affairs Minister v DGLR*,²²⁷ a child was born to Cuban parents who had come to work in South Africa. They settled in South Africa and gave birth to a daughter whom they assumed would acquire South African citizenship. The Department of Home Affairs refused to grant nationality status to the child. The parents attempted to apply for Cuban citizenship for the child but were unsuccessful due to the nationality laws in Cuba.²²⁸ In terms of Article 3 of the Constitution of Cuba, a person can only obtain citizenship if born in Cuba or through naturalisation. The Court held that the child should be granted South African citizenship as it was in her best interest. Further to that, the Court held that there is an obligation²²⁹ to grant citizenship to a child born in South Africa if not doing so would render the child stateless. Not all children are this fortunate and the majority of them must wait until they reach the age of minority to be eligible to apply for South African citizenship. The result of this is that during the first 18 years of their life, they are stateless and face possible challenges in enrolling for school, accessing healthcare and social grants. A child in this position may also find it difficult to travel outside the country due to a lack of documentation. Administration oversight at the policy level implementation level in this instance is evident in that there is no official guiding procedure on how a child, upon reaching the age of 18, should apply for South African Citizenship.

An additional factor to be considered is that birth registration in terms of the Birth and Death Registration Act 51 of 1992 is a requirement for the acquisition of nationality in South Africa. Birth registration does not guarantee that a child will enjoy and be able to access full socio-economic rights; however, failure to register the birth of a child exposes the child to greater risks of becoming stateless. If a child's birth was not registered in terms of the Act,²³⁰ then such a child cannot apply for nationality. This has the potential to affect mostly children who have been abandoned. With an estimated 3500 babies being abandoned each year in South Africa,²³¹ the risk of statelessness becomes a threatening reality for these children especially because the Department of Home Affairs often fails to issue these children with birth

²²⁷ 1051/2015 SCA.

²²⁸ Article 3 of the Constitution of Cuba 1976 states that Cuban Citizenship is acquired through birth or naturalisation.

²²⁹ In terms of Article 7 of the Convention on the Right of the Child 1989 and Article 6 (4) of the African Charter on the Rights and Welfare of the Child 1990.

²³⁰ Birth and Death Registration Act.

²³¹ See "Child Abandonment in South Africa: The ever-growing pandemic Law" Law of All <https://www.lawforall.co.za/family-relationships/child-abandonment-south-africa/> (accessed 12 June 2022).

certificates. In South Africa, a person is required to have their birth registered to be eligible for South African citizenship.²³² This often poses challenges and has the effect of perpetuating statelessness resulting in children inheriting the state of ‘being without a state’ from their parents. This is true for a 40-year-old mother who was born in South Africa but who never had her birth registered and is therefore stateless. She has four children who have subsequently inherited her statelessness status because she lacks the documentation to register the births of her children.²³³

In terms of the South African Death and Registrations Act, a child born to undocumented parents is issued with a birth certificate, but the certificate will not have an identity number, nor will it be entered into the national birth register. South Africa has a reliable statistical birth registration record. The latest report issued by Statistics South Africa highlights that over 80% of children under the age of five are registered.²³⁴ However, the most marginalised and vulnerable children fall within the 20% of unregistered births. Unfortunately, this has the potential to affect those groups of children who struggle to register their birth and are, therefore, put at risk of being rendered stateless.²³⁵ For example, in terms of the South African Citizenship Act, a child must have been registered at birth to acquire nationality.²³⁶ Without a birth certificate, it becomes almost impossible for a child to acquire South African nationality even if the child was born in South Africa and never left the country.

Recurrent gaps in nationality laws in Southern Africa include a lack of protection for children found abandoned in the territory of a state. Most legislation in the region, including that of South Africa, does not grant those children a right to nationality, thus exposing them to a life of sorrow and exclusion. For example, Mpho, aged 33, is amongst many in the region who suffer from this lack of protection. She has lived in South Africa her whole life and speaks South Africa’s local languages.²³⁷ When she was found abandoned as a young child, however, the identity of her parents and her place of birth were unknown. She was thus left stateless, and sadly, her three children have inherited her status.²³⁸ Children who are abandoned at

²³² South African Citizenship Act.

²³³ “No Country no Future” *Daily Maverick* 29 November 2020 <https://www.dailymaverick.co.za/article/2020-11-29-no-country-no-future-the-bleak-plight-of-stateless-children-in-south-africa/> (accessed 7 April 2022).

²³⁴ Recorded Live Births statistics SA (2020) <https://www.statssa.gov.za/?p=14902> (accessed 20 May 2022).

²³⁵ Joint Committee on the Rights of the Child https://files.institutesi.org/CRC88_South_Africa.pdf (accessed 19 May 2022).

²³⁶ The birth must have been registered in terms of the Birth and Death Registration Act 51 of 1992.

²³⁷ “No Country no Future” *Daily Maverick*.

²³⁸ *Ibid.*

birth are at risk of becoming stateless and possibly giving birth to stateless children thereby creating a cycle of statelessness. In Morester Child and Youth Centre, a home for abandoned and abused children, nearly 50% of the children have yet to receive birth certificates from the Department of Home Affairs.²³⁹ The biggest challenge is that because these children were abandoned at birth, they never had their births registered and therefore obtaining birth certificates for them becomes a hurdle.

4.4 International Surrogacy as a Potential Cause of Statelessness in South Africa

While international surrogacy agreements have not yet gained much traction in South Africa, the fact that this is an avenue that some South Africans may follow means that the legal challenges that come with such agreements have the potential to cause statelessness in South Africa. As such, a discussion of international surrogacy agreements as a potential cause of statelessness is needed.

Surrogacy is the process through which one person (the surrogate) agrees to carry and deliver a child for another person (the commissioned parent).²⁴⁰ International surrogacy or cross-border surrogacy is an arrangement involving a surrogate mother who lives in another country.²⁴¹ As more people are moving towards finding different ways of conceiving and starting families, international surrogacy has become popular. Some challenges may arise as far as surrogacy is concerned. Besides the obvious challenges or concerns such as ethical, moral, religious, and cultural challenges or considerations, international surrogacy may lead to statelessness in South Africa. Statelessness may occur where the commissioning parents in South Africa enter into a surrogacy agreement with a surrogate mother from another country that has different laws regarding the acquisition of nationality and surrogacy or where surrogacy agreements are not recognised at all. In South Africa, the Children's Act 38 of 2005 is relevant to surrogacy agreements.²⁴² The Children's Act only allows and recognises altruistic surrogacy entered between parties who are in South Africa. Altruistic surrogacy refers to a surrogacy agreement whereby the surrogate mother does not benefit financially from the

²³⁹ Ibid.

²⁴⁰ N Patel et al. "Insight into Different Aspects of Surrogacy Practices" (2018) 11 (3) *Journal of human reproductive science* at 212-218.

²⁴¹ Ibid.

²⁴² Section 292.

agreement.²⁴³ The Children's Act is silent on international surrogacy but it is clear that it seeks to limit international surrogacy by requiring that the surrogate agreement be signed in South Africa by at least one of the commissioning parents and the surrogate mother and her husband or the partner must be domiciled in South Africa at the time of the agreement.

Surrogacy agreements that do not comply with the Children's Act will be deemed invalid.²⁴⁴ In this instance, the child is deemed to belong to the surrogate mother. A surrogacy agreement that is deemed invalid has the potential to render a child stateless where the surrogate mother is stateless or undocumented. Surrogacy arrangements add a new dimension to the issue of statelessness because there are various players involved (the commissioning parents, the surrogate as well as the state). Surrogacy agreements in general do not contribute to statelessness where all the parties involved are within the same territory. The issue becomes problematic when parties involved in the agreement are from different states. In cases of international surrogacy arrangements, there is a real risk of statelessness for children if there is a conflict between the surrogacy system and the nationality laws of the surrogate mother's country of nationality and that of the commissioning parents. This can mean that nationality cannot be attributed to the child in certain circumstances.²⁴⁵ In most states, surrogacy agreements, especially international surrogacy, are either prohibited,²⁴⁶ limited by law, or highly regulated by law.²⁴⁷ The obvious logic causing the hesitance behind allowing international surrogacy agreements is based on the uncertainty and possibility of issues that such agreements may bring. Potential risks include child trafficking, abuse of vulnerable women, and possible conflict with the different state laws.

5 Conclusion

This chapter set out to define the concept of statelessness to provide an understanding of what it means to be stateless. To fully understand statelessness, the chapter outlined the concept of

²⁴³ J Stoll "Surrogacy Arrangements and Legal Parenthood: Swedish Law in a Comparative Context" (2013) *Juridiska institutionen* at 373.

²⁴⁴ Section 294 of the Children's Act 2005.

²⁴⁵ For example, in France, surrogacy is illegal and thus refuses to give nationality to around 400 children born each year as a result of French nationals entering into surrogacy arrangements with surrogate mothers in the United States, Ukraine or India S Rajan "World's Stateless Children: International Surrogacy arrangements and statelessness" <http://children.worldsstateless.org/3/safeguarding-against-childhood-statelessness/international-surrogacy-arrangements-and-statelessness.html> (accessed 23 May 2022).

²⁴⁶ Surrogacy is prohibited in countries such as Germany, France, Japan and Italy.

²⁴⁷ Commercial Surrogacy is limited in New Zealand, Israel, Australia and the Netherlands.

statelessness, its causes, and more importantly, the history of statelessness. In the first instance, the discussion outlined the history of statelessness globally with the aim of giving a background to statelessness and its causes in the global context. Having regard to the core focus of this study, it was necessary to narrow down the discussion to the history of stateless as it relates to Africa and more specifically, to South Africa. Moreover, the discussion sought to delve into an in-depth discussion of colonisation and how it contributed to the nationality laws in most African states including South Africa. Keeping in mind that the focus of this study is on South Africa, a discussion of the different stages of colonisation was conducted and it demonstrated how this informed the laws on nationality in South Africa. The history of apartheid in South Africa was discussed as it related to the stripping of Black people in South Africa of nationality through nationality laws. The causes of statelessness were discussed from a continent-wide perspective and then the discussion was narrowed down to South Africa which is the focus of the study. What is evident from the discussion in this chapter, is that statelessness is an old-age problem that has taken different dimensions over the years. The chapter has placed emphasis on the fact that statelessness is not a new concept. Political theorists such as Arendt spoke of the concept of statelessness 60 years ago,²⁴⁸ yet, decades later we are not only still attempting to fully understand the concept of statelessness, but we are also struggling to deal with the situation. With the undisputed fact that South Africa is home to stateless children, another critical question that this thesis seeks to answer is whether and to what extent the laws and policies in South Africa entrench or seek to eliminate statelessness. The next chapter grapples with this question.

²⁴⁸ H Arendt *The origins of totalitarianism* (1973).

CHAPTER THREE: SOUTH AFRICA'S NATIONALITY LAWS: GAPS IN LEGISLATION, THE DISCRETION OF POLICYMAKERS AND CHILDHOOD STATELESSNESS

1. Introduction

The commonly accepted position under international law is that it is for each state to determine, by operation of domestic law, who its nationals are. This was articulated in the case of *Nottebohm, Liechtenstein v Guatemala*.²⁴⁹ Bearing this in mind, this chapter analyses South Africa's approach to nationality, particularly how it has exercised its discretion to determine who its nationals are. In this regard, the national laws of South Africa are examined to demonstrate how they create gaps that make it impossible for some stateless children to acquire nationality in South Africa. The laws and policies that will be examined include South Africa's Constitution of 1996, the Citizenship Act 88 of 1995, the Birth and Death Registration Act 51 of 1992, the 2014 Regulations to the Birth and Death Registration Act and the Regulations of the Department of Home Affairs - the custodian and the gatekeeper for the implementation of nationality laws in South Africa. Drawing on the rational choice theory, the chapter underscores that South Africa's failure to prioritise nationality for stateless children as evident in its laws and policies is aligned with its state interests.

2. The history and background of citizenship law in South Africa

Before delving into a discussion of citizenship law in South Africa, it is imperative that the concept of nationality and citizenship is discussed. The terms nationality and citizenship are often used interchangeably, however, these terms are not the same.²⁵⁰ In *Nottebohm (Liechtenstein v Guatemala)*, the Court defined nationality as follows:

"Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties".²⁵¹

In contrast, the term citizenship has been defined as follows:

²⁴⁹ (1955) ICJ (4) ICGJ 20.

²⁵⁰ B von Rütte, "Chapter 2 Citizenship and Nationality: Terms, Concepts and Rights". In *The Human Right to Citizenship*. (2022) Leiden, The Netherlands at 11.

²⁵¹ *Nottebohm (Liechtenstein v Guatemala)* para. 23.

“a legal status and political membership; as rights and obligations; as identity and belonging; as civic virtues and practices of engagement; as a discourse of political and social equality or responsibility for a common good”.²⁵²

There is not much consensus regarding these two different concepts. For the purposes of this study, the terms nationality and citizenship will both be used to refer to full membership to a state in the legal sense of a bond between an individual and a state. In principle, the two terms will be used interchangeably. However, the term ‘nationality’ is mainly used to refer to sources of international law using this terminology.

To better understand the current nationality laws in South Africa, it is important to give a contextual background and history of South Africa’s citizenship law. South Africa’s citizenship legislation has generally provided for at least three pathways through which citizenship can be acquired; birth, descent, and naturalisation. South Africa is fundamentally a *jus soli* (born on soil) jurisdiction with a territorial right to citizenship and the ambit of this right is restricted by law.²⁵³ Citizenship by birth is limited by legislation to a child born in the Republic to a South African citizen or to parents who are permanent residents.²⁵⁴ Citizenship by descent can be acquired by a child born outside the Republic to at least one citizen parent; together with registration of birth.²⁵⁵ Citizenship by naturalisation can be acquired once a child reaches the age of 18 years.²⁵⁶ Section 5 of the Citizenship Act 88 of 1995 gives the Minister the discretion to grant a naturalisation certificate to a person who is over the age of 18 years who has been living lawfully in South Africa and can communicate in any of the official languages. Citizenship by naturalisation is thus not available to a person under the age of 18 years and who is in South Africa illegally. A stateless child, with no legal documentation, by the age of 18, is automatically excluded from acquiring citizenship by naturalisation because they are deemed to be in South Africa illegally.

²⁵² B von Rütte, "Chapter 2 Citizenship and Nationality: Terms, Concepts and Rights". In *The Human Right to Citizenship* at 22.

²⁵³ J Klaaren “Constitutional citizenship in South Africa” (2010) 8(1) *International Journal of Constitutional Law* 94–110.

²⁵⁴ See section 2 of the Citizenship Act 88 of 1995.

²⁵⁵ Ibid section 2(3).

²⁵⁶ This will be fully explained in due course.

Citizenship laws are often a reflection of the existing legal climate and political agenda of a particular state.²⁵⁷ Before democracy, citizenship law in South Africa was governed by the Citizenship Act 44 of 1949. Black people were able to acquire South African citizenship in terms of the Citizenship Act of 1949, however, they did not acquire all the rights that came with being a citizen, such as the right to vote and freedom of movement. The apartheid government went a step further and enacted the Homeland Citizenship Act 26 of 1970.²⁵⁸ The Homeland Citizenship Act made provision for the process of creating independent ‘Homelands’ based on ethnic groupings. Black people were forced to move to certain designated areas based on their ethnicity.²⁵⁹ For instance, isiZulu-speaking people were forced to move to KwaZulu-Natal, isiXhosa-speaking people to the Transkei, and SeTswana-speaking people to Bophuthatswana. Once a Homeland was formally declared independent, citizens of that Homeland then lost their South African citizenship and acquired the citizenship of their Homeland.²⁶⁰

In light of this background, and given South Africa’s transition to democracy, there was an eagerness to provide common, inclusive, non-racial, and equal access to citizenship. This is evident in the initial legislation that was enacted post-democracy. This law was generous in scope and was especially aimed at catering to the many groups of people who had been deprived of their citizenship during Apartheid.²⁶¹ Post-democracy, there was an increase in migration to South Africa and as a result, through legislation, the government began to reduce access to citizenship.²⁶² Since the amendment of laws relating to the acquisition of nationality, there has been increased effort to limit access to citizenship in South Africa.²⁶³ Hobden asserts in this regard that, in recent years, amendments to the Citizenship Act in 2010 have significantly restricted the acquisition of citizenship by persons born to non-South Africans

²⁵⁷ See *Chisuse v Director-General, Department of Home Affairs* (2020) ZACC para 28 “Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. Citizenship is not just a legal status. It goes to the core of a person’s identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person’s citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enroll in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.”.

²⁵⁸ 26 of 1970 (hereinafter the Homeland Citizenship Act).

²⁵⁹ Section 2 and 3 of the Homeland Citizenship Act.

²⁶⁰ South African History online The Black Homeland Citizenship Act of 1970 <https://www.sahistory.org.za/article/black-homeland-citizenship-act-1970> (accessed 21 June 2023).

²⁶¹ The Restoration and Extension of South African Citizenship Act (No. 196) Under its terms, persons who had formerly had citizenship in the homelands could naturalise in South Africa.

²⁶² Ibid 159.

²⁶³ Ibid.

on South African soil.²⁶⁴ Perhaps the most concerning is how access was reduced through the Department of Home Affairs.²⁶⁵ The attitude and ethos of the Department of Home Affairs are a reflection of how nationality laws in South Africa are interpreted in practice and this stance will be discussed later in this chapter.

3. Nationality as a Right Whose Regulation Falls within States' Domain

Human rights are universal entitlements that accrue to an individual by virtue of being human.²⁶⁶ The universality of rights lends impetus for human rights issues to be removed from the national domain, thus making them matters of international regulation subject to universal standards. However, despite the right to nationality being guaranteed under international human rights treaties, the practical implementation of this right - which speaks to the procedural aspects of the right, is considered a domain that should be reserved for the state.²⁶⁷ Thus, although the right to nationality is entrenched in various international treaties as will be discussed in Chapter Five, it is also an issue subject to national regulation and it is here that state discretion and state sovereignty come sharply into focus.²⁶⁸ It follows that the implementation and regulation of this right vary from one jurisdiction to another, with international law not prescribing the means through which states should determine who their nationals are. South Africa, through constitutional and legislative provisions, has set criteria for determining who its nationals shall be.

The obvious limiting factor to the realisation of the right to acquire nationality is the fact that states have the prerogative to decide who their nationals are. Therefore, as much as the right to acquire nationality is considered a universal human right, a state's discretion on issues of nationality remains the norm. Effectively, state sovereignty limits the application of certain human rights such as the right to acquire nationality. Therefore, when South Africa, in exer-

²⁶⁴ Ibid 161.

²⁶⁵ See J Klaaren *International Journal of Constitutional Law* at 95-100. "Department of Home Affairs' increasingly strict interpretation of the law, and continued failure to create provision for certain cases protected under law. The chief challenge that South Africa faces in respect to citizenship law is thus ensuring the free, fair, and efficient application of the South African Citizenship Act."

²⁶⁶ C Barry and N "Southwood What Is Special About Human Rights"? (2011) 25 (23) *Ethics & International Affairs* at 369-383. W Doise "Human rights: common meaning and differences in positioning" (2003) 19 (3) *Psicologia: Teoria E Pesquisa* at 201-210. R Fasel 'Simply in virtue of being human'? A critical appraisal of a human rights commonplace.

²⁶⁷ D Jarczewska "To What Extent do Universal Human Rights Encoded within International Law Challenge State Sovereignty?" (2013) *International Relations* at 2.

²⁶⁸ Ibid 2.

cising its sovereignty, enacts and implements national laws that have the effect of limiting the acquisition of nationality by stateless persons, it may be difficult to argue that it violates general international law. The rules and procedures relating to the acquisition of nationality depend solely on South Africa's legal system. To this end, South Africa has made provision for the acquisition of nationality as required by the various international human rights treaties to which it is a party.²⁶⁹ However, international law does not dictate how the acquisition of nationality should be implemented or what measures should be put in place to ensure the realisation of this right.

The challenge with the right to nationality and or the acquisition thereof is that ultimately, matters relating to nationality fall within the ambit of national laws. This not only creates a challenge for those seeking to acquire a nationality but it also has the potential of creating loopholes whereby some children fall through the cracks, thereby becoming or remaining stateless. Thus, while the argument for the right to acquire nationality needs to be advanced, one cannot lose sight of the fact that ultimately, state sovereignty remains the cornerstone for the acquisition of nationality. As much as the right to acquire nationality is recognised under various treaties,²⁷⁰ there is no specific obligation on states to grant nationality in terms of general international law. As a result, it is difficult to argue that there is a human right to nationality. The absence of such an obligation has led states to act as they please, with some states sometimes enacting laws that limit the acquisition of nationality even if such laws cause statelessness.²⁷¹ Yet, although state sovereignty can be abused through, for example, arbitrarily depriving people of nationality, the pivotal role of state sovereignty in legitimising and maintaining a democratic state cannot be downplayed. According to Owen²⁷²

“A democratically legitimate legislature should be broadly free to set the rules not only for citizenship acquisition but also for deprivation in accordance with its political goals and in a way that it considers conducive to the public good, within constraints of constitutional and international law that the legislature has itself freely accepted”.

²⁶⁹ See for example, article 24 of the International Covenant on Civil and Political Rights 1966, article 7 the Convention on the Rights of the Child 1989 the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990 and article 6 (3) of the African Charter on the Rights and Welfare of the Child 1990.

²⁷⁰ Ibid.

²⁷¹ Ibid 28.

²⁷² Owen *Netherlands International Law Review* at 299–317.

Owen's words hold truth for South Africa. Although the right for every child to acquire nationality at birth is guaranteed by the Constitution, how this right is realised remains South Africa's prerogative through its nationality laws. In the final instance and of utmost importance, is the principle that state discretion primarily means legislative discretion. Owen states in this regard:

“The sovereign power of states to determine their own citizens is not merely a principle of international law that applies in relations with other States but it is also as an element of a state's internal democratic self-determination. State discretion therefore primarily means legislative discretion”.²⁷³

Owen stresses that this is a critical point to remember when dealing with matters of nationality. With the guidance of international principles, sovereign states have the prerogative to decide who their nationals are, and this is done through the enactment of legislation that deals with the rules and procedures for the acquisition of nationality. A critical issue worth pondering and relevant to South Africa's posture on nationality for stateless children pertains to why states, in exercising their sovereignty on matters of nationality, end up with policies that undermine the acquisition of nationality by stateless children. The rational choice theory is unpacked below to provide an understanding of South Africa's stance on this matter.

4. Understanding the stance of South Africa regarding Childhood Statelessness: The Rational Choice Theory

In as far as politics is concerned, it may help provide an understanding of why states fail to prioritise certain issues including ending childhood statelessness despite the various international treaty provisions on the right to acquire nationality for children. It is easy to assume that when states sign conventions and treaties, such a decision will be followed by strict compliance following the agreed contents of treaties. Even in the absence of clear obligations, as the case is regarding the right to nationality, global agendas on the need to end childhood statelessness, seemingly bring persuasive momentum to bear on states to grant stateless children nationality. However, this is far from the position. On the contrary, as far as the right to acquire nationality and the global agenda to end statelessness is concerned, states do not always comply and this may be attributable to several factors.²⁷⁴ According to Guzman

²⁷³ Ibid.

²⁷⁴ A Guzman *How international law works: a rational choice theory* (2008).

men,²⁷⁵ legal obligations and global agendas might influence state behaviour only when there is some benefit attached to such compliance, or if non-compliance comes with serious consequences. This is referred to as the rational choice theory.

The rational choice theory is applicable to an array of fields including psychology, economics, philosophy, and state politics. It comprises guidelines that help to make sense of the conduct of individuals of states. The theory originated in the eighteenth century and can be traced back to political economist and philosopher, Adam Smith.²⁷⁶ Ganti observes that the rational choice theory states that individuals use rational calculations to make rational choices and achieve outcomes that are aligned with their own personal objectives.²⁷⁷ These results are also associated with maximising an individual's self-interest. Using rational choice theory is expected to result in outcomes that provide people with the greatest benefit and satisfaction, given the limited options that they have available.²⁷⁸ When applied to states, the rational choice theory asserts that in deciding whether to enforce rights and various international principles at the national level, states are calculative and guided by three factors. These are reputation, reciprocity, and retaliation. Guzman refers to them as the three Rs of compliance.²⁷⁹ Therefore, the key to understanding why states comply with international obligations is based on the understanding of the three costs — reputation, reciprocity, and retaliation.

Reputation pertains to the costs imposed on a state when its good name is damaged by the failure to comply with international law and global agendas, such as ending statelessness.²⁸⁰ The reality is that a state's compliance with international legal obligations and global causes is influenced by factors such as the political climate, national interest, incentives, and political will from government role players. As far as statelessness is concerned and the goal to end childhood stateless, based on the rational choice theory, it can be argued that the tendency of states to exercise their sovereignty in a manner that renders children stateless is a calculated move. Because stateless children are not linked to any state, arguably no state feels obliged to advocate for the rights of stateless children. Effectively, no state is appropriately positioned to call out other states that fail to grant stateless children nationality. The stateless

²⁷⁵ Ibid.

²⁷⁶ Adam Smith was an 18th-century Scottish economist, philosopher and author who is considered the father of modern economics see, <https://www.investopedia.com/updates/adam-smith-economics/> (accessed 6 June 2023)

²⁷⁷ A Ganti "Rational Choice Theory: What It Is in Economics, With Examples"(2022) <https://www.investopedia.com/terms/r/rational-choice-theory.asp> (accessed 21 June 2023).

²⁷⁸ Ibid.

²⁷⁹ Guzman *How international law works* at 33.

²⁸⁰ Ibid 34.

children implicated in these circumstances have no affiliation to any state. Based on the fact that no state is often prepared to stand in solidarity with stateless children, due to their lack of national link with any state, there is hardly any state prepared to name and shame other states that fail to grant these children nationality. Therefore, for states not prepared to adjust national laws and policies to ensure that nationality is granted to stateless children, there is often no reputational damage in terms of such a state's name being spoiled in the international community. It would therefore make sense why states, including South Africa, do not fully commit to ensuring an effective, implementable, and workable legal and policy framework for the acquisition of nationality by stateless children. This lack of commitment to ending childhood statelessness does very little to undermine South Africa's international reputation.

Reciprocity, the second 'R' that Guzman refers to the practice of exchanging things with others for mutual benefit, especially privileges granted by one country or organisation to another. One of the dimensions of reciprocity is tacit understanding.²⁸¹ Most relations between states are viewed this way. Even in the absence of any obligation under Treaty Law, some states may have a mutual understanding regarding the rights and responsibilities of other states as far as certain fundamental issues are concerned. These obligations are often governed by informal norms of reciprocity, not by formal treaties.²⁸² Some of these obligations pertain to how states should treat each other's nationals, with each state reciprocating the other state's good gesture. However, the mere fact that stateless children do not belong to any state, one cannot speak of reciprocity. In granting nationality to stateless children, such conduct would in no way be a reciprocation because these children are stateless and there is no state to reciprocate should South Africa grant nationality to stateless children. In giving nationality to stateless children, arguably, South Africa would be putting itself in a position of giving with no possibility of benefiting from such a move because the lack of nationality by stateless children means that there is no state to reciprocate South Africa's good gesture of granting these children nationality. Precisely put, the fact that South Africa has little to nothing to gain in granting nationality to these children leaves it with no political benefit, thus, the acquisition of nationality by stateless children remains unprioritised. Unsurprisingly, in exercising discretion at the national level, South Africa is inclined towards policies and laws that

²⁸¹ T Besley "State Capacity, Reciprocity, and the Social Contract" (2020) 88 (4) *Econometrica* 1307-1335.

²⁸² *Ibid.*

undermine rather than advance the prospects of the acquisition of nationality by stateless children.²⁸³

Retaliation, the third R, pertains to the action of counterattack by a state resulting from the conduct of another state. It is common practice for a state to reciprocate through good gestures when another state treats its nationals well. Besley submits that norms of reciprocity play a role in building strong and effective states.²⁸⁴ Conversely, when the nationals are treated harshly by another state, the affected state often retaliates. Mertens²⁸⁵ observes that states derive two benefits from retaliation. Firstly, retaliation through protectionist approaches benefits the state politically. Secondly, it may induce the state that attacked first to end any further attacks on the retaliating state. As far as statelessness is concerned, the failure to grant nationality to stateless children may not be considered to be an attack on a state because the children involved are not linked to any state. Effectively, there is no basis for retaliation because there is no state directly aggrieved by another state's failure to grant these stateless children nationality. Mertens rightly submits that retaliation has a way of stopping the state that attacked first from conducting further attacks. It is hard to argue that this would be the case regarding the issue of statelessness because no state may be seen to retaliate on behalf of individuals who have no link to the retaliating state. Therefore, based on the rational choice theory, South Africa's stance on the acquisition of nationality is arguably calculated in the sense that the lack of a clear threat for retaliation to arise means there is nothing to lose in terms of international relations in depriving stateless children of nationality.

Having unpacked the rational choice theory and how it helps us understand the stance of states, in this case, South Africa, on the issue of nationality for stateless children, it is apt to engage with South Africa's legal and policy framework to demonstrate how South Africa's stance on nationality is not just state-centered but also calculated.

²⁸³ Section 3 of the Regulations on the Registration of Births and Deaths 2014 requires parents to provide documentation in order to register a child's birth. The Citizenship Act 88 of 1995 provides for a child to obtain nationality only if the birth was registered in terms of the Birth and Death Registration Act 51 of 1992.

²⁸⁴ T Besley *Econometrica* at 1309.

²⁸⁵ C Mertens The determinants of retaliation in international economic conflict and the implications for global climate policy: a difference-in-difference design, 3 July 2022 https://www.peio.me/wp-content/uploads/PEIO14/PEIO14_paper_130.pdf (accessed 19 June 2023).

5 South Africa's Legal and Policy Framework on Nationality: A Guaranteed Right often Inaccessible

5.1. South Africa's Constitutional Framework on Nationality

The Interim Constitution of South Africa of 1993 paved the way for the explicit recognition of the right to nationality from birth. This Constitution was enacted to negotiate the transition from apartheid to democracy.²⁸⁶ It was negotiated in the spirit of common citizenship and inclusion.²⁸⁷ Section 5 of the Interim Constitution²⁸⁸ states that the acquisition of South African citizenship shall be regulated by an Act of Parliament. There is nothing much that can be gathered from the Interim Constitution on the issue of nationality²⁸⁹ except the fact that it also left it to the state to give effect to this right through the enactment of legislation. Moreover, the Interim Constitution²⁹⁰ made provision for the right to a name and nationality from birth.²⁹¹ The advent of the Interim Constitution brought about a major overhaul to the citizenship regime through the enactment of the 1995 Citizenship Act.²⁹² This Act will be discussed in detail in the course of this chapter.

The Interim Constitution of 1993 was replaced by the final Constitution of 1996. The South African Constitution of 1996 is considered one of the most transformative and progressive constitutions globally.²⁹³ South Africa's constitution is significant because it is a historic document that provided for the transition from apartheid to democracy.²⁹⁴ The Constitution

²⁸⁶ Hobden *Politikon* at 165.

²⁸⁷ Klaaren *International Journal of Constitutional Law* at 94–110.

²⁸⁸ 1993.

²⁸⁹ One of the most important concepts established by the interim constitution is the concept of “sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races. See *Chisuse v Director-General, Department of Home Affairs* (2020) ZACC para 20.

²⁹⁰ Section 2.

²⁹¹ Section 30 of the Interim Constitution 1993. In recognition of this, the first Constitutional Principle, outlined in the interim Constitution, directed that the new South African Constitution must establish a “sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

²⁹² 88 of 1996.

²⁹³ See, A Elizabeth “Rebuilding the Nation: On Architecture and the Aesthetics of Constitutionalism in South African Literature” (2015) 2 (1) *Cambridge journal of postcolonial literary inquiry* at 73. Global Post R Bosch 20 years on, South Africa's remarkable constitution remains unfulfilled (2015)

<https://theworld.org/stories/2015-03-21/20-years-south-africa-s-remarkable-constitution-remains-unfulfilled> (accessed 16 June 2021). Rowan Philp “In love with SA's Constitution” *Mail & Guardian* 2012 <https://mg.co.za/article/2012-02-24-in-love-with-sas-constitution/> (accessed 19 June 2021) “The Constitution 25 years on: A dream deferred or great expectations realised?” *News24*

<https://www.news24.com/news24/opinions/fridaybriefing/analysis-the-constitution-25-years-on-a-dream-deferred-or-great-expectations-realised-20210506> (accessed 19 June 2021)

²⁹⁴ See *S v Makwanyane* (1995) ZACC Para 7. See also, The Constitutional Court of South Africa: rights interpretation and comparative constitutional law (1998) 1 (2) *Journal of Constitutional Law* at 205–283.

of South Africa has undoubtedly a unique history and what makes it different is that it was not enacted by parliament, instead it was enacted by the assembly and as such does not have an Act number.²⁹⁵ Perhaps what makes the Constitution more significant is its supremacy, meaning that all other laws are subject to it. Therefore, as the supreme law in the Republic, any law or conduct inconsistent with it is invalid.²⁹⁶ Constitutional supremacy plays a significant role in the enactment and implementation of legislation because all enacted legislation must be consistent with the Constitution.

5.1.1. The Wording and Textual Meaning of the Right to Nationality in the Constitution of 1996

The South African Constitution is one of the few constitutions on the African continent that provide a specific provision that guarantees the right to nationality.²⁹⁷ The right is guaranteed in terms of Section 28 as follows:

Children

28. (1) Every child has the right—

(a) to a name and a nationality from birth;²⁹⁸

One gathers from the framing of the right to nationality under South Africa's Constitution that reference is made to "every child." This constitutional guarantee implies that "every child", including a stateless child, is envisaged in this guarantee. Suffice it to note that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality, and freedom.²⁹⁹ The question often arises whether the constitution's reference to the term 'all' or 'everyone' includes foreign nationals, refugees, stateless persons, and undocumented people. Various decisions of the courts in South Africa lend support to the inclusive nature of the

²⁹⁵ Elizabeth Cambridge *journal of postcolonial literary inquiry* 73.

²⁹⁶ Section 2.

²⁹⁷ Other countries that guarantee to nationality at birth are article 32 of the Constitution of Angola of 2010, article 26 of the Constitution of the Federal Democratic Republic of Ethiopia, article 23 of the Constitution of Malawi 1994.

²⁹⁸ Section 28 (1).

²⁹⁹ Section 7 (1) Constitution 1996.

terms “everyone” or “all”. For instance, in the Constitutional Court case of *Lawyers for Human Rights v Minister of Home Affairs*, the Constitutional Court stated:

“Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why the term “everyone” should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so”.³⁰⁰

From the above ruling, it is clear that the Constitution protects the rights of everyone in South Africa, including stateless persons. By implication, this interpretation applies to section 28(1)(a) of the constitution regarding the right to nationality for every child from birth. Moreover, everyone has a right to have their human rights respected and promoted regardless of their legal status in the country.³⁰¹ Therefore, everyone in the country is entitled to the rights guaranteed under the constitution by virtue of being human.³⁰² Section 9 of the constitution prohibits discrimination against anyone on one or more of the listed grounds including race, colour, ethnic or social origin, and birth. Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do.

Equality, with respect to access to socio-economic rights, is implicit about “everyone” being entitled to have access to such rights in Section 27 of the constitution. In the Constitutional Court judgement of *Khosa v Minister of Social Development*,³⁰³ the Court explained the term “everyone” to mean the following:

“Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country and in the absence of any indication that the Section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word “everyone” in this section cannot be construed as referring only to citizens”.³⁰⁴

When interpreting the term “everyone”, the court will adopt a purposive approach, meaning that the court will attach meaning to a specific provision based on the purpose of the provision.³⁰⁵ Where the constitution is silent on whether a provision applies strictly to citizens, the court will interpret the provision using a purposive approach to decide whether the provision was meant to exclude non-nationals. In the case of *Mahlaule v The Minister of Social Devel-*

³⁰⁰ (2004) ZACC 12 para 79.

³⁰¹ Article 2 Universal Declaration of Human Rights 1948.

³⁰² Ibid article 6.

³⁰³ (2004) 6 SA 505 (CC).

³⁰⁴ Ibid para 47

³⁰⁵ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 47.

opment,³⁰⁶ a constitutional challenge was brought against section 4(b)(ii) of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997.³⁰⁷ These provisions restricted access to social assistance and were afforded to South African citizens only. The practical effect of the provisions was that permanent residents, old-aged persons, and children who would otherwise have qualified for social assistance, but for the requirement of citizenship requirement were excluded from benefiting from social security. The Court held that social assistance under the act applied to all “residents” who qualify for such assistance, irrespective of their citizenship.³⁰⁸ The Court underscored that unless “resident in the Republic” is construed narrowly to cover only permanent residents, the default position is that the state is under obligation to assist both permanent and temporary residents.³⁰⁹ Evidently, the provisions in the constitution apply to everyone who is in South Africa unless a provision clearly limits the right in question to citizens.

The South African Constitution guarantees the right to nationality at birth; however, the realisation and implementation of this right is left to policymakers and the Department of Home Affairs. The legislation and policies giving force to the right suggest that South Africa is exercising its discretion in a manner that makes it impossible for some children to access nationality.

5.1.2. *South African Courts’ Engagement with the Right to Nationality under the Constitution*

In interpreting the right to nationality at birth, the Constitutional Court has been emphatic on the unambiguous meaning of this provision. For instance, in *DGRL v Minister of Home Affairs*,³¹⁰ the Court had to interpret the meaning of Section 28 (1) (a) of the constitution. The most significant thing to note in this case is that the child met all the requirements of section 2 (2) of the Citizenship Act which will subsequently be discussed. In this case, a child was born in South Africa to Cuban parents. The child’s mother had acquired South African per-

³⁰⁶ 25453/02.

³⁰⁷ Some of the provisions (4B(b)(ii) of the Welfare Laws Amendment Act 106 of 1997 that had not yet been brought into force.

³⁰⁸ Para 85.

³⁰⁹ Para 9.

³¹⁰ 38429/13.

manent residence while the Cuban government refused to recognise the father as a Cuban national.³¹¹ The Cuban government refused to recognise the child as a Cuban citizen.³¹² The mother subsequently applied for the child's citizenship in terms of Section 2(2) of the Citizenship Act.³¹³ Although the child met all the requirements of Section 2 (2), the application was declined on numerous occasions by the Department of Home Affairs. The matter was eventually taken to court and the question before the Court was whether the child had met all the requirements of Section 2 (2) of the Citizenship Act. In its analysis of Section 2 (2) of the Citizenship Act, the Court stated that the first point of the query was whether the child was unable to acquire citizenship in another country. Secondly, was the child born in South Africa? And thirdly, was the child's birth registered in accordance with the Birth and Death Registration Act 51 of 1992?

The Court answered all these questions in the affirmative, meaning that she qualified to acquire South African Citizenship.³¹⁴ The Department of Home Affairs asserted that the child qualified for permanent residence and could be given permanent residence instead of citizenship. The Court, however, rejected this argument and held that the mere fact that the child qualified for permanent residence does not, in itself, equate to citizenship. Moreover, permanent residence is given to a foreigner who is a citizen of another country whilst Section 2 (2) of the Citizenship Act and Section 28 (1) of the constitution envisaged giving stateless children citizenship and not a permanent residence. The Department of Home Affairs' assertion that the child could alternatively apply for naturalisation was also rejected by the Court on two bases. Firstly, there is no right to citizenship through naturalisation because the granting of naturalisation is dependent on the minister's discretion.³¹⁵ Secondly, naturalisation as a

³¹¹ The parents had come to South Africa on a treaty programme allowing engineers to work in the country on a special permit. After Daniella was born, they discovered that the Cuban government considers those who work outside Cuba for more than 11 months to be "permanent emigrants" who cannot pass on their nationality to any child born outside Cuba.

³¹² In terms of article 34 of the Cuban Constitution 1999, a child will be Cuban by birth if they are born abroad to a Cuban mother or father, who were completing an official mission, according to the requirements and formalities established by the law. Unfortunately, both the child's parents in this case failed to return to Cuba after their work mission was over in terms of the laws of Cuba. They therefore lost their Cuban Citizenship.

³¹³ 88 of 1995. The requirements for section 2 (2) are that the child must have been born in South Africa and registered in terms of the Birth and Death Registration Act 51 of 1992 and finally the child must not have the nationality of any other country nor the right to acquire the citizenship of another country.

³¹⁴ Para 35.

³¹⁵ Para 17.2, see also, section 4 and 5 of the Citizenship Act 88 of 1995.

solution is not in the best interest of the child, based on the fact that a stateless child would have to wait until the age of 18 years to apply for naturalisation, thereby resulting in childhood statelessness until the child attains age of majority.³¹⁶ The Court held that this would be inconsistent with the intention of Section 2 (2) of the Citizenship Act as well as the international goal of eliminating statelessness. The Court noted further that naturalisation requires a link to a particular country and without such a link a stateless child is unable to rely on this provision.

In addition, the Court held that it is against the spirit and purport of the Constitution and against international law principles to make children wait until the age of 18 to apply for nationality.³¹⁷ Moreover, the Court held that it is trite law that wherever reasonably possible, all statutes must be interpreted in a manner that best promotes the provisions of the Bill of Rights³¹⁸ and the principles of international law.³¹⁹ To this end, the Court found that the Department of Home Affairs' interpretation and approach to Section 28 (1)(a) was unconstitutional.³²⁰ The Court held that South Africa is obliged to enact legislative measures to prevent children from being born stateless. More importantly, South Africa is obliged to ensure that children born within the territory, who would otherwise be stateless, do not have to wait until the age of 18 to acquire citizenship, but are granted nationality instead.³²¹ Section 2 (2) of the Citizenship Act clearly states that every child³²² who meets all the requirements of the section should acquire nationality and the Department of Home Affairs has no discretion on this point.

In a judgement of the Gauteng High Court Division, the Court took a similar approach in the interpretation of Section 28 (1) of the constitution. In the matter of *Tebogo Khoza v Minister of Home Affairs*,³²³ the applicant (Mr. Khoza) was born in South Africa in 1997 and had lived

³¹⁶ Para 28.3.

³¹⁷ To this end, see General Comment on Article 6 on the Right and Welfare of the Child para 91 "Any law, policy or practice that entails that children must wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an adequate effort on the part of the State party to comply with its Charter obligations."

³¹⁸ Section 39 (2) of the Constitution 1996. See also, *Arse v Minister of Home Affairs* (2012) 4 SA 544 (SCA) para10.

³¹⁹ Section 233 of the Constitution.

³²⁰ Para 40.

³²¹ Para 44.

³²² The term 'every child' as contemplated by section 28 of the Constitution is not restrictive but encompasses every child and not only children who are South African citizens, children who are lawfully present in the country, or children in possession of birth certificates. See *Centre for Child Law v Minister of Basic Education* 2840/2017 para 76.

³²³ 6700/2022.

in South Africa since birth. In 2006, after his mother passed away, his grandmother brought him to the Thabang Youth Centre (“the Centre”) in Limpopo. His mother was undocumented, so he struggled to find out where his mother was buried and was unable to obtain a copy of her death certificate. The whereabouts of his father were unknown. He remained at the Centre and when he was sixteen years old, he applied for late birth registration and an identity document. Following this application, the immigration officer compiled a report (referred to as the Phakadi Report). In terms of the Phakadi Report, both of Mr. Khoza’s parents were foreigners. Mr. Khoza’s mother was from the Kingdom of Eswatini (Eswatini) and during Mr. Khoza’s birth, she had been in the country illegally. The report also established that Mr. Khoza’s grandmother resided in Eswatini. The Phakadi Report concluded that Mr. Khoza should be taken to the Eswatini border and allowed entry in order to facilitate an application for identity documentation in Eswatini. However, Mr. Khoza was refused entry into Eswatini. The immigration officers in Eswatini said that Mr. Khoza’s surname was not recognised in Eswatini, so it was impossible for him to be a Swazi national. He was thus returned to South Africa by Swazi immigration authorities and declared stateless.

In this instance, the Court interpreted Section 28(1)(a) as a right that is guaranteed to every child from birth and not subject to the discretion of lawmakers or the Department of Home Affairs.³²⁴ This case brings into sharp focus the interplay between constitutional provisions and state sovereignty which leaves the Department of Home Affairs with discretion regarding matters of nationality law and the acquisition of nationality. The Court held that it is evident that Mr. Khoza has no ties to any other country, nor does he have the right to the nationality of any other country, therefore he met all the requirements of Section 2(2) of the Citizenship Act. The Department of Home Affairs was ordered to register his birth and grant him nationality.

Seemingly the Constitutional Court applies a purposeful interpretation to Section 28 (2) of the Constitution. In *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,³²⁵ the Constitutional Court described the purposive approach as follows:

“Words and expressions used in a statute must be interpreted according to their ordinary meaning thus the statement must be interpreted in the light of their context. But it may be useful to stress two points

³²⁴ Para 55-59.

³²⁵ (2004) 7 BCLR 687 (CC).

in relation to the application of this principle. The first is that ‘the context’, as used here, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background”.³²⁶

The *DGLR* case³²⁷ was straightforward in that the child met all the requirements of Section 2 (2) of the Citizenship Act, hence she qualified for nationality. The challenge occurs when a stateless child does not meet one or more of the requirements. This challenge is yet to be brought before the courts. Moreover, the court has not yet decided on the constitutionality of the birth registration requirement under the BDRA. What this case illustrates is that a child who meets all the requirements of Section 2 (2) Citizenship Act can and should be able to acquire nationality. Seemingly, a stateless child who does not meet all the requirements of Section 2 (2) of the Citizenship Act will not be able to acquire nationality. In this instance, a stateless child who is unable to successfully rely on Section 2 (2) of the Citizenship Act will not be able to benefit from Section 28 (1)(a) of the constitution unless the courts set a new precedent. Until then it remains an unfortunate reality that not all stateless children will acquire nationality. The Constitution guarantees every child the right to nationality,³²⁸ however, this right is limited by nationality laws and policies. State sovereignty allows South Africa to decide who its nationals are. It can, therefore, be argued that the guarantee that every child has a right to a nationality is somewhat of an illusion. Thus, despite constitutional and legislative provisions on the right to nationality at birth for every child born in the country, South Africa ultimately has the discretion to decide who its nationals are. In exercising this discretion, some children are left stateless despite the strong constitutional and legislative guarantees on nationality for stateless children born in South Africa.

5.2. South African Citizenship Act 88 of 1995, as amended

The Citizenship Act 88 of 1995 gives effect to Section 3 (3) of the constitution³²⁹ and it is the main legislation that governs the acquisition of nationality in South Africa. The current Citizenship Act is different from the Citizenship Act that was first enacted in 1992 and that was

³²⁶ Para 89.

³²⁷ 38429/13.

³²⁸ Section 28(1) (a).

³²⁹ National legislation must provide for the acquisition, loss and restoration of citizenship.

subsequently amended in 1995,³³⁰ 2005, and finally in 2010. In the discussion below, I critically examine how the framing of nationality in South Africa's laws has an impact on the right to acquire nationality for stateless children in South Africa. The South African Citizenship Act 88 of 1995, as amended (hereinafter the Citizenship Act), makes provision for the acquisition of nationality by birth through two different avenues.³³¹ This is provided for in Section (2) of the Citizenship Act which states the following:

Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if—

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act

(3) Any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, if—

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act.

From this provision, the first way that nationality can be acquired is by birth as provided for in Section 2(2) of the Citizenship Act. Section 2 (2) states that any person born in the Republic and who is not a South African citizen shall be a South African citizen by birth, if he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and his or her birth is registered in the Republic in accordance with the Birth and Death Registration Act 51 of 1992 (BDRA).³³² The second way in which nationality can be acquired by birth is through Section 2 (3) of the Citizenship Act which states that any person born in South Africa to a parent who is a permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth if he or she has lived

³³⁰ Citizenship 88 of 1995, Citizenship amendment Act 17 of 2010, 2005 Amendments.

³³¹ Unlike some other constitutional jurisdictions, the Constitution delegates the authority for defining citizenship to national legislation.

³³² The Birth and Death Registration Act 51 of 1992 was amended in 2010.

in South Africa from birth until the age of majority (18 years) and the birth was registered in terms of the provisions of the BDRA. For ease of reference, the provisions of section 2 will be unpacked and dealt with separately.

Section 2 (2) of the Citizenship Act, often referred to as the “statelessness provision”,³³³ states the following:

(2) Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if-

(a) he or she does not have the citizenship or nationality of any other country. or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).

Section 2 (2) has three requirements: firstly, the child must have been born in South Africa, secondly; the birth must have been registered in accordance with the provisions of the BDRA. Lastly, the child must be stateless or must be at risk of being stateless due to not qualifying for the nationality of any other country. The requirement that the child’s birth must have been registered in terms of the BDRA poses some challenges.³³⁴ In order to discuss these challenges, it is necessary to explain how the BDRA is regulated and implemented in South Africa. The Department of Home Affairs is tasked with promulgating the rules and procedures governing the procedure for the acquisition of citizenship. To this end, the Department of Home Affairs issued regulations on the registration of birth and death in 2014.³³⁵

³³³ See *DGLR v the Minister of Home Affairs* 38429/13 para 22. Lawyers for Human Rights and Institute on Statelessness and Inclusion Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review. The Republic of South Africa <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=3801&file=EnglishTranslation#:~:text=It%20is%20only%20foundlings%20whose,child%20is%20orphaned%20or%20abandoned> (accessed 16 June 2023) It can also be argued that section 2(2) of the Citizenship Act is a statelessness provision because it provides a way for a child, who would otherwise be stateless, to acquire nationality.

³³⁴ For example, where parents are undocumented or stateless themselves.

³³⁵ Regulations to the registration of birth and death 2014 (hereinafter “the regulations”).

Section 3 (1) of the regulations provides for the birth registration of a child born to a South African citizen.³³⁶ To register a child's birth, the application form must be accompanied by a certified copy of the identity document of the mother or the father of the child.³³⁷ The requirement to provide a copy of an identity document to register a child born to a South African citizen might seem straightforward and unproblematic. However, this is far from the truth. Some adults were born and have lived in South Africa all their lives but never registered their births and thus have no identifying documents and are technically stateless.³³⁸ Children born to these adults, who are technically South African but considered stateless by law, are at a high risk of becoming stateless themselves. Without any valid documentation required to register a child's birth, the risk of statelessness becomes high. There is no other way that the child will be able to acquire nationality,³³⁹ therefore, a child in this situation is left without protection.³⁴⁰

Section 9 of the BDRA only provides the timeframes for the registration of the birth and leaves it to the Minister of Home Affairs to decide what the rules for acquiring citizenship are. This creates a gap in the law which results in some children being deprived of nationality despite Section 2 (2) of the Citizenship Act; the statelessness provision.³⁴¹ In essence, South Africa has provided for birth registration through legislation and yet the same legislation is silent on the rules and information required for the acquisition of citizenship. International law recognises this sovereign power and even though various treaties guarantee the right to acquire a nationality, the national laws, rules, and procedures for the acquisition of nationality are the preserve of South Africa. With such discretion, states can tactfully create loopholes in nation-

³³⁶ Section 3 (1) of the Regulations states that any South African citizen must give notice of the birth of his or her child within 30 days of the birth.

³³⁷ Section 3 (1) (g) of the Regulations.

³³⁸ See Manby Statelessness in Southern Africa Briefing paper. "Born in but stateless in South Africa" *The Mail and Guardian* 13 November 2021. <https://mg.co.za/news/2021-11-13-born-in-but-stateless-in-south-africa/> (accessed 27 June 2023).

³³⁹ A child in this case cannot rely on section 4 of the Citizenship Act which makes provision for naturalisation. Section 4 required that the person's birth must have been registered in terms of the BDRA.

³⁴⁰ For example, where parents are undocumented or stateless themselves.

³⁴¹ Pertinent to note that as of 2022, the Department of Home Affairs has failed to comply with a court order instructing the Minister of DHA to promulgate regulations and procedure to be followed by people who want to make use of the 'statelessness provision' section 2(2) of the Citizenship Act. On 03 July 2014, the High Court in *DGLR v Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13. ordered that the Minister at paragraph 4(d) to "make regulations in relation to section 2(2) of the Citizenship Act within a time period that the court deems reasonable. This order was further confirmed in the same case in the Supreme Court of Appeal (the deadline given by the SCA was March 2018).

ality laws³⁴² to exclude certain stateless children from acquiring nationality despite the statelessness provision in the Citizenship Act and the constitutional provision that guarantees the right for stateless children in open-ended terms. In this instance, the BDRA's silence on certain aspects of the acquisition of nationality creates a loophole through which children can be deprived of nationality.

Section 7 of the regulations makes provision for the registration of children born to permanent residents and refugees. The regulations state that a child registered in terms of the BDRA must be issued with a birth certificate, provided that the mother or father provides a permanent residence permit or a refugee permit. Section 8 (1) of the regulations makes provision for the registration of birth of children who are born to parents who are non-South African citizens.³⁴³ In terms of Section 8 of the regulations, a mother or father who is neither a permanent residence nor a refugee must, within 30 days of the child's birth, give notice of the child's birth and provide valid documents in the form of a copy of a certified identity document, a certified passport, permit or a valid visa. If the notice is being given by a next of kin, he or she will also be required to provide certified copies of identifying documents.

Section 9 of the regulations provides for the registration of the birth of an orphaned or abandoned child. In this instance, a social worker is required to give notice of the birth of an abandoned or orphaned child within 60 days of the child's birth and after obtaining a court order in terms of Section 156 of the Children's Act 38 of 2005.³⁴⁴ Birth registration by a social worker is marked with challenges such as backlog in the judicial system and challenges relating to obtaining the death certificate of a caregiver where the child is an orphan.³⁴⁵ To this end, not all abandoned or orphaned children can register their births in terms of the BDRA. Some of these children do fall through the cracks and as such, become stateless.

³⁴² "Statelessness may also be manufactured in more subtle, less visible ways—increasingly, states rely on more creative techniques to circumvent international law standards, including norms on non-discrimination, by tampering with "neutral" criteria that are relevant to nationality and its absence" N Jain "Manufacturing Statelessness" (2022) 116 (2) *American Journal of International Law* at 237-288.

³⁴³ Pertinent to note that the DHA will issue a birth certificate with no identity number. The courts have held that there is nothing in the BDRA that invalidates birth registration due to a lack of an identity number. See *DGLR v The Minister of Home Affairs* para 32.

³⁴⁴ This section gives the court power to declare that a child is in need of care and protection. This application must also be accompanied by a copy of the social worker's birth certificate, a court order issued by the children's court, a death certificate of the parent of an orphaned child as well as a copy of the social worker's report.

³⁴⁵ H Beko *The impact of unregistered births of children in South Africa and how their rights to essential services and basic education are affected* (Master's thesis, UWC, 2021,).

Based on the Regulations, some children will not qualify for birth registration and they will potentially become stateless. As far as states have the prerogative to decide who their nationals are, there will be loopholes and gaps that result in some children being deprived of nationality. Therefore, as long as South Africa has the discretion to decide how children acquire a nationality, there will be stateless children who will not be able to acquire nationality despite the constitutional guarantee to nationality at birth and the Citizenship Act making provision for the acquisition of nationality. The fact remains that role players such as politicians, ministers, and policymakers make the decisions regarding how the right to acquire nationality is realised. For this reason, childhood statelessness remains a reality. For instance, the requirement that birth registration must be accompanied by identifying documentation, which is a requirement imposed by policymakers and the Department of Home Affairs, can be considered a loophole that results in some children not being able to acquire nationality.

The South African Constitution provides the right of every child to acquire a nationality, however, how nationality is acquired is a matter of the legislature³⁴⁶ and citizenship is therefore defined through legislation. The Minister of Home Affairs is tasked with regulating the acquisition of nationality through issuing regulations. This is a clear instance of South Africa exercising its sovereignty to decide how the right to nationality is realised. This discretion has unintended consequences such as some children not being able to register their birth due to a parent or guardian's lack of valid documentation. Pertinent to note, the registration of a child's birth is a crucial requirement for the acquisition of nationality in South Africa. Failure to register a child's birth in accordance with the BDRA will result in a child not being able to acquire nationality in terms of Section 2 (2) of the Citizenship Act.³⁴⁷ The requirement to provide valid identifying documentation excludes stateless children, who are born in South Africa to undocumented or stateless parents, from acquiring citizenship.

Section 2 (3) of the Citizenship Act states that any person born in South Africa to a parent who is a permanent resident and who is not a South African citizen, qualifies to be a South African citizen by birth. To qualify for nationality in terms of Subsection 3, the child's birth

³⁴⁶ In *Chisuse v Director-General, Department of Home Affairs* (2020) (CCT155/19) para 33, the Constitutional stated: Unlike some other constitutional jurisdictions, the Constitution delegates the authority for defining citizenship to national legislation. Of course, national legislation defining citizenship must be consistent with the Constitution.

³⁴⁷ *Nandutu v Minister of Home Affairs* (2019) ZACC, a child's birth was not registered because the mother's permit had expired.

must have been registered in terms of the BDRA.³⁴⁸ Secondly, the child must have lived in South Africa from the date of birth until the age of 18. Thus, Subsection 3 has four requirements namely, the child must be born in South Africa, the birth must have been registered in terms of the BDRA, the child must have been born to a parent with permanent residency status and lastly, they need to have reached the age of 18 to apply for nationality. This provision is problematic for several reasons. Firstly, a child who is born in South Africa to a parent with permanent residence status will potentially be stateless for the first 18 years of his or her life. The irony of the age requirement is that instead of preventing and eradicating childhood statelessness, it has the potential to perpetuate the problem and thereby potentially create a cycle of statelessness. Therefore, a child born in South Africa to a permanent resident who has not yet attained the age of majority could potentially be stateless because not all children born to parents with a permanent residence status will be able to acquire nationality from the parent's country of birth. This may be because of nationality laws that do not allow women to pass their nationality status to their children.³⁴⁹ For instance, an unmarried woman from the Kingdom of Eswatini who obtains the status of permanent residence in South Africa will not be able to transmit her Swazi nationality to her child because unmarried women in Eswatini cannot pass on nationality to their children. In terms of Section 2 (2), this would mean that South Africa has the obligation to grant the child nationality since she would be unable to obtain Swazi nationality.

Moreover, there are new regulations that require children of permanent residents to apply for relative visas before applying for permanent residence.³⁵⁰ However, to apply for a relative visa, children of permanent residents would need to use passports from their parents' country of nationality.³⁵¹ A child, in this case, (for example, a child born to a Swazi Mother as discussed above) would remain stateless even upon attaining the age of majority. It is quite easy to see how despite South Africa's ratification of treaties with provisions on nationality and its strong constitutional guarantee of nationality for all children at birth, the national discretion exercised through legal and policy enactment renders the right to nationality for stateless children illusory.

³⁴⁸ Registration in terms of the Act require that the parents provide identifying documentation.

³⁴⁹ See for example, Section 43 of the Eswatini Constitution 2005, the Child Protection and Welfare Act 6 of 2012. Article 1 (2) Somali Citizenship law 1962 (note: the Citizenship Amendment Bill was introduced in 2016). The Lebanon Constitution and Decree-Law of 18 September 1965.

³⁵⁰ Section 17 of the amended Immigration Regulations 2018

³⁵¹ Ibid Section 23 (3).

Section 2 (3) of the Citizenship Act is significant because it is a qualifier for the acquisition of nationality. To rely on any of the provisions of the Citizenship Act, a stateless or potentially stateless child needs to meet the first qualifying criteria, which is the registration of his or her birth, in accordance with the provisions of the BDRA. To date, the Department of Home Affairs has not enacted regulations to give effect to this provision (the statelessness provision). Therefore, it is not clear how a stateless child may go about acquiring citizenship through Section 2 (2) of the Citizenship Act.³⁵² The court ordered the Minister of the Department of Home Affairs to remedy this gap by issuing regulations.³⁵³ However, the Department of Home Affairs has not yet given effect to this court order. Consequently, the regulations in Section 2(2) of the Citizenship Act³⁵⁴ have not yet been amended or updated to create an application procedure or an official Department of Home Affairs form that can be used to apply for citizenship in terms of Section 2 (2) of the Citizenship Act. It becomes close to impossible to make the application to force the Department of Home Affairs to give effect to Section 2 of the Citizenship Act without the help of third-party institutions. Organisations such as Lawyers for Human Rights (LHR),³⁵⁵ Centre for Child Law³⁵⁶, and Legal Resources Centre,³⁵⁷ amongst others, have often had to intervene to ensure stateless children acquire nationality in terms of Section 2(2) of the Citizenship Act.

Section 4 (3) of the Citizenship Act makes provision for a child born in South Africa to acquire nationality through naturalisation.³⁵⁸ A child born in South Africa may apply to be naturalised as a citizen once they reach the age of 18 if he or she has lived in the republic since birth and if the birth was registered in terms of the BDRA. The obvious challenge here is that the child's birth must have been registered in terms of the BDRA. The birth registration requirement has been discussed at length and will therefore not be repeated here. However, what will be highlighted here is that, technically, this provision may be seen as being dedicated to reducing statelessness by granting nationality, but the reality is that the birth registration

³⁵² 88 of 1995.

³⁵³ See *DGLR v The Minister of Home Affairs* para 49.

³⁵⁴ Regulations on the Citizenship Act 2014.

³⁵⁵ See reports and submissions on behalf of stateless people <https://www.lhr.org.za/cases-reports/> (accessed 19 June 2021).

³⁵⁶ See for example, *Centre for Child Law v Minister of Home Affairs* (2021) ZACC 31. *DGLR v Minister of Home Affairs* (GPJHC) 38429/13. *Centre for Child Law v Director General: Department of Home Affairs* (2021) ZACC 31. *Khosa v Minister of Home Affairs*.

³⁵⁷ See for example *Centre for Child Law v Director General: Department of Home Affairs* (2021) ZACC 31; 2022 (2) SA 131. *Centre for Child Law v Minister of Basic Education* (2020) 1 All SA para 71. *N v Director General: Department of Home Affairs* (2018) ZAECGHC para 90.

³⁵⁸ It is pertinent to note that nationality by naturalised is only an option for stateless people who are over the age of 18 years. It therefore does little to eradicate childhood stateless.

requirement creates a hurdle for stateless children. Indeed, South Africa has various options for the acquisition of nationality and at first glance, it appears that the nationality legislation is generous enough to allow all stateless children to acquire nationality. However, upon closer inspection, these various options do not cater to all stateless children, especially due to the immense and at times, impossible challenge of registering their births.³⁵⁹ The requirement that the birth must have been registered in terms of the BDRA presents an additional limitation for stateless children born in South Africa.³⁶⁰ Registering a child's birth through the BDRA is marked with challenges.³⁶¹

In terms of the regulations, a mother or father who intends to register a child's birth must provide identifying documents such as an identity document, a copy of a certified passport, permit, or visa. The irony of this provision is that it excludes stateless children who need protection. Stateless children born to stateless parents are excluded from this provision because they do not have the identifying documents required for registration. Without registering their birth in terms of the BDRA, these stateless children cannot apply for citizenship and will remain stateless as a result. Nationality, as a solution for the protection of stateless children, is only limited to stateless children who are born to documented parents. Stateless children born to undocumented parents will not be able to acquire a nationality and will consequently be left without protection. Unfortunately, the discretion left to states to administer the procedural aspects of the right to nationality, as the case is in this explanation, results in loopholes, thus certain stateless children falling through the cracks.

The Citizenship Act only allows children of permanent residents to acquire citizenship upon reaching the majority. Requiring children to wait until the age of 18 to obtain nationality is arguably against the spirit of eradicating childhood statelessness and is not in the best interest of children. Moreover, despite the 'statelessness exception' in Section 2(2) of the Citizenship Act, the Department of Home Affairs has yet to provide regulations to set out the path for

³⁵⁹ Some stateless children are born to undocumented or stateless parents. Since the BDRA Act requires parents to provide valid identifying document to register children's births, not all the births of stateless children can be registered.

³⁶⁰ There are substantial barriers to birth registration. Procedural obstacles include the need for parents to have valid identity documents, the required presence and consent of both parents and also the high costs associated with some requirements for registration, such as DNA testing. In addition, inconsistent or unclear procedures within and between government departments, inconsistent application of laws and procedures and lack of knowledge, ability and willingness of key service providers to navigate the complex legal and procedural processes involved, all create risks for childhood statelessness. United Nations Human Rights <https://www.unhcr.org/ibelong/south-africa-joint-strategy/> (accessed 16 June 2023).

³⁶¹ Hobden *Politikon* at 165.

acquisition through this provision.³⁶² Therefore, this section does not in itself guarantee the acquisition of nationality, and the Department of Home Affairs has conceded to this fact.³⁶³

South Africa uses its discretion to decide how stateless children can acquire a nationality. This discretion results in some stateless children not qualifying to meet the criteria to acquire a nationality. These stateless children fall through the cracks and are left with no avenue for acquiring nationality, yet, amidst such a gap, it remains difficult to argue that South Africa is in breach of its international treaty obligations. There is yet to be an answer to whether there is an obligation on South Africa to grant nationality to stateless children under international treaty law.

It is to be emphasised that the issue is not that there is no law on the acquisition of nationality by stateless children in South Africa, it is rather the arbitrary standards, loopholes, and undue hurdles that are put in place by law and policymakers that impede stateless children's access to nationality. For example, making identity documents a requirement for birth registration, knowing full well that stateless children, and sometimes their parents, lack identification documents, renders the right to nationality for stateless children illusory. Consequently, the discretion exercised by South Africa regarding the procedure of acquiring nationality, stemming from the exercise of its sovereign powers, has become a stumbling block to the right to nationality for stateless children. It is submitted that South Africa cannot be said to be in breach of international treaties that provide a right to nationality. In terms of Article 6 of the ACRWC, South Africa is required to make provision for the acquisition of nationality by implementing legislation that gives effect to this right. This is precisely what South Africa has done. It has enacted a provision on how a stateless child can acquire a nationality and has used its discretion to decide which stateless child can apply and does not discriminate based on race, ethnicity, or religion.

³⁶² Stateless child born to Cuba court instructed the Department of Home Affairs to enact regulations to give effect to statelessness provision s2(2) of the Act. To date no such regulations have been enacted.

³⁶³ In a statement minister Aaron Motsoaledi, stated that "there is a common misconception that a child born in South Africa had the right to apply for citizenship when they turned 18 years on the grounds that without that, they would be stateless. However, they are actually citizens of the country of their parents," see, Linda Ensor *Statelessness in spotlight as home affairs to review three acts* (January 2022) <https://www.businesslive.co.za/bd/national/2022-01-26-statelessness-in-spotlight-as-home-affairs-to-review-three-acts/> (accessed 16 June 2023).

All things considered, South Africa's legal and policy framework on nationality is crafted in such a manner that it renders the right to nationality for stateless children illusory. Revisiting the rational choice theory that was discussed at the start of this chapter, this stance is calculative and arguably, aligned with South Africa's political interests. By this, I mean that in terms of international relations and South Africa's stance in the international community, South Africa has little to lose in not granting stateless children nationality.

6. The Department of Home Affairs: Discretion and denial of nationality to stateless children

The Department of Home Affairs plays a critical role in the acquisition of nationality. The role played by the Department of Home Affairs is reflective of how the discretion left to South Africa by virtue of the international law principle of state sovereignty has created loopholes via which stateless children are deprived of nationality, despite South Africa being party to international treaties with provisions on nationality, and South Africa's very own strong constitutional guarantee of nationality for all children from birth. The Department of Home Affairs is at the core of providing the state with information on the identity and status of all the people within the country. Without this information, the integrity, security, and sovereignty of the state itself cannot be guaranteed.³⁶⁴

The Department of Home Affairs plays a vital role in the implementation of nationality laws in South Africa. It is therefore critical to discuss how the Department of Home Affairs' implementation of nationality laws is reflective of South Africa's exercise of rational choice in a manner that excludes stateless children, with this calculative move being inspired by the fact that South Africa has little to lose. It is also critical to demonstrate how the Department of Home Affairs's shortcomings and often, misguidance, negatively impact children and their right to nationality. Consequently, the role played by the Department of Home Affairs will be discussed to demonstrate how the discretion left to states by virtue of the international law principle of sovereignty has played out in the Department of Home Affairs department, whereby administrative procedures sometimes have resulted the unintended consequences, thereby creating loopholes via which stateless children are deprived of nationality. This is despite South Africa's commitment to international treaties with provisions on nationality

³⁶⁴White Paper on the rearrangement of the Department of Home Affairs 2019
<http://www.dha.gov.za/files/dhawhitepaper.pdf> (accessed 16 June 2023).

and South Africa's very own strong constitutional guarantee on nationality for all children from birth.

The Department of Home Affairs uses its discretion, guided by legislation,³⁶⁵ to decide who qualifies for citizenship and who does not. The Department of Home Affairs executes its mandate through various methods, such as enacting policies that guide the implementation of legislation and taking administrative implementation measures. More often than not, administrative and implementation measures that the Department of Home Affairs takes relating to issues of immigration have negative effects on people and their nationality. The 2024 case of *P.P.M v Minister of Home Affairs*,³⁶⁶ will be briefly discussed to illustrate how this often plays out in practice. However, to give context to this case, it is important to first discuss the practice by the Department of Home Affairs which, has been referred to as the 'Identity Document' blocking system (ID blocking). South Africa faces many migration-related challenges, including the increased prevalence of irregular migration and identity theft.³⁶⁷ Non-South African citizens who enter the country unlawfully sometimes use a certain sort of means to obtain identity numbers under the pretence that they were either born as South African citizens or awarded permanent resident status. To address this dilemma, the Department of Home Affairs adopted a practice of ID blocking. This practice involves blocking any suspiciously processed identity number (ID's) before or while investigating whether a person registered in the national population register is a South African citizen or permanent resident.³⁶⁸ The issue with this system was that the ID blocking occurred before any investigation was concluded and a final decision was reached regarding a person's status as a citizen or permanent resident. Therefore, it prejudiced *bona fide* citizens and permanent residents.³⁶⁹ One of the unfortunate results of blocking of the ID's of mothers was that it significantly affected the children of those mothers. For example, in such a case, a mother would be unable to her child at birth due to a lack of legal documents, which, in some instances, prevented children from obtaining South African citizenship *via* their mother's citizenship and an ID after they have turned 16 years old.³⁷⁰ It was identified that specific categories of children who are more likely to struggle to obtain birth certificates or IDs include children whose

³⁶⁵ chapter 1 of the Constitution of the Republic of South Africa (1996) states, "National legislation must provide for the acquisition, loss and restoration of citizenship."

³⁶⁶ [2024] ZAGPPHC 2.

³⁶⁷ *P.P.M v Minister of Home Affairs* Para 1.

³⁶⁸ *Ibid* para 2.

³⁶⁹ *Ibid*.

³⁷⁰ Para 21.

mothers or grandmothers have IDs blocked by the Department of Home Affairs.³⁷¹ In highlighting the negative impact that this practice had on children, the Court noted:

“The practice of blocking a parent’s ID impacts such parent’s children. A child’s status as a citizen, refugee, permanent resident, or illegal foreigner is tied to its parents’ status. Since the South African approach regarding attaining citizenship or permanent residence connects the child’s status to that of at least one of its parents, it is unavoidable that a child cared for by a single parent whose ID is blocked will inevitably be prejudicially affected by the blocking of that parent’s ID. In addition, a child whose birth is not registered in terms of the Births and Deaths Registration Act because there is uncertainty as to whether a birth certificate with an identity number must be issued or a certificate without an identity number because the child’s parents *sojourn* temporarily in the Republic, may face almost insurmountable obstacles if such child.”³⁷²

The Court held that in the absence of a fair administrative process preceding the blocking of IDs before any final decision is taken relating to the affected individual’s status as a South African citizen or permanent resident and in the absence of any empowering legislation having been promulgated, constitutes unjust and irregular administrative action that is inconsistent with the Constitution and therefore invalid.

The Department of Home Affairs’s discretion also extends to the question of whether a stateless child qualifies for citizenship or not.³⁷³ It brings into focus the reality of access to the right to nationality resting on decisions taken by politicians, policymakers, and technicians within South Africa. It is here that the tension between the right to nationality and state sovereignty becomes apparent. The Department of Home Affairs has, on numerous occasions, demonstrated that it will not easily comply with ‘stateless provision.’³⁷⁴ This is further illustrated by the fact that the Department of Home Affairs will not grant nationality or naturalisation even when a stateless child is entitled to it, based on the Citizenship Act.³⁷⁵ This was illustrated in the Department of Home Affairs’ problematic interpretation of the law in the case of *DGLR v the Minister of Home Affairs*³⁷⁶ where the minister was of the view that the stateless child in question could not rely on Section 2 (2) of the Citizenship Act, based on the fact

³⁷¹ Para 47.

³⁷² Para 117.

³⁷³ Section 2(2) of the Citizenship Act.

³⁷⁴ Ibid.

³⁷⁵ See *DGLR v The Minister of Home Affairs*, where a child born to Cuban parents was not granted nationality even though the child was registered in terms of the BDRA and the Cuban government had provided communication stating that they do not recognise the child as a Cuban citizen. See also, *Minister of Home Affairs v Ali* (2018) ZASCA, where the Department of Home Affairs refused to grant citizenship by naturalisation to children who met all the requirements of section 4 (3) of the Citizenship Act.

³⁷⁶ 38429/13.

that the child's mother was a permanent resident. The Department of Home Affairs was of the view that the child could, thus be granted permanent citizenship through her mother in terms of the Immigration Act.³⁷⁷ This demonstrates the gaps in policy implementation that are partly attributable to the exercise of state sovereignty on the issues of nationality. In this case, the court made it clear that the Department of Home Affairs' interpretation was incorrect because the provision clearly stated that the requirement was that a child born in South Africa should be granted nationality, if not doing so would render them stateless. Furthermore, the Immigration Act³⁷⁸ deals with foreigners who are not citizens and not with stateless children who do not belong to any state.³⁷⁹

The Department of Home Affairs has, on numerous occasions, also made its views clear on the issues of the acquisition of nationality. In one such instance and following media reports, that a child born in South Africa to a foreign national was entitled to a South African nationality, the Minister of the Department of Home Affairs issued the following statement:

"The basic principle of the South African citizenship is that a child follows the citizenship or nationality of his or her parents. If one parent is a South African citizen, the child will be a citizen by birth. A foreign child adopted by South African citizens becomes a citizen by descent whilst a naturalised citizen is one who has complied with the requirements for naturalisation as set out in Section 5 of the South African Citizenship Act."³⁸⁰

In the same statement, the Minister further stated:

"It is a difficult thing to issue a birth certificate where grounds for citizenship are not established, whether in terms of birth, descent, or naturalisation. Citizenship is not in every country based on nationality or territory. Children born of permanent residents follow their parents' status. We do not separate children from parents. What can be done is to record a notice of birth of the child. Such notification of birth can thereafter be taken to the parents' countries of origin for registration and issuance of passport, after which the child will be issued with a derivative permanent residence permit status, upon application.'³⁸¹

From the minister's statements above, one gathers that the basic principle applied by the Department of Home Affairs is that a child follows the nationality of his or her parents. This means that a stateless child born to a stateless parent will follow the parent's statelessness.

³⁷⁷ 13 of 2002.

³⁷⁸ Ibid.

³⁷⁹ Para 27.

³⁸⁰ See Department of Home Affairs media statement <http://www.dha.gov.za/index.php/statementspeeches/958-media-statement-on-how-citizenship-is-acquired-and-children-registered-in-south-africa> (accessed 16 June 2022).

³⁸¹ Ibid.

Simply put, such a child will remain stateless due to his or her parent's absence of nationality status. Although strictly speaking, this is not in line with Section 2 (2) of the Citizenship Act, the Department of Home Affairs is, in fact, using its discretion to decide how nationality is acquired. This is contrary to South Africa's own constitution and legislative provision on nationality for stateless children such as Section 2(2) of the Citizenship Act. Such a stance by the Department of Home Affairs sheds light on its attitude towards the implementation of nationality laws in the republic.³⁸² Evidently, with South Africa still invoking the traditional approach to nationality, which still leaves it with the discretion to grant or withhold nationality from some children, some stateless children will not acquire nationality.³⁸³ To this end, there are stateless children in South Africa who will never be able to acquire citizenship despite qualifying for it. The Department of Home Affairs' handling of childhood statelessness cases as well as its failure to issue regulations to give effect to the statelessness provision provided for in Section 2(2) of the Citizenship Act is concerning.³⁸⁴ Because of using its discretion to decide who qualifies for nationality and who does not, South Africa uses policy and legislation to limit access to nationality. This is a demonstration of how granting states discretion on issues of nationality, on account of the principle of state sovereignty, creates challenges to the guarantee of the right nationality for stateless children.

7. Conclusion

This chapter has analysed the nationality laws of South Africa. The analysis has established that the Constitution of South Africa guarantees the right of every child to nationality from birth. By implication, this right is guaranteed for all children including stateless children. While this is the logical conclusion to be drawn based on this very strong constitutional guar-

³⁸² See statement by the Minister of the Department of Home Affairs, "The basic principle of the South African citizenship is that a child follows the citizenship or nationality of his or her parents. If one parent is a South African citizen, the child will be a citizen by birth. A foreign child adopted by South African citizens becomes a citizen by descent whilst a naturalised citizen is one who has complied with the requirements for naturalisation as set out in section 5 of the South African Citizenship Act."

³⁸³ This is also reflected in the statement made by the Minister of the department of Home Affairs where he states "It is a difficult thing to issue a birth certificate where grounds for citizenship are not established, whether in terms of birth, descent or naturalisation. Citizenship is not in every country based on nationality of territory. Children born of permanent residents follow their parents' status." <http://www.dha.gov.za/index.php/statementspeeches/958-media-statement-on-how-citizenship-is-acquired-and-children-registered-in-south-africa> (accessed 16 June 2023). The Department of Home Affairs has consistently failed to recognise the applicants' citizenship and give effect to the rights emanating from it, without providing adequate reasons for this denial in a manner consistent with the High Court's and this Court's orders and procedural requirements. *Chisuse v Director-General, Department of Home Affairs* (2020) ZACC para 20.

³⁸⁴ See also, L Catherine *Is South African Refugee Law creating a stateless generation?* (Master's thesis, UCT, 2019).

antee, engagement with the laws that give effect to the right to nationality for children born in South Africa demonstrates that the freedom that comes with states' sovereignty gives latitude to lawmakers and policymakers in South Africa to decide the scope and content of nationality laws and policies. How this discretion has been exercised constitutes an obstacle to the attainment of nationality by stateless children. Notably, the procedure for children born in South Africa to attain nationality is a matter that falls within the powers of the lawmakers and politicians and this power has been exercised in a manner that excludes some stateless children from acquiring nationality. It can therefore be concluded that the notion of state sovereignty, which places nationality out of the realm of international regulation, is the root cause of childhood statelessness in South Africa and more broadly, the cause of this global human rights violation. Precisely put, the national laws of South Africa on nationality leave certain children stateless. This raises the issue of whether stateless children can access basic rights considering that international human rights law guarantees rights for all by virtue of being human. The next chapter resolves this issue.

CHAPTER FOUR: STATELESSNESS AND CHILDREN'S ACCESS TO BASIC RIGHTS IN SOUTH AFRICA

1. Introduction

In the preceding chapter, it was established that in exercising its discretion on issues of nationality by virtue of the international law principle of state sovereignty, South Africa has, through its laws and policies, created loopholes via which stateless children are deprived of nationality despite the constitutional provision on nationality for every child born in South Africa's jurisdiction from birth. How this discretion is exercised suggests that childhood statelessness is a reality, with its elimination being impracticable based on the current laws and policies. Notably, although stateless children have the opportunity to apply for nationality, some do not qualify to acquire nationality due to the requirements set out in South Africa's nationality law.

The current international human rights regime advances the notion that stateless people can be protected and can enjoy basic rights, since rights are entitlements that accrue to an individual by virtue of being human, with such enjoyment having nothing to do with nationality or lack thereof. In this chapter, I challenge this narrative by demonstrating that in the absence of nationality, access to basic rights for stateless children is close to impossible. I conduct an analysis of selected laws on basic rights including health, education, and social security, to demonstrate the unavailability of access to basic rights for stateless children amidst a lack of nationality. In conducting this analysis, Arendt's renowned "right to have rights" is used as a lens through which to advance the argument that nationality, which Arendt has conceptualised as "the right to have rights", is a condition precedent to accessing basic rights in South Africa for stateless children despite the glamorous notion of the universality of human rights. The analysis seeks to underscore that the framing of legislation and policies sometimes has the effect of limiting access to rights for stateless children. Stateless children are still excluded on account of lacking South African nationality or any other form of documentation that identifies them with another nationality.

2. International human rights law regime and the notion of universality of human rights

The concept of human rights is not always black and white, and scholars hold different views on what human rights entail. This has created debates between those who believe that human

rights are obvious and universal and those who take a contrary view. Human rights are generally standards, regimes, or laws that bring together a variety of actors to establish and implement a set of norms.³⁸⁵ International human rights regimes only emerged after the Second World War.³⁸⁶ There are different schools of thought regarding what human rights mean. These include the natural law school of thought, the protesting school of thought, the deliberative school of thought, and the discourse school of thought.³⁸⁷ For this chapter, the focus is placed on the natural law school of thought because it speaks directly to the notion of the universality of human rights. Scholars from the natural law school of thought are of the view that rights are inherent to all human beings.³⁸⁸ These rights find their roots in the natural order or divine origin. It is for this reason that they are considered inalienable, immutable, and absolute. Furthermore, natural law scholars advance the view that human beings are entitled to certain basic rights by virtue of being human. For example, Donnelly states that human rights are “the rights one has because one is a human”. To Donnelly, “general rights arise from no special undertaking beyond membership in the human race. To have human rights, one does not have to be anything other than be born a human being.”³⁸⁹

Since the 1970s, there has been a huge uptake and buy-in towards universal human rights.³⁹⁰ At the forefront of international human rights is the idea that human rights are universal and every human being has rights by virtue of being human. The United Nations is at the forefront of this concept of the universality of human rights. It is pertinent to have a discussion of human rights by exploring how the United Nations, being a gatekeeper of rights, describes the concept of human rights. It has defined human rights as follows:

³⁸⁵ See N Seppala “Business and the International Human Rights Regime: A Comparison of UN Initiatives” (2009) 87 *Journal of Business Ethics* at 401–417. J Ingram “What Is a “Right to Have Rights”? Three Images of the Politics of Human Rights” (2008) 102 (4) *The American Political Science Review* at 401-416.

³⁸⁶ A Føllesdal et al. Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives” (2013) at 1.

³⁸⁷ S Marie-Benedicte *What are human rights? Four schools of thought In The idea of Human Rights* by C Beitz (2011) at 139.

³⁸⁸ Ibid 140.

³⁸⁹ Ibid.

³⁹⁰ Ibid.

“Human rights are rights we have simply because we exist as human beings - they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status”.³⁹¹

This statement brings forth the critical issue of whether human rights are indeed universal. The United Nations considers human rights as universal entitlements that everyone has by virtue of being human. The argument that human rights are universal is premised on the view that they are the same for everyone because they are inherent in human beings by virtue of all people being human. According to this view, human rights are derived from nature, thus, the usage of the term “natural rights.” From the definition of human rights, above by the United Nations, it would seem that in practice stateless children should readily enjoy basic rights including education, food, shelter, and healthcare since these rights accrue to them by virtue of being human rather than on the basis of nationality. According to the United Nations, every human being is walking around with their basic human rights. The United Nations further asserts that human rights are not granted by any state but are rather automatic. The manner in which human rights have been conceptualised by the United Nations is akin to the notion of a birthright, with human rights being a birthright written in our Deoxyribonucleic acid (DNA). Based on this conceptualisation, the very state of being human comes with an inherent right.³⁹²

This position has been affirmed by human rights instruments at the United Nations level and regional levels. At the United Nations level, the Universal Declaration of Human Rights 1948 (UDHR) refers to “the inherent dignity and equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”.³⁹³ At the regional level, mention may be made of the American Declaration of Independence using similar terminology in underscoring the inalienability of rights. It provides that “all men are created equal, that they are endowed by their Creator with certain unalienable rights”.³⁹⁴ The French Declaration of 1789, refers to the “natural, unalienable, and sacred rights of man”³⁹⁵

³⁹¹ UNHRC What are human rights? <https://www.ohchr.org/en/what-are-human-rights#:~:text=Human%20rights%20are%20rights%20we,language%2C%20or%20any%20other%20status> (accessed 16 June)

³⁹² D Stamos *Myth of Universal Human Rights: Its Origin and Explanation, along with a More Humane way* (2013) at 2.

³⁹³ See, Preamble of the Universal Declaration of Human Rights 1948.

³⁹⁴ Preamble of the American Declaration of Independence 1776.

³⁹⁵ Preamble of The French Declaration of 1789.

while the African Charter on Human and Peoples' Rights, uses the term "inviolable" in buttressing the inalienable nature of human rights.³⁹⁶

Treaties devoted to the rights of children have also used similar language. The United Nations Convention on the Rights of the Child, in its preamble, draws on the Charter of the United Nations to recognise "the inherent dignity and of the equal and inalienable rights of all members of the human family".³⁹⁷ The Convention on the Rights of the Child (CRC) and the African Charter on the Rights of the Child 1990 (ACRWC) are the two documents that specifically make provisions for the protection and promotion of the rights of children. Both conventions apply universally to all children regardless of birth or nationality status or lack thereof.³⁹⁸ It should follow then that stateless children can enjoy basic human rights in the same way that children with nationality status enjoy rights. Moreover, the formal adoption of United Nations human rights instruments including the UDHR, International Covenant on Civil and Political Rights 1976 and International Covenant on Economic, Social and Cultural Rights 1966 as well as regional instruments on human rights by virtually all states have further been relied on to conclude that rights are indeed universal. In this regard, Donnelly contends that the fact that human rights have been accepted by almost all states, means they are universal, thus, establishing obligations that are binding in international law.³⁹⁹

If human rights are inherent, it would follow that every human being can enjoy basic human rights. The premise is that the inherent nature of these rights makes it impossible for them to be taken away by anyone. This means that all human beings are entitled to human rights regardless of nationality status. However, this viewpoint is questionable. Indeed, the United Nations promises universal human rights for all but the question remains whether every human being enjoys these rights by virtue of being human. Enjoyment of basic human rights by virtue of being human may indeed be ideal, however, practically speaking and as far as actual access to basic rights is concerned, it is somewhat of a myth to assume that these rights are universal entitlements that accrue to all by virtue of being human because there are other fac-

³⁹⁶ Preamble of the African Charter on Human and Peoples' Rights 1986.

³⁹⁷ Charter of the United Nations and Statute of the International Court of Justice 1945.

³⁹⁸ Article 2 of the CRC states that: States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

³⁹⁹ J Donnelly *Universal Human Rights in Theory and Practice* 2013.

tors at play, such as state sovereignty, that undermine the notion of the inalienable nature of human rights.

If rights were indeed inalienable, statelessness would not be a complex issue because stateless people would be entitled to human rights simply because they are human. Studies have illustrated that stateless children still find it difficult and at times impossible to access basic human rights, especially at the implementation level.⁴⁰⁰ This puts into dispute the narrative that human rights are universal and exposes the myth that human rights are inalienable. The reality is that the enjoyment of human rights is linked to a given state, with a state recognising individuals as one of their own or at least, recognising them as being legally present in a country.⁴⁰¹ Several other scholars have also challenged the notion of universality and inalienability of human rights, considering it a mere fallacy.⁴⁰² For example, David asserts that the citizenship of a person determines how he or she is treated by the system, thus, the rights of people are still generally determined by reference to the country they belong to.⁴⁰³ The implication of this is that international human rights are in no way inalienable.

Gündoğdu⁴⁰⁴ asserts that the concept of inalienability of human rights is a fallacy and somewhat of a myth. He bases his argument on the fact that the acquisition of rights depends on

⁴⁰⁰ See, S Buckland “From policy to practice: The challenges to educational access for non-nationals in South Africa” (2011) 31 *International Journal of Educational Development* at 367–373. B Chiyangwa *Mozambican Migrant Children’s access to education in Bushbuckridge, Mpumalanga: A Case Study of Buffelshoek Trust OVC Educational Support* (Master’s thesis, 2018, University of Johannesburg). T Callender *Thank you for coming? policy, politics, and polity: How education stakeholders interpret post-apartheid education policy for immigrants in South Africa—the case of Cape Town* (PhD-Thesis, University of Colombia, 2013). South African Human Rights Commission Access to a Basic Education for Undocumented Learners in South Africa September 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> (accessed 18 June 2023).

⁴⁰¹ “For Arendt, there is one universal right, which should be enjoyed by all, and which is not dependent on race, nation or any other criteria, save for the criterion of being human. This right is ‘the right to have rights.’” H Arendt “The rights of man; what are they?” (1949) *Modern Review Summer* at 24–37.

⁴⁰² See, David Owen “On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights” (2018) 65 *Netherlands International Law Review* at 299–317. S Benhabib *The Rights of Others: Aliens, Residents, and Citizens* (2004). A Gündoğdu *Rightlessness in an Age of Rights* (2015). M Borren “Rightlessness in an age of rights: Hannah Arendt and the contemporary struggles of migrants” (2017) 16 *Contemp Polit Theory* 269–273. A Gündoğdu “Perplexities of the rights of man’: Arendt on the aporias of human rights” (2011) *European Journal of Political Theory* 25–54.

⁴⁰³ David Owen *Netherlands International Law Review* 299–317.

⁴⁰⁴ A Gündoğdu “On the ambivalent politics of human rights” (2018) 14 (3) *Journal of International Political Theory* 367–380.

more than just the concept of being a human being. He further asserts that the very fact that the acquisition of rights depends on the membership of a particular community puts into question the inalienability of rights. According to Gündoğdu, there is no such thing as inalienable rights because for a person to acquire rights, they must belong to a particular community.⁴⁰⁵ Therefore, one doesn't automatically acquire, for example, the right to basic free education in South Africa simply because they are born human in South Africa. Such a right is earned through membership in a particular community through the acquisition of a nationality or satisfying certain requirements as a legal immigrant in South Africa. Thus, the enjoyment and actual access to human rights depend largely on a person's connection with a particular state either as a national or through adhering to a nation's immigration laws. The emergence of statelessness and the plight of stateless people in accessing basic human rights challenges the notion of the inalienability of human rights at the implementation level and has illustrated that human rights are indeed not inherent. Not surprisingly, Donnelly rightly concedes that "we must take special care not to confuse having a right with the respect and ease in which it is enforced or realised".⁴⁰⁶ Drawing on Donnelly's concession, it may be concluded that stateless children have rights that cannot be accessed. In other words, the notion of inherent rights is an illusion for them.

All things considered, the view that stateless people can be protected and that they can enjoy basic rights because rights are entitlements that accrue to an individual by virtue of their being human, under the current international human rights regime, is thus, disputed.⁴⁰⁷ Furthermore, the narrative that stateless children can be protected because the enjoyment of basic human rights has nothing to do with nationality or lack thereof is a myth. In the course of this chapter, I challenge this narrative of the inalienability of human rights by demonstrating that in the absence of nationality, access to basic human rights for stateless children in South Africa is almost impossible.⁴⁰⁸ Therefore, the inalienability of human rights as a basis for the enjoyment of basic human rights for stateless children in South Africa proves to be an ineffective solution for the protection of stateless children.

⁴⁰⁵ Ibid.

⁴⁰⁶ Donnelly *Universal Human Rights in Theory and Practice* at 10.

⁴⁰⁷ J Schenner "Stateless Persons and the Question of Rights" (2016) 7 (1) *Global policy* at 122.

⁴⁰⁸ Ibid 123.

3. The protectionist approach to statelessness

There are approximately 10 million stateless people globally,⁴⁰⁹ thus, illustrating that statelessness is a global crisis.⁴¹⁰ International legal approaches to statelessness can be roughly divided into two categories; the avoidance approach and the protectionist approach.⁴¹¹ Avoidance norms tend to focus on employing mechanisms to avoid statelessness while protectionist norms tend to focus efforts on employing mechanisms to protect stateless persons, for example, through establishing statelessness determination procedures.⁴¹² The protectionist approach to the global issue of statelessness promotes the narrative that under the international human rights regime, stateless persons can be protected and they can enjoy basic rights because rights are entitlements that accrue to an individual by virtue of being human. Furthermore, the argument advanced by this approach is that the enjoyment of basic human rights has nothing to do with nationality or lack thereof. Accordingly, stateless people are entitled and can access the same human rights as those who have nationality status. Therefore, in order to protect them, there needs to be legal mechanisms that enable them to enjoy basic human rights without nationality.⁴¹³ For example, the UNHCR asserts that due to the lack of nationality, stateless people are vulnerable and thus need special attention and protection to ensure that they are able to exercise their rights.⁴¹⁴

The protectionist and avoidance approaches have found expression in various treaties and views of international organisations. The major United Nations treaty that enshrines the protection norms is the Convention Relating to the Status of Stateless Persons 1954 (hereinafter 1954 Statelessness Convention). Through various provisions, the 1954 Convention provides minimum rights to which stateless people are entitled, such as the right to identity documents, the right to social security, and the right to primary education.⁴¹⁵ In contrast, the

⁴⁰⁹ UNHRC Global Appeal 2023

<https://reporting.unhcr.org/globalappeal2023#:~:text=2023%20Global%20planning%20figures,2023%2C%20acording%20to%20UNHCR's%20estimations> (accessed 23 August 2022).

⁴¹⁰ L van Waas & O Spearman “The Life-or-Death Cost of Being Stateless in a Global Pandemic” (2020) 32 (3) *International Journal of Refugee Law* at 498.

⁴¹¹ K Swider and M den Heijer “Why Union Law Can and Should Protect Stateless Persons” (2017) 19:2 *European journal of migration and law* 101-135.

⁴¹² Ibid 103.

⁴¹³ Swider and Den Heijer *European journal of migration and law* at 102.

⁴¹⁴ The United Nations High Commissioner for Refugees *Protecting the Rights of Stateless Persons: The 1954 Convention on the Status of Stateless Persons* (2014) <https://www.refworld.org/pdfid/4cad88292.pdf> (accessed 11 June 2023).

⁴¹⁵ Article 27, Article 24, Article 22 respectively.

1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention) enshrines the avoidance norms.⁴¹⁶ The 1961 Statelessness Convention established standards on the acquisition and loss of nationality, to prevent statelessness and thus, avoid its occurrence.

Other international and regional conventions also contain avoidance norms, such as Article 7(2) of the CRC, Article 6 (4) of the ACRWC, Article 9(1) Elimination of all Forms of Discrimination against Women 1979, and Article 6(2b) of the European Convention on Nationality 1966.⁴¹⁷ The above mentioned sections provide avoidant norms in that 7 (2) of the CRC for example provides that a child should be granted nationality where the child would otherwise be stateless. Article 6 (4) of the ACRWC obliges state to make provision for children to acquire nationality if they do not qualify for nationality in any other state. Thus, this particular section requires that a child be granted nationality if not doing so would render the child stateless. In addition, article 9(1) Elimination of all Forms of Discrimination against Women provides that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife or render her stateless. Protection norms on statelessness advance the notion that a more fruitful source of protection for stateless persons is to utilise regional documents, in combination with relevant pre-existing international human rights treaty commitments to ensure protection.⁴¹⁸ Therefore, the best way to protect stateless people is to implement international and regional human rights instruments that are already in existence and apply to everyone regardless of nationality status or the lack thereof.⁴¹⁹

To illustrate this point, one can consider the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD). Under Article 1(3) of ICERD, States may not discriminate against persons of any nationality. The Committee on the Elimination of Racial Discrimination, tasked with monitoring the implementation of this Convention, has indicated that states may draw distinctions between citizens and non-citizens as long as such distinctions do not have the effect of limiting non-citizens' enjoyment of rights enshrined in oth-

⁴¹⁶ Swider and Den Heijer *European journal of migration and law* at 106.

⁴¹⁷ See also, article 18 of the Convention on the Rights of Persons with Disabilities of 2006 and article. 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965.

⁴¹⁸ S Akram "The Search for Protection for Stateless Refugees in the Middle East: Palestinians and Kurds in Lebanon and Jordan" (2018) 30:3 *International journal of refugee law* at 407-443.

⁴¹⁹ Ibid 407-409.

er instruments, such as the UDHR, International Covenant on Civil and Political Rights of 1966 and as long as all non-citizens are treated equally.⁴²⁰ Accordingly, when implementing certain national laws and policies, care should be taken to ensure that stateless children are not unfairly discriminated against, thereby infringing upon their human rights. A protectionist approach to childhood statelessness in South Africa would be to focus on the rights contained in the constitution, the CRC, the ACRWC, and other national, regional, and international legal instruments that guarantee the rights of children.⁴²¹

The view that stateless people can be protected under the current international human rights regime is prominent among some scholars in the international community.⁴²² However, the question of whether stateless people can enjoy basic rights based on the fact that rights are entitlements that accrue to an individual by virtue of being human is debatable. Moreover, the protectionist notion that the enjoyment of human rights has nothing to do with nationality or lack thereof is questionable. Human rights may be universal and inalienable in theory, however, the challenges and difficulties faced by stateless people demonstrate the stark contrast between theory and practice.

4. Arendt and the Right to Have Rights

What makes Arendt an interesting scholar on the subject of human rights and statelessness, is that she spent eighteen years of her life as a stateless person.⁴²³ Hannah Arendt was born in 1906 to a German-Jewish family. After World War II, she was forced to flee from Germany without any identifying documentation⁴²⁴ and thus, became a *de facto* stateless refugee.⁴²⁵ This lived experience as a refugee and a stateless person became the catalyst to Arendt's life

⁴²⁰ General Recommendation XI, 19 March 1993.

⁴²¹ For example, the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights, Convention on the Status of Stateless Persons 1961, Convention on the Reduction of Statelessness 1954, Protection of the Rights of All Migrant Workers and Members of Their Families 2003.

⁴²² Office of the United Nations Human Rights Commissioner for Human Rights: The Rights of Non-Citizens (2006) <https://www.ohchr.org/sites/default/files/Documents/Publications/noncitizensen.pdf> (accessed 6 June 2023).

⁴²³ L Kingston *Fully Human: Personhood, Citizenship, and Rights* (2019) at 60.

⁴²⁴ Ibid.

⁴²⁵ *De facto* stateless refugees are persons who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality and are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country. See Hugh Messy UNHCR and *De Facto* Statelessness Legal and Protection Policy Research Studies LPPR/2010/01.

and journey as a scholar. Arendt's work and concept on the right to have rights help to put into perspective the limits of the notion of the inalienable nature of human rights, particularly for stateless individuals, in this case, children. It supports the view that without nationality, access to basic rights remains illusory. Arendt's right to have rights, therefore, helps us to understand how a lack of nationality for children in South Africa directly impacts their access to basic rights, thus, challenging the notion of the inalienability of human rights for all children regardless of their nationality. It also exposes the limits of a protectionist approach which is premised on the view that stateless children enjoy rights since enjoyment is premised on humanity rather than nationality. To fully understand Arendt's theory on the 'Rights to have Rights', this section will be broken down into different subsections below.

4.1. Understanding Arendt's 'Right to Have Rights'

In one of her earliest works, *The Origins of Totalitarianism*, published in 1951, Arendt refers to what she calls the "Perplexities of the Rights of Man". She explores the decline of the rights of man, underscoring that once a person loses the recognition of a state, it brings an end to rights for that person.⁴²⁶ Stateless people first experience the loss of community and then, they lose protection from the government, as they are no longer recognised as nationals of any sovereign state.⁴²⁷ Consequently, stateless people experience what is known as rightlessness despite the concept of so-called human rights.⁴²⁸ Arendt did not believe that everyone had human rights by virtue of being born human because history has shown that once a state refuses to recognise an individual as its own, that individual loses protection from his or her state and loses the right to have rights.⁴²⁹ Arendt explains this notion as follows:

"The Rights of Man are assumed to be natural; individuals are entitled to them by virtue of being born as human beings. As distinct from historically inherited rights that change from one community to the other, these rights are derived from a universally shared human nature. However, the Rights of Man, which are supposed to be independent of political membership, turned out to be unenforceable in the case of the stateless".⁴³⁰

⁴²⁶ H Arendt *The origins of totalitarianism* (1951). Arendt asserts that, "the right of Man, supposedly inalienable, proved to be unenforceable- even in countries whose contributions were based upon it- whenever people appeared to no longer be citizens of any sovereign state."

⁴²⁷ Ibid 294.

⁴²⁸ Ibid 295.

⁴²⁹ Ibid 302.

⁴³⁰ Ibid 302

Arendt challenges the concept of universal rights and questions their inalienability. She raises the following questions: if rights are incapable of being taken away, or even renounced by the subjects entitled to them, why do the stateless people find themselves in a state of rightlessness? If rights are the source of all laws, and as such “irreducible to and unreducible from other rights or laws,” why do they fail to guarantee protection to the stateless in the absence of nationality? Thus, according to Arendt, statelessness brought an end to the illusion of the universal and inalienability of human rights.⁴³¹

One of the core arguments for the *Right to have Rights* is the aspect of membership. For Arendt, the right to have rights goes hand-in-hand with the right to membership of a political community. Moreover, Arendt argues that there is a difference between having human rights and enjoying them. For as long as there are political borders constructing separate nation-states and creating clear definitions of insiders and outsiders, there will be stateless people and access to rights will always be marked by the dichotomy of “insiders” and “outsiders.”⁴³² Moreover, Arendt avers that rights are given to a person as a member of a specific community, as opposed to being given to a person by virtue of being human. The literature has applied Arendt’s *Right to have Rights* for stateless children to demonstrate that the absence of nationality status results in children not being able to enjoy basic rights. In this regard, Bhabha poses a critical question “When do children have the right to have rights”? The author answers this question by observing that children who do not have nationality status are not able to enjoy or benefit from human rights in most cases.⁴³³

All things considered; Arendt’s work challenges the inalienable nature of human rights. To her, the idea of universal human rights is a myth because time and time again, it has been shown that the lack of nationality status strips one of all human rights. Therefore, to claim

⁴³¹ Arendt *Origins of Totalitarianism* at 276.

⁴³² H Arendt *The Decline of the Nation state and the End of the Rights of Man In the Origins of Totalitarianism* (1966) at 298-301. See also, H Arendt “The stateless people. Commentary” (1945) 8(2) at 137. H Arendt *The perplexities of the rights of man* (1998) at 88. H Arendt *Nation-state and democracy* (2017) at 1. H Arendt *Imperialism: Part two of the origins of totalitarianism* (1968) at 2. H Arendt “The Origins of Totalitarianism: A Reply” (1953) 15(1) *The Review of Politics* 76-84.

⁴³³ Jaqueline Bhabha states that, “There are at least three correct, yet mutually contradictory, answers to the question: “Do Arendt’s children have a right to have rights?” The first answer is an unqualified “yes”; the second, a resounding “no”; and the third, a cautious, even diffident “sometimes,” “perhaps,” or “it depends.” Each answer finds support in the empirical record, though regrettably this is somewhat of an “evidence-free zone.” The paucity of statistics and official data makes individual vignettes.”

that human rights are universal for all human beings is somewhat obscure, if not a fallacy. To become part of a community and be included in a particular community, one needs to be national. Nationality, therefore, becomes the right that paves the way to enjoy other basic rights, hence, the phrase “the right to have rights.” The absence of nationality, thus, makes an individual “rightless”. Essentially, the absence of nationality takes away a person’s right to have rights. Human rights are only universal to those who possess nationality status or some form of legal status. It is significant that even back in the early 1950s, Arendt recognised that the *Rights of Man*, supposedly inalienable, proved to be unenforceable, even in countries whose constitutions were based upon them, whenever people appeared who were no longer citizens of any sovereign state.⁴³⁴ Essentially, the notion that rights are universal is a myth because as Arendt asserts, people don’t acquire rights by virtue of being born, rather, rights are acquired through belonging to a particular community which includes having nationality or citizenship status. Without one of these factors being present, the universality of rights becomes questionable.

Some scholars always fall back on the notion of universality of human rights to argue that all individuals including stateless children are guaranteed rights by virtue of being human. Notably, Rancière⁴³⁵ criticises Arendt’s “right to have rights” as a basis for accessing human rights. Rancière questions whether it can be said that human rights exist only if a person is part of a political community. To this end, he questions what the ground to have rights is.⁴³⁶ Rancière insists that human rights are considered inherent by virtue of being human and that is the ground and basis for human rights. His view is supported by authors such as Mbondenyi⁴³⁷ who contend that any definition of human rights cannot ignore the view that they are inherent, indivisible, interrelated, universal, and belong to every society, regardless of geographical, historical, cultural, ideological, political, or economic orientation.⁴³⁸ These criticisms may hold weight because theoretically speaking, a stateless person has rights by virtue of being human. However, as Arendt makes it clear, having these rights does not necessarily mean that they are accessible or enjoyed. In his theory of human rights, Macklem

⁴³⁴ H Arendt *Origins of Totalitarianism* (1968).

⁴³⁵ A Schaap “Enacting the right to have rights: Jacques Rancière’s critique of Hannah Arendt” (2011) 10 (1) *European Journal of Political Theory* 3-135.

⁴³⁶ Schaap *European Journal of Political Theory*.

⁴³⁷ Mbondenyi *International human rights and their enforcement in Africa* (2011) at 18.

⁴³⁸ Ibid.

argues that the distribution of sovereignty in the modern global order, however capable of adjustment or adaptation, has regrettably caused the proliferation of human rights violations against the most vulnerable and oppressed communities in the world.⁴³⁹

The creation of sovereign states and the development of the international law order have created majority and minority groups within states.⁴⁴⁰ Sovereign states create laws that often protect the rights of majority groups to the exclusion of minority groups.⁴⁴¹ To this end, Macklem offers a new way of thinking about human rights. He does this by defining the nature and purpose of human rights in terms of their capacity to mitigate adverse consequences that result from the structure and operation of international law.⁴⁴² Therefore, human rights are to be understood through the lens of an ever-changing international legal order. Furthermore, the notion that human rights are universal is limited by the fact that human rights are interdependent,⁴⁴³ which means that the enjoyment of one right requires the enjoyment of others. For example, the enjoyment of state protection requires a legal connection to that state. Schilling⁴⁴⁴ asserts that human rights are not created but recognised by law.⁴⁴⁵ Thus, without recognition, the universality of human rights is a myth. Therefore, the UDHR, the founding document of modern international human rights, unequivocally states that “everyone is entitled to all the rights and freedoms outlined in the declaration, without distinction of any kind, such as social origin, birth or another status”,⁴⁴⁶ these rights have to be recognised and respected by states for them to be universally enjoyed.⁴⁴⁷

Arendt, therefore, helps us understand that while everyone has rights in theory, practically, stateless individuals do not enjoy the very rights that they are entitled to due to their lack of nationality. The significance of Arendt’s theory on stateless people and their lack of rights is that it reinforces the notion that without a state connection, one struggles to access basic

⁴³⁹ P Macklem *The Sovereignty of Human Rights* (2015 at 45.

⁴⁴⁰ S Frost “Book Review Essay: The Sovereignty of Human Rights” (2018) 52(1) *Israel Law Review* 145–156.

⁴⁴¹ Ibid 147.

⁴⁴² Macklem *The Sovereignty of Human Rights* at 45.

⁴⁴³ Ibid 64.

⁴⁴⁴ T Schilling “The Recognition of Human Rights: A Threefold Myth” (2020) 20 *Human Rights Law Review* 210–235.

⁴⁴⁵ Ibid 210.

⁴⁴⁶ Article 4 Universal Declaration of Human Rights 1948.

⁴⁴⁷ Ibid article 212.

rights and it becomes easy for the state, where such stateless persons are situated, to violate their rights. It is imperative to examine South Africa's laws and policies to assess whether Arendt's assertion that stateless persons struggle to access basic rights holds weight. This analysis follows below.

5. South Africa's Legislative and Policy Enactments on Access to Basic Rights for Children: A reflection of Arendt's notion of "the right to have rights"

The preamble to the CRC emphasises the importance of protecting children in their developmental stages.⁴⁴⁸ One of the four core principles of the CRC is the development rights.⁴⁴⁹ In addition, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, states that the rights of the child to survival, development, and protection require that he or she benefits from special measures of protection from infancy. These special measures for protection include child health, early childhood education, and social grants.⁴⁵⁰

Article 8 of the United Nations Declaration, on the Right to Development 1986, states that states should undertake, at national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, and food.⁴⁵¹ Although it is just a declaration, it speaks to the importance of development and what it entails. Consequently, for children to reach their full potential and develop into active members of society, they need access to education and access to health care. Lastly, the full development of children will be impacted by their inability to have access to food and basic necessities, hence the importance of access to social welfare. The subsections below unpack the legislative and policy framework on these basic rights in South Africa to assess the extent to which children without nationality or non-nationals without documentation can access these basic rights. This will help establish

⁴⁴⁸ See the Preamble to the Convention on the Right of the child 1989, which states the following "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" see also the Preamble of the African Charter on the Rights and Welfare of the Child 1990, which states as follows: "recognising that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding."

⁴⁴⁹ The principle most directly related to children's economic and social rights is formulated in the right to life article. The article goes further than just granting children the right not to be killed; it includes the right to survival and development which is formulated in Article 6:2 and states thus: "State parties shall ensure to the maximum extent possible the survival and development of the child."

⁴⁵⁰ General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child 17.

⁴⁵¹ Article 8 United Nations Declaration on the Right to Development 1986.

whether Arendt's notion of 'right to have rights' holds in South Africa as far as stateless children are concerned.

5.1. The South African Schools Act

The apartheid system created an inferior, discriminatory, and racially unjust education system for Black people. The education system was structured in such a way that it maintained and reproduced the social and economic dominion of White people.⁴⁵² At the dawn of democracy, the new government was eager to change this system. To this end, the Schools Act 84 of 1996 (Schools Act) was created to move away from the racially unjust and inferior education system that was created by the apartheid system.⁴⁵³ The Schools Act aims to prohibit all forms of unfair discrimination, race, and sexism in the admission of children into school. As a Schedule to the Schools Act, the Admission Policy for Ordinary Public Schools⁴⁵⁴ was established to provide an admission policy for all public schools. The purpose of the Admission Policy for Ordinary Public Schools (Admission Policy) is to provide a framework to all provincial departments of education and governing bodies of public schools for developing the admission policy of schools.⁴⁵⁵ In terms of the Admission Policy, when a parent applies for admission of a learner to an ordinary public school, he or she must provide one of the following documents.⁴⁵⁶

- i. an official birth certificate and
- ii. proof of immunisation of communicable diseases, and (in the case of migrant learners)
- ii. a copy of the permit for temporary or permanent residence, or
- iv. a study permit, or
- v. evidence that an application has been made to the Department of Home Affairs for learners and/or parents to legalise their stay in the country.

⁴⁵² D Woodroffe "When Visions of the rainbow Nation are not Enough: Effect of Post-Apartheid Education Reform on Social Cohesion in South Africa" (2011) *Peabody Journal of education* 171-182.

⁴⁵³ See Preamble to the Schools Act.

⁴⁵⁴ Notice No. 2432 of 1998.

⁴⁵⁵ Section 4 Admission Policy.

⁴⁵⁶ Section 15, 19, 20, of the Admission Policy respectively.

If a parent is unable to submit a birth certificate, the learner may be conditionally admitted⁴⁵⁷ until a copy of the birth certificate is obtained from the regional office of the Department of Home Affairs.⁴⁵⁸ Pertinent to note that, the birth certificate requirement applies to all learners regardless of nationality status. Section 4 of the Admission Policy states that persons classified as illegal immigrants must, when applying for admission for their children or themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country, in terms of the Aliens Control Act, 1991.⁴⁵⁹ Moreover, the Admission Policy makes it compulsory for the school principal to keep an admission register that must be verified against the birth certificate or identity document of the learner concerned.⁴⁶⁰ Consequently, many non-national children are being denied access to education in South Africa due to a lack of documentation.⁴⁶¹ This is in stark contrast with the Schools Act which states that public schools must admit learners and meet their educational needs without discrimination.⁴⁶²

Pertinent to note that, Section 3 of the South African Schools Act (SASA) states that basic education is compulsory for every child from the age of seven until the learner reaches the age of fifteen or ninth grade, whichever comes first. It is, however, necessary to emphasise that even for learners who do not fall within the category of compulsory attendance, access to

⁴⁵⁷ Circular 01 of 2019 accommodates undocumented children at schools, whilst their parents or caregivers take steps to secure the requisite documents. The Circular stipulates a maximum period within which such steps must be taken, and, in part, does so in the following terms:

“The Head of the Department when considering the reasons for the delay in obtaining the birth certificates or any other relevant documentation required for admission must treat each case on its own merits and may extend the period within which to obtain the required documentation up to a period of not more than twelve (12) months from the date on which the undocumented learner was conditionally admitted at school. See *Centre for Child Law v Minister of Basic Education* (2017) para 19.

⁴⁵⁸ Ibid section 15. *Centre for Child Law vs Minister of Basic Education* (2017) held that this section effectively denies children access to education on the basis of their documentation status, which constitutes unfair discrimination para 83.

⁴⁵⁹ Repealed by the Immigration Act 13 of 2002. In *Centre for Child Law v Minister of basic education* (2017) para 89 the Court asserted that requirement of learners classified as “illegal aliens” to prove that they have applied to legalise their stay before they can be admitted to public schools which is well-nigh impossible, if one has regard to the fact that the children were brought into South Africa illegally and, therefore, cannot meet the requirements of a residence or study permit. They thus cannot apply to legalise their stay. They have no choice in their being brought to the country but end up bearing the negative consequences attached to their parents’ choices.

⁴⁶⁰ Admission Policy section 317.

⁴⁶¹ S Buckland” From policy to practice: The challenges to educational access for non-nationals in South Africa” (2011) 31 *International Journal of Educational Development* 367–373.

⁴⁶² South African Schools Act 1996.

basic education is still legally and constitutionally guaranteed.⁴⁶³ Moreover, Sections 3(5) and (6) of SASA impose criminal sanctions on parents or any other persons who prevent a learner who is subject to compulsory attendance from attending school. Notwithstanding the obligation of public schools to admit learners and serve their educational requirements without discrimination, certain provisions of the Admission Policy contribute to barriers to accessing education for stateless children. The Admission Policy does not make provision for an unconditional admission procedure for children who are undocumented or stateless.

Admittedly, the Admission Policy allows for a minimum three-month grace period and a maximum 12-month grace period for parents to enroll their children at school without a copy of a birth certificate, provided that they have applied for one from the Department of Home Affairs.⁴⁶⁴ However, this three-month grace period only applies to children who potentially qualify for birth certificates from the Department of Home Affairs. A birth certificate is only issued once the birth of a child has been registered.⁴⁶⁵ The Department of Home Affairs requires the identifying documentation of the child's parent or guardian when registering a child's birth.⁴⁶⁶ Thus, without the necessary documentation, the birth of a child born to an undocumented parent or guardian will not be registered hence no birth certificate will be issued. Thus, even if the child is provisionally enrolled without a birth certificate, he or she is at risk of being deregistered from the school for failing to provide a birth certificate. The requirement that a parent, who is in the country illegally, must provide evidence that they have applied to legalise their stay with the Department of Home Affairs⁴⁶⁷ is a further exclusion for those children whose parents do not have access to this evidence. A stateless parent may never be able to apply to legalise their stay due to the lack of documentation.

Thus, a non-national child who does not have a birth certificate may be excluded from admission at a public school, if his or her parents are unable to provide evidence that they have applied to legalise their stay in the country. This coincides directly with Arendt's assertion that

⁴⁶³ Section 29 (1) of the Constitution.

⁴⁶⁴ Section 15 Admission Policy.

⁴⁶⁵ BDRA Regulations. Department of Home Affairs <https://www.gov.za/services/birth/register-birth> (accessed 23 June 2023).

⁴⁶⁶ See Regulations to the BDRA.

⁴⁶⁷ Clause 21 of the Admission Policy.

the absence of nationality makes a person rightless. In order to enjoy human rights, one needs to belong to a community (state). Without belonging to a community, stateless people are considered outsiders with no entitlement to the enjoyment of human rights.⁴⁶⁸ Stateless children do not belong to any community, hence in Arendt's view, they are 'rightless'. Therefore, stateless children are denied the right to education because they lack nationality.⁴⁶⁹

Section 29 (1)(a) of the South African Constitution states that everyone has a right to basic education and since the constitution is the supreme law in South Africa, it means that no child should be denied basic education due to a lack of documentation.⁴⁷⁰ This is significant because it demonstrates the misalignment that often exists in practice between the constitution and national policy. As rightfully asserted by Arendt, there is a difference between having human rights and enjoying them. This is the reality for stateless children; they have the right to education but struggle to enjoy this right. The case that dealt extensively with the exclusionary provisions of the Admission Policy was the case of *Centre for Child Law v Minister of Basic Education*.⁴⁷¹ The misalignment that often exists between the constitution and the national policy was properly illustrated in this case. The brief facts of this case are as follows; before 2016, the Eastern Cape Basic Education Department (Department) provided funding to all learners at public schools and independent subsidised schools in the Eastern Cape Province regardless of whether or not the learners had identification documents. Funding was provided to schools based on the actual number of learners in the school, and not on the number of learners whose identification document particulars were entered into the South African Schools Administration and Management System. This system ensured that all learners in the province gained access to basic education and food provided by the National School Nutrition Program. Consequently, learners without identification documents were

⁴⁶⁸ I Yoon "Cosmopolitanism: The Foundational Ground for a More Inclusive Understanding of Belonging to Protect the Human Rights of North Korean Stateless Women" (2019) 58 (2) *International Migration* at 68.

⁴⁶⁹ See S Buckland *Lost in transition: The barriers to educational access for school-age Zimbabwe migrant children in South Africa and the influences of institutional and social networks on overcoming them* (2011). Callender *Thank you for coming? policy, politics, and polity: How education stakeholders interpret post-apartheid education policy for immigrants in South Africa— the case of Cape Town* (PhD thesis, University of Sussex, 2011) at 99.

⁴⁷⁰ This was reaffirmed in the case of *Centre for Child Law v Department of Basic Education* (2017), where the court stated that "Section 28 of the Constitution does not permit of a restrictive interpretation; it must be given a wider interpretation so as to encompass "every child," and not only children who are South African citizens, children who are lawfully present in the country, or children in possession of birth certificates para 76. See also, *Governing Body of the Juma Masjid Primary School v Essay* (2011) ZACC 761 para 41-42.

⁴⁷¹ (2840/2017) [2019] ZAECGHC 126; [2020].

not excluded from attending school. However, in March 2016, the Department issued a circular⁴⁷² to all public schools and independent subsidised schools which read as follows:

- 4.1 Schools should update the South African Schools Administration & Management System database with the correct National Identity (“ID”) or Passport numbers for all learners in order to qualify for funding pertaining to each learner.
- 4.2 In cases where learners do not have ID or Passport numbers, the Department will not transfer the budget for such learners until valid ID and Passport numbers have been provided.

A subsequent circular was issued by the Department in June 2016,⁴⁷³ which stated that learners who did not have identity documents or passport numbers would be removed from schools. The consequences of the decision to stop funding undocumented children resulted in their exclusion from schools. The children who were affected by the department’s decision included children born of South African parents but who have, for a variety of reasons, not been able to obtain birth certificates, as well as children of foreign nationals residing in South Africa without the necessary documentation allowing them to reside or study in South Africa. Certain provisions of the Admission Policy also came under scrutiny in this case. Clause 15 of the Admission Policy makes the admission of children to public schools conditional upon the production of a birth certificate within 3 months, failure to comply with this condition results in the child of the defaulting parent being excluded from enrolment. The Court held that Clause 15 of the Admission Policy effectively denies children access to education based on their documentation status, which constitutes unfair discrimination.⁴⁷⁴ Clause 21 of the Admission Policy requires parents of learners classified as “*illegal aliens*” to prove that they have applied to legalise their stay before they can be admitted to public schools. The Court held that Clause 21 of the Admission Policy was unconstitutional, as it excluded undocumented children from accessing education. The Court further held that the right to educa-

⁴⁷²Circular 06 of 2016

https://www.eccurriculum.co.za/Circulars/2016_Circulars/Circular%206%20of%202016%20ID%20Numbers.pdf (accessed 6 June 2023).

⁴⁷³*Centre for Child Law vs Minister of Basic Education* para 17.

⁴⁷⁴*Ibid* para 83.

tion⁴⁷⁵ extends to everyone within the boundaries of South Africa; their nationality or immigration status is immaterial.⁴⁷⁶

As much as the Court, in this case, declared that the requirement that learners need to provide documentation in order to be enrolled at public schools, was unconstitutional and invalid, undocumented children continue to be excluded from public schools due to a lack of documentation.⁴⁷⁷ Moreover, while this decision seems to provide some relief for public schools, the issue of whether independent schools are obliged to admit students without legal documentation was not discussed in this case because the issues pertained to policies in public schools. For example, the question of whether there is an obligation for independent schools to ensure access to education for stateless children was somewhat addressed in a recent Constitutional Judgement. In 2020, the South African Constitutional Court attempted to address the issue of education and access as it related to public schools in the case of *AB v Pridwin Preparatory School*.⁴⁷⁸ Pertinent to note, that the main issue in this case was not access to education *per se* but rather, the determination of the constitutional rights of children in the private education system and the constitutional obligations of independent schools towards those children.⁴⁷⁹ The issue, in this case, pertained to a specific contract between the school and the parents. The relevant clause read as follows:

“The School has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you”.⁴⁸⁰

A summarised version of the facts is that the headmaster of the school terminated the contract between the parents of two boys and the school due to the alleged misconduct of the boys. This meant that the boys had to be removed from the school. The matter was first brought to

⁴⁷⁵ Section 29 (1) a of the South African Constitution.

⁴⁷⁶ *Centre for Child Law vs Minister of Basic Education* 90.

⁴⁷⁷ Research shows that the lack of proper documentation for migrant children is a key impediment to full participation in schooling see, S Blessed-Sayah at al “Social psychological perspective on schooling for migrant children: A case within a public secondary school in South Africa” (2022) 86 *Journal of Education (University of KwaZulu-Natal)* at 143-163. See also, “Schools still turning away immigrant children” *News24* 23 March 2021 <https://www.news24.com/life/archive/schools-still-turning-away-immigrant-children-20210323> (accessed 8 June 2023). “Learners who are unable to provide ID documentation are being removed from schools, says the Centre for Child Law” *CapeTalk* 567 FM [capetalk.co.za/articles/353682/lack-of-documentation-should-not-block-any-child-s-access-to-education](https://www.capetalk.co.za/articles/353682/lack-of-documentation-should-not-block-any-child-s-access-to-education). (accessed 11 August 2023).

⁴⁷⁸ *AB v Pridwin Preparatory School* (2020) ZACC.

⁴⁷⁹ Para 4.

⁴⁸⁰ Para 8.

the Gauteng High Court. The High Court dismissed the application and held that the school had no obligation to provide basic education.⁴⁸¹ Nor is there any contractual nexus between it and the state.⁴⁸² The Gauteng High Court held further that the right to basic education in Section 29(1) of the South African Constitution did not include the right, on the part of a learner, to attend a wholly independent school.⁴⁸³ To find otherwise would entitle every learner to attend only the best wholly independent schools.⁴⁸⁴ The matter was subsequently taken to the Supreme Court of Appeal and was also dismissed by the Court for the same reasons.⁴⁸⁵ The matter was subsequently brought to the Constitutional Court. The issues that the Constitutional Court dealt with, were the best interest of a child who is in a private school, as well as the right to education for a child who attends a private school. The Court held that private schools are independent of the State and as such are under no obligation to provide basic education to children as envisaged by Section 29 (2) of the Constitution.⁴⁸⁶ The court held that the relevant question is what the right to education entails for children who attend private schools.⁴⁸⁷ The Constitutional Court held that the right to provide access to basic education does not extend to private schools but once an independent school provides basic education, it is then required to ensure that the right to basic education of children attending the independent school is not negatively infringed.⁴⁸⁸

What can be gathered from the judgment of the Constitutional Court is that there is no general obligation on private schools to grant access to basic education. However, once a child is enrolled in an independent private school, then there is an obligation on the school to ensure that the child's access to education is not violated. The obligations of non-state actors in as far as access to basic rights including education remains a controversial issue.⁴⁸⁹ For example, Section 8 of the South African Constitution provides that "a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". It seems that the Constitutional Court, in the above case, did not deviate from this constitutional provision

⁴⁸¹ Ibid para 27-28

⁴⁸² Ibid.

⁴⁸³ Ibid 32-33.

⁴⁸⁴ Ibid.

⁴⁸⁵ *AB v Pridwin Preparatory School* (2018) ZASCA.

⁴⁸⁶ *AB v Pridwin Preparatory School* (2020) ZACC para 77.

⁴⁸⁷ Para 75.

⁴⁸⁸ Para 88.

⁴⁸⁹ Human Rights Library A Training resource Obligations of State and Non-State Actors <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module9.htm> (accessed 12 August 2023).

but instead confirmed the limitations applicable to non-state actors where some rights are concerned.

As alluded to, the obligations of non-state actors remain controversial. This is already problematic for children with nationality and becomes much worse for stateless children. Indeed, terminology on issues of human rights violation of international human rights standards is beginning to embrace “all parties” rather than just states. For example, the Human Rights Committee (HRC) in its Resolution 9/17 of 18 September 2008 on the situation of human rights in Sudan, called on:

“all parties to respect their obligations under international human rights law and international humanitarian law, in particular with regard to the protection of civilians, and to end all attacks on civilians, with a special focus on vulnerable groups, including women, children and internally displaced persons, as well as human rights defenders and humanitarian workers.”

Similarly, in Resolution 7/35 of 23 March 2008 on Assistance to Somalia in the field of human rights, the HRC demanded that:

“all parties in Somalia reject and stop all acts of violence, abstain from engaging in hostilities, prevent any act likely to increase tension and security and fully respect their obligations under international human rights law and international humanitarian law.”

Successive resolutions by the HRC have adopted similar wording, thus, underscoring the shift towards recognition of the changing nature of duty-bearers in as far as human rights obligations are concerned in terms of international human rights law. The Articles on the Responsibility of States for internationally wrongful acts, which represent customary international law, foresee the possibility imposing obligations on non-state actors. Article 9 these Articles states that

“the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”⁴⁹⁰

In general, states are not responsible for acts committed by private entities or persons. However, in certain circumstances a state can be legally responsible at the international level for violations of international law committed by non-state actors. This is so when the non-state

⁴⁹⁰ International Law Commission, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’, in Yearbook of the International Law Commission, 2001, Vol. II, Part Two.

actor has exercised elements of governmental authority in the absence or default of official state authorities and in circumstances where it was necessary to so act.

A number of United Nations Special Procedures have discussed the applicability of human rights to non-state actors. For instance, following a mission to Sri Lanka, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions stated:⁴⁹¹

“Human rights law affirms that both the Government and the LTTE [Liberation Tigers of Tamil Eelam – which is a non-state actor] must respect the rights of every person in Sri Lanka. Human rights norms operate on three levels – as the rights of individuals, as obligations assumed by States, and as legitimate expectations of the international community. The Government has assumed the binding legal obligation to respect and ensure the rights recognised in the International Covenant on Civil and Political Rights. As a non-State actor, the LTTE does not have legal obligations under [the International Covenant on Civil and Political Rights],⁴⁹² but it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights.”

The Office of the High Commissioner for Human Rights has consistently taken the position that “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the individuals under their control.”⁴⁹³ The 2014 Joint Report on the mission to Lebanon and Israel by a group of four special procedure mandate holders noted, in relation to Hezbollah, that “the Security Council has long called upon various groups which Member States do not recognise as having the capacity to do so, to formally assume international obligations to respect human rights. It is especially appropriate and feasible to call for an armed group to respect human rights norms when it “exercises significant control over territory and population and has an identifiable political structure.”⁴⁹⁴

⁴⁹¹ Special Rapporteur on extrajudicial, summary or arbitrary executions, Phillip Alston, E/CN.4/2006/53/Add.5, 27 March 2006, paragraph 25.

⁴⁹² But note that this particular sentence can be alternatively used by the respondent to argue that even international organs have acknowledged the absence of obligations on the part of non-state actors).

⁴⁹³ 7 OHCHR, Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly the recent ones in the occupied Gaza Strip - Report of the High Commissioner for Human Rights on the implementation of Human Rights Council resolution 7/1, A/HRC/8/17, 6 June 2008, paragraph 9. OHCHR reiterated its position in a 2011 publication on the international legal protection of human rights in armed conflict: ‘Concerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law.’ See OHCHR, The international legal protection of human rights in armed conflict, 2011, p 24.

⁴⁹⁴ Mission to Lebanon and Israel (7-14 September 2006), prepared jointly by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, the Special Rapporteur on the right of everyone to the

In light of the above developments, one could argue that independent organs or non-state actors are mandated to ensure that stateless children access basic rights.⁴⁹⁵ However, these developments remain unsettled and no consensus on them has been arrived at.⁴⁹⁶ In this regard, Andrew Clapham argues that although non-state actors are among the greatest violators of human rights, there are no treaty obligations under international human rights law to hold them accountable.⁴⁹⁷ The universal and regional human rights instruments are all formulated in terms of states' obligations.⁴⁹⁸ The objective of human rights treaties is to establish norms for regulating the relationship between states and individuals living under their jurisdiction, and in consequence human rights treaties are not intended to govern violations by non-state actors.⁴⁹⁹ Effectively, international human rights law rules are state based⁵⁰⁰ and are generally focused on states, therefore, stateless children would struggle to claim protection of basic rights from non-state actors.

It is also to be noted that the *Pacta sunt servanda* rule, a principle entrenched in international law⁵⁰¹ in article 26 of the Vienna Convention of the Law of Treaties 1969, equates treaties to

enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, the Representative of the Secretary General on human rights of internally displaced persons, Walter Kälin, and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, A/HRC/2/7, 22 December 2014 para 19.

⁴⁹⁵ See A Clapham *Human Rights Obligations of Non-State Actors* (2006) at 31. General Comment no 5 on "State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection at 46. The role of none-state actors <https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities> (accessed 15 October 2023).

⁴⁹⁶ N Santarelli "Non-State Actors' Human Rights Obligations and Responsibility under International Law" (2008) *Revista electrónica de estudios internacionales*. Clapham *Human Rights Obligations of Non-State Actors* at 33.

⁴⁹⁷ Clapham *Human Rights Obligations of Non-State Actors* at 88. "Human rights obligations of non-state actors in conflict situations" (2006) 88 *International Review of the Red Cross* 863. See also, S "Bakare Boko Haram and the child's right to education in Africa: Examining the accountability of non-state armed groups" (2018) 18 *African Human Rights Law Journal* at 166.

⁴⁹⁸ UNHCR International Human Rights <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=By%20becoming%20parties%20to%20international,the%20enjoyment%20of%20human%20rights> (16 October 2023).

⁴⁹⁹ Y Ronel "Human Rights Obligations of Territorial Non-State Actors" (1948) 46 *Cornell International Law Journal* at 23-24.

⁵⁰⁰ Ronel *Cornell International Law Journal* at 22. United Nations Children's Fund A Human rights-based approach to Education for All: a framework for the realization of children's right to education and rights within education (2007) at 50. <https://unesdoc.unesco.org/ark:/48223/pf0000154861> (accessed 19 October 2023).

⁵⁰¹ The role of domestic courts in implementing International human rights treaties. Report of the Human Rights Committee, 103rd session [17 October–4 November (2014) para 50 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)036-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e). (accessed 18 October 2023).

contracts and demands that they be interpreted in good faith.⁵⁰² However, the wording of human rights treaties (contracts) has not yet evolved in a corresponding fashion to appropriately address the challenges brought about by the new means through which rights are violated, including, by non-state actors.⁵⁰³ Most of the obligations under international human rights law were formulated with the understanding that states are the primary duty bearers.⁵⁰⁴ Until such time as international human rights law treaties are reformed through amendment, one could argue that the existing treaties must be interpreted in good faith and the contract that states signed up being kept.

Moreover, in terms of article 34 of the Vienna Convention of the Law of Treaties 1969 which governs the interpretation of treaties, “A treaty does not create either obligations or rights for a third state without its consent.” It could then be argued that the obligations in treaties signed by South Africa cannot be extended to non-state actors as to do so would be to undermine 34 of the Vienna Convention on the Law of Treaties 1969 which prohibits extending obligations to third parties without their consent. Non-state actors did not take part in treaty ratification (i.e., did not enter into contract through ratification) and did not consent to these obligations. One therefore gathers that stateless children struggle to have recourse and protection from both the state and from non-state actors in as far as access to basic rights is concerned, with implementation of basic rights including education being uneven across South Africa.⁵⁰⁵ Under these circumstances, stateless children and other children without documentation have suffered the brunt of such uneven implementation.

⁵⁰² Article 26 states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

⁵⁰³ Bakare *African Human Rights Law Journal* at 146-170.

⁵⁰⁴ See for example, the CRC, ACRWC, ICCPR, ICESCR, etc. all of which South Africa has ratified and is therefore bound by the obligations therein. The obligations make no mention of non-state actors and so do the general comments developed to interpret these treaties. Also see, Y Ronel “Human Rights Obligations of Territorial Non-State Actors” (1948) at 25.

⁵⁰⁵ S Mateus and K Shange “Broken & unequal: the South African education system and the attainment of the right to basic education through litigation” (2021) 15 *Pretoria Law Student Review* 353-369. L Arendse “The South African Constitution's empty promise of “radical transformation”: unequal access to quality education for black and/or poor learners in the public basic education system” (2019) 23 *Law, Democracy and Development* at 100-147. Amnesty International “South Africa: Broken and unequal education perpetuating poverty and inequality” 11 February 2020 <https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> (accessed 18 October 2023).

A study conducted in 2013⁵⁰⁶ found that policy implementation is uneven in South African educational institutions and that policy on immigrant education is a part of this misalignment. Education policies are not made in a vacuum but are influenced by external factors inside and outside of a nation's borders. For example, factors such as socio-cultural context, economics, and globalisation can all influence education policy creation, interpretation, and implementation.⁵⁰⁷ As seen in the case discussed above, this may lead to stateless children being excluded from exercising their right to education on an equal basis with children who are documented or have citizenship. Even when the courts do intervene to try and enforce the provisions of the constitution, undocumented children continue to be denied access to education. In some instances, undocumented children are enrolled at public schools but are often not able to sit for final exams due to a lack of documentation.⁵⁰⁸

From the above discussion, it is evident that nationality, legal recognition, or documentation is a requirement for accessing basic rights,⁵⁰⁹ thus making it difficult for stateless children to enjoy basic human rights.⁵¹⁰ It has been noted that despite the courts declaring that refusing to admit learners who lack documentation amounts to unfair discrimination and against the constitution, undocumented children are still being refused admission.⁵¹¹ Arguably, the judiciary plays a crucial role in enforcing the Constitution and thereby protecting the rights of stateless children. However, courts are not easily accessible to all. The 37 learners who were affected by this policy were fortunate to have an organisation like the Centre for Child Law to litigate on their behalf, however, this is not the case for every stateless child in South Africa who is being denied access to basic rights.

⁵⁰⁶ T Callender *Thank you for coming* at 105.

⁵⁰⁷ Ibid 102.

⁵⁰⁸ S Blessed-Sayah et al "Social psychological perspective on schooling for migrant children: A case within a public secondary school in South Africa" (2022) 86 *Journal of education: Durban* at 151. "Education system fails undocumented learners" *Mail & Guardian* 31 January 2020.<https://mg.co.za/article/2020-01-31-education-system-fails-undocumented-learners/> (accessed 17 January 2023).

⁵⁰⁹ The spokesperson for the Department of Education Elijah Mhlanga stated in an interview that "it is good that a court case (referring to Centre for Child Law vs Department of Basic Education 2840/2017), had been won but the bottom line is that learners without documentation will forever be disadvantaged if their parents do not present themselves to the department of home affairs and receive assistance" Bongekile Macupe Education system fails undocumented learners *Mail & Guardian* 31 January 2020. T Callender (2013) 99.

⁵¹⁰ See also, Chiyangwa and Rugunanan *Experiences of Mozambican Migrant Children in Bushbuckridge, Mpumalanga, South Africa*.

⁵¹¹ The spokesperson for the Department of Education Elijah Mhlanga stated in an interview, even after the judgment (*Centre for Child Law vs Department of Basic Education* 2840/2017), schools were turning learners without documentation away because they do not know how to admit learners who are not documented "Education system fails undocumented learners" *Mail & Guardian* 31 January 2020. See also, Sayah et al. (2022) 86.

This section has illustrated that nationality, which Arendt has conceptualised as “the right to have rights”, is a condition precedent to accessing education in South Africa despite the constitutional guarantee of education for every child. Therefore, the glamorous notion of education as an inherent basic human right for all including stateless children is a myth. As demonstrated through the work of various authors,⁵¹² stateless and undocumented children are excluded from accessing education through different policies and practices. Even though the South African Constitution and the SASA guarantee free compulsory basic education for all, subsequent policies such as the Admission Policy and other government circulars make this right impossible to attain for stateless children.⁵¹³ Therefore, the framing of legislation and policies sometimes has the effect of limiting access to rights for stateless children.

5.2. The National Health Act 61 of 2003

The National Health Act aims to provide a framework for a structured uniform health system within the Republic of South Africa, taking into account the obligations imposed by the constitution and other laws on national, provincial, and local governments concerning health services; and to provide for matters connected therewith.

Section 27 of the South African Constitution states that everyone has the right to access basic healthcare services and that no one may be denied emergency medical treatment. This means that stateless children may not be refused basic health care and emergency medical treatment due to a lack of nationality. Section 4 (1) of the National Health Act gives the minister the discretion to prescribe conditions relating to who should qualify for free health. The only exception provided by Section 4 of the National Health Act is that children and pregnant or lactating women have access to free healthcare services, irrespective of their documentation status or nationality. However, despite an international human rights discourse embedded in the South African Constitution and the National Health Act, government policies and regulations divert from the constitution concerning healthcare access.⁵¹⁴ An example of this divergence

⁵¹² S Buckland *Lost in transition: The barriers to educational access for school-age Zimbabwe migrant children in South Africa*. T Callender *Thanks for coming* at 99.

⁵¹³ Sayah et al. *Journal of education: Durban* at 145.

⁵¹⁴ T Alfaro-Velcamp “Don’t send your sick here to be treated, our own people need it more”: immigrants’ access to healthcare in South Africa” (2017) 13 (1) *International Journal of Migration, Health and Social Care* at

can be seen in certain provisions in the Immigration Act 13 of 2002, thus contributing to the challenges faced by undocumented people who try to access the right to medical services. In this instance, the National Health Act is undermined by the Immigration Act 13 of 2002.⁵¹⁵ In terms of the Immigration Act, medical care providers are to ascertain the legal status of patients before administering care. According to Section 44 of the Immigration Act:

“When possible, any organ of state shall endeavor to ascertain the status or citizenship of the persons receiving its services and shall report to the Director-General any illegal foreigner, or any person whose status or citizenship could not be ascertained, provided that such requirement shall not prevent rendering of services to which illegal foreigners and foreigners are entitled under the Constitution or any law”.

As a consequence, undocumented individuals, among which are stateless children, are usually reluctant to seek medical and other assistance due to their lack of documentation for fear of possible arrest, detention, and even deportation.⁵¹⁶ Furthermore, undocumented people have difficulty accessing healthcare for reasons including the wording of policies and what has been termed as “medical xenophobia”.⁵¹⁷ “Medical xenophobia” refers to the attitudes and practices of medical practitioners and healthcare workers towards a certain group, specifically the undocumented, refugees, and migrants, resulting in medical mistreatment of the person seeking healthcare.⁵¹⁸ For instance, in a district hospital in the Western Cape, an Angolan patient died as a result of failing to get the necessary medical attention. The Cardiology Unit declined to assess him because it was their understanding that they could not provide

53-68. J White et al. “Social exclusion and the perspectives of health care providers on migrants in Gauteng public health facilities, South Africa” (2020) 15 (2) *PLoS ONE* 1-19.

⁵¹⁵ Hereinafter the Immigration Act.

⁵¹⁶ Mukumbang et al. “Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa” (2020) 19(141) *International Journal for Equity in Health* at 2-7. Dr Tasanya Chinsamy Doctors without Borders “Access to healthcare remains a challenge for migrant mothers and children in Gauteng Hospitals” (14 December 2022) <https://www.msf.org.za/news-and-resources/press-release/access-healthcare-remains-challenge-migrant-mothers-and-children>. Social Development on denial of access to basic health care to migrant women and children 23 March 2023 <https://www.gov.za/speeches/denial-access-basic-health-care-has-detrimental-effects-migrant-women-and-children-23-mar> (accessed 8 June 2023). South African Human Rights Commission Ensuring access to health and access to health care for migrants: A right and good public health practice (1 July 2018) <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice> (accessed 8 June 2023).

⁵¹⁷ See J Crush and G Tawodzera “Medical Xenophobia and Zimbabwean Migrant Access to Public Health Services in South Africa” (2014) 40(4) *Journal of Ethnic and Migration Studies* 655-670.

⁵¹⁸ See J Crush & G Tawodzera at 660. Kholofelo Mphahlele Opinion: What the law says about medical xenophobia in South Africa 13 May 2022, Thembi Mahlathi and Sibusisiwe Ndlela Opinion: Mothers and babies pay the price for medical xenophobia 9 September 2022.

healthcare to a foreign patient until the medical superintendent had approved the treatment. Unfortunately, the patient died while waiting for the approval.⁵¹⁹ In another instance, an undocumented woman died from cancer after the hospital refused to continue with her chemotherapy treatment upon finding out that she was undocumented.⁵²⁰ In another isolated incident,⁵²¹ a two-year-old Zimbabwean boy died from rat poisoning after his mother had taken him to a public hospital for urgent care.⁵²² The child's mother took him to the nearest public hospital where he was transferred to another public hospital for urgent care. Upon arriving at the hospital, the administrative staff informed her that before the child could be treated, she needed to provide the child's birth certificate or pay R5,000.⁵²³ On the way home to fetch the birth certificate, the child's condition worsened and he died.⁵²⁴ In terms of the Gauteng Hospitals Ordinance Amendment Act 4 of 1999, the chief executive officer of a hospital may require identification documents before admission to a hospital, except where deferring treatment may have "dangerous or detrimental consequences."⁵²⁵ Therefore, as much as the National Health Act provides for the right to access healthcare, undocumented people still face various challenges when they try to exercise this right.

The challenge faced by undocumented persons in accessing healthcare has gained the attention of human rights organisations such as SECTION27,⁵²⁶ which speaks of the urgency of the problem. In June 2022, SECTION27, together with other affected persons, launched litigation in the Gauteng Division of the High Court of South Africa, to confirm access to free healthcare for all pregnant and lactating women, and children under six, including persons seeking asylum, undocumented persons and persons affected by statelessness. In *Section 27 v MEC for Health*,⁵²⁷ SECTION27 alleged that undocumented pregnant and lactating women and children have been denied access to basic healthcare at various public hospitals in and

⁵¹⁹ T Alfaro-Velcamp *Don't send your sick here to be treated, our own people need it more': immigrants' access to healthcare in South Africa* (Masters thesis, UCT, 2015).

⁵²⁰ Ibid.

⁵²¹ See para 8 of court papers submitted in *Section 27 v The Minister of Health* 22/05/31. According to the Court Papers, there is evidence that there have been many instances where undocumented mothers and children were refused healthcare due to a lack of documentation.

⁵²² Alfaro-Velcamp *Don't send your sick here to be treated, our own people need it more* at 62.

⁵²³ Ibid.

⁵²⁴ Ibid.

⁵²⁵ Section 5.

⁵²⁶ A South African non-profit human rights organisation.

⁵²⁷ 22/19404.

around Gauteng.⁵²⁸ In April 2023, the court held that all pregnant and lactating women, and children under six, irrespective of nationality and documentation status, have the right to access free health services at all public health establishments, including hospitals. The court held further that Gauteng Regulations and a policy, introduced by the Gauteng Department of Health in 2020, that denies free healthcare services to pregnant and lactating women, and young children who are asylum seekers, undocumented, or persons affected by statelessness were declared unlawful.⁵²⁹ Seemingly, with the proposed 2019 National Health Insurance Bill, the ability for undocumented people to access healthcare will become more challenging. In terms of the proposed National Health Insurance Bill, children born to asylum seekers and undocumented migrants will be entitled to basic healthcare services as enshrined in Section 28 of the South African Constitution.⁵³⁰ However, there is no definition of what the basic healthcare services package includes, therefore it is not clear what these children are entitled to. Moreover, the provision of these basic healthcare services is only effective once the child is born and excludes antenatal services while the asylum seeker or undocumented migrant mother is pregnant. Thus, although Section 4 of the National Health Act ensures access to basic healthcare with no condition, there have been subordinate laws and practices implemented in hospitals around the country that have limited access for stateless persons.⁵³¹

Consequently, although stateless children are endowed with rights, they struggle to access them as they are often excluded due to a lack of nationality.⁵³² This section has, again, illustrated that nationality, which Arendt has conceptualised as “the right to have rights”, is a condition precedent to accessing healthcare in South Africa despite the constitutional guarantee to basic healthcare for every child. As demonstrated in this section and through the work of various authors,⁵³³ stateless and undocumented children have difficulty accessing healthcare in South Africa as a result of policies and practices that distinguish between state-

⁵²⁸ See *Section 27 v MEC for Health* 22/19404. Crush and Tawodzera *Journal of Ethnic and Migration Studies* at 660-662. *Section 27 v The Minister of Health* 22/05/31

⁵²⁹ Ibid para 3.

⁵³⁰ Section 4 National Health Insurance Bill 2019.

⁵³¹ *Section 27 v The Minister of Health* 22/05/31. The matter has not been decided yet.

⁵³² Tamsin Metelerkamp “No cash, no care – Gauteng hospitals turn away undocumented children and pregnant women” Daily Maverick 20 November 2022 <https://www.dailymaverick.co.za/article/2022-11-30-no-cash-no-care-gauteng-hospitals-turn-away-undocumented-children-and-pregnant-women/> (accessed 8 June 2023).

⁵³³ Sayah et al. *Journal of education: Durban* at 143-163. T Alfaro-Velcamp “Don’t send your sick here to be treated, our own people need it more”: immigrants’ access to healthcare in South Africa” (2017) 13 (1) *International Journal of Migration, Health and Social Care* 53-68. J Crush and G Tawodzera *Journal of Ethnic and Migration Studies* at 655-670.

less individuals and nationals.⁵³⁴ Even though the constitution and the health act guarantee access to healthcare for all, subsequent policies and government regulations such as the Gauteng Hospitals Ordinance Amendment Act 4 of 1999, make this right impossible to attain for stateless children. The framing of legislation and policies sometimes has the effect of limiting access to rights for stateless children.

5.3. Social Assistance Act 13 of 2004

The aim of the Social Assistance Act 13 of 2004 (hereinafter the Social Assistant Act) is to provide for the rendering of social assistance to persons; to provide for the mechanism for the rendering of such assistance; to provide for the establishment of an inspectorate for social assistance; and to provide for matters connected therewith. In South Africa, the government provides social grants to certain people who are in need⁵³⁵ and these grants are administered through the South African Social Security Agency (SASSA).⁵³⁶ The Social Assistance Act provides for the payment of a child support grant, care dependency grant, foster child grant, disability grant, older person's grant, war veterans grant, a grant-in-aid, and social relief of distress.⁵³⁷

In terms of the Social Assistance Act and collaboration with the Minister of Finance, social grants are made available by the Minister of Social Development from the money received from Parliament.⁵³⁸ The social grants that are directly relevant to children are the child support grant, care dependency grant, and foster child grants. The most relevant grant for stateless children is the child support grant, thus, this will be the social grant that will be referred to and discussed in this section. The child support grant is only accessible to children who are South African nationals, children with refugee status, and children of permanent citizens.⁵³⁹ Stateless children and undocumented children are not eligible to apply for a social grant. A child support grant is made available to a child in need through the child's caregiver. In order

⁵³⁴ This is despite the intervention of the courts. See Section 27 v Department of Health 22/19404, "Struggle for migrant health rights still far from over after landmark judgment" News24 (22 April 2023) <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-struggle-for-migrant-health-rights-still-far-from-over-after-landmark-judgment-20230422>.

⁵³⁵ T Lubisi et al. "International Human Rights Law and the Access of Children of Asylum Seekers to Social Assistance in South Africa" (2020) 53 *The Comparative and international law journal of southern Africa* at 2-32.

⁵³⁶ South African Social Security Agency Act 9 of 2004.

⁵³⁷ Section 6-13.

⁵³⁸ Lubisi et al. *The Comparative and international law journal of southern Africa* at 23-24.

⁵³⁹ Section 10 of the Regulations in terms of the Social Assistance Act.

to apply for a social grant, the caregiver must be a South African citizen, have refugee status, or be a permanent resident. The application must be accompanied by a South African identity document or proof of refugee status of the caregiver. In terms of Section 13 (1) of the Social Assistant Act 2004 (the Social Assistant Act Regulations), a caregiver applying for a social grant for their child is required to submit an identity document and the child's birth certificate. A child's right to access social grants depends on the nationality status of the caregiver and valid proof of birth of the child. Consequently, children of stateless and undocumented parents or caregivers are excluded from accessing social grants.⁵⁴⁰ Section 27(1)(c) of the South African Constitution guarantees everyone the right to have access to social security and if they are unable to support themselves and their dependents, appropriate social assistance should be provided. The regulations were subsequently amended to include a provision that allows officials to accept alternative identifying documentation.⁵⁴¹ Alternative proof of identity includes a baptism certificate, a clinic card, a school report, and a sworn statement by a reputable person (e.g. councillor, traditional leader, social worker, minister of religion) who knows the applicant and the child.⁵⁴² This is indeed good progress for stateless children, however, not every stateless child will have access to any of this alternative documentation. Many stateless children do not have access to schools or clinics and do not have a clinic card or a school report.⁵⁴³ Moreover, SASSA, which is responsible for administering social grants, requires that grant beneficiaries apply to the Department of Home Affairs within three months for proper identifying documents. Once the person provides proof of having applied for their documents, the social grant will continue to be paid until the beneficiary receives their identity documents and returns to the SASSA office to update their records. However, if they do not apply for these documents and do not return to SASSA to confirm that this has been done within the three months, payment of their grant may be suspended.⁵⁴⁴ Although it has been established that the term 'everyone' in the constitution applies to all people who live

⁵⁴⁰ Ibid. See also, Lubisi et al. *The Comparative and international law journal of southern Africa* at 23-24.

⁵⁴¹ Section 11(1) of the 2008 Regulations of the Social Assistance Act of 2004.

⁵⁴² S Smith and L Smith *Rapid Appraisal of Home Affairs Policy and Practice Affecting Children in South Africa* (2007) Cape Town: Alliance for Children's Entitlement to Social Security at 20-21.

⁵⁴³ Unicef *Universal Child Benefit Case Studies: The experience of South Africa* (July 2019) 3 <https://www.unicef.org/media/70486/file/ZAF-case-study-2020.pdf>. (accessed 23 June 2023).

⁵⁴⁴ See <https://legalfundi.com/legal-question/what-can-you-use-for-proof-of-identity-when-applying-for-a-social-grant/> (accessed 16 June 2023).

in South Africa⁵⁴⁵ so actual access to this right remains elusive, with stateless children being among those left out.

This section has, again, illustrated that nationality is a condition precedent to access social security in South Africa, despite the constitutional guarantee to access social security, thus, putting into question the inalienability of the right to social security. As demonstrated in this section, stateless and undocumented children are excluded from accessing social security due to a lack of documentation. Although the constitution guarantees social security for all, policies and laws such as the Social Assistant Act make this right impossible to attain for stateless children. The framing of legislation and policies sometimes has the effect of limiting access to rights for stateless children or, in this case, excluding access altogether.

6. Conclusion

In this chapter, I conducted an analysis of selected laws on basic rights including healthcare, education, and social security, to assess whether it is viable for stateless children to access basic rights despite their lack of nationality. In conducting this analysis, Arendt's renowned "*right to have rights*" has been critically analysed and used as a lens to advance the argument that nationality, which Arendt has conceptualised as "*the right to have rights*", is a condition precedent to accessing basic rights in South Africa contrary to the notion that to access human rights, a stateless child does not have to be anything other than be born a human being. This analysis has challenged the notion of the inalienability of human rights for stateless children. A critical analysis of the concept of universal human rights has led to the conclusion that as much as rights may be universal this does not translate to universal enjoyment of these rights. The chapter also discussed the position of international bodies such as the Human Rights Council, Office of the High Commissioner for Human Rights and the United Nations. Additionally, the chapter has also demonstrated and underscored that the framing of legislation and policies has had the effect of limiting access to rights for stateless children. This makes nationality relevant in children's access to basic rights in South Africa. Therefore, based on the analysis in this chapter, attaining nationality by stateless children is the only vi-

⁵⁴⁵ See *Khosa v Minister of Social Development* para 127. T Lubisi et al. "International Human Rights Law and the Access of Children of Asylum Seekers to Social Assistance in South Africa. V Neluvhalani-Caquece "Statelessness and COVID-19 in South Africa" (2022) 37 (1) *Southern African Public Law* at 2-28. *Scalabrini Centre of Cape Town v Minister of Social Development* 22808/2020.

able solution to protecting stateless children. The critical question that remains unanswered is whether there is an obligation on South Africa to grant stateless children nationality. The next chapter resolves this question with a focus on treaties as sources of international law.

CHAPTER FIVE: TREATY LAW AND THE OBLIGATION (OR LACK THEREOF) TO GRANT NATIONALITY TO STATELESS CHILDREN

1. Introduction

The previous chapter assessed whether stateless children can effectively access basic rights in South Africa. A conclusion was drawn that lack of nationality poses major barriers to accessing basic rights, thus, making nationality a prerequisite for the enjoyment of basic rights. A vital starting point to vouching for nationality is resolving the issue of whether there is an obligation on South Africa to grant stateless children nationality. In this chapter, I critically analyse a range of international conventions to determine how the notion of nationality has been framed under international law and to decide whether such framing places an obligation on South Africa to grant nationality to stateless children. This will be done by analysing the treaty framework at the United Nations level and the African Union level. However, before this engagement, the chapter unpacks the notion of nationality and how the principle of state sovereignty places some limitations on the right to nationality.

2. State Sovereignty as a Limitation to Nationality

The principle of state sovereignty advances the view that states have the prerogative to determine how they exercise and apply their laws. This means that as much as international law may set standards and principles, states are the ones who ultimately decide how those principles are applied. Articles 1 and 2 of the Hague Convention Relating to Certain Questions on Conflict in Nationality Laws of 1930 state the following:

“It is for each State to determine under its own law who are its nationals. This 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.” Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.”

This principle was reaffirmed by the International Court of Justice (ICJ) in *Liechtenstein v. Guatemala*⁵⁴⁶ where it was stipulated that “it is for every sovereign State to settle by its own legislation the rules relating to the acquisition of its nationality; and that nationality is within the domestic jurisdiction of the State.” Since it is left to the states to determine who its nationals are, states have generally limited nationality to those with a “genuine connection” with the state. The laws of most, if not all States, contain criteria for establishing such connection, amongst which are place of birth, family ties, parentage, or place of residence.⁵⁴⁷ Similarly, in buttressing the limits that state sovereignty places on the acquisition of nationality, the case of *Conseil d’Etat, in Messiah v Minister of the Interior*,⁵⁴⁸ held as follows:

“acts of sovereignty are those which concern the high policies of the state, such as the measures which the government takes in virtue of its powers to safeguard the internal as well as the external sovereignty of the state. In light of this, nationality which is the juridical link uniting an individual with a state, concerns the sovereignty of the state, whose function it is to determine which individual enjoys its nationality and to impose on them the restrictions and responsibilities it decides upon”.

From the finding in the above case, one gathers that states have the discretion and power to determine who is considered a national and who is not. Thus, in principle, the notion of nationality under international law falls within the purview of domestic jurisdictions. Because states are sovereign entities, they enjoy broad discretion to enact laws that determine who should be a national of their country. This is a limitation on the right to acquire nationality.

3 The prospects of nationality as a solution to statelessness as framed by selected rights bodies

In the forgoing chapter, the challenges faced by stateless children in accessing rights were highlighted. The discussion, in that chapter, demonstrated that a lack of nationality puts stateless children at a disadvantage. To determine the extent of South Africa’s obligation to grant nationality to stateless children, it is necessary to consider whether the framing of the right to nationality under international law places an obligation on states to grant nationality to stateless children. A discussion of how various treaties and bodies have framed the right to nationality is undertaken below.

⁵⁴⁶ *Nottebohm, Liechtenstein v Guatemala* 1953 I.C.J. 111. See also, advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 4, Permanent Court of International Justice, 7 February 1923.

⁵⁴⁷ J Park *Minority Rights Constraints on a State’s Power to Regulate Citizenship under International Law* (PhD thesis, University of London, 2006).

⁵⁴⁸ *Messiah v Minister of the Interior* (1950) 28 ILR 291.

The UNHCR⁵⁴⁹ is a United Nations body created in 1950, during the aftermath of World War II.⁵⁵⁰ The UNHCR's role is to supervise and ensure that state parties to United Nations instruments fulfill the obligations that require them to provide international protection to refugees and other forcefully displaced people.⁵⁵¹ In 2014, the UNHCR launched the 'I belong' campaign to end statelessness by 2024.⁵⁵² In terms of this campaign, the UNHCR envisages the eradication of statelessness within 10 years. The campaign aims to end statelessness within ten years by identifying stateless persons, protecting stateless people, and resolving and preventing statelessness.⁵⁵³ Through the campaign, the UNHCR has issued a plan referred to as the 'Global Action Plan'.⁵⁵⁴ This plan has ten action points to end statelessness which include ensuring that no child is born stateless, nationality documentation to those entitled to it, resolving existing major situations of statelessness, and preventing denial of nationality on discriminatory grounds.⁵⁵⁵ The stance of the UNHCR is that the acquisition of nationality is viable and that it will resolve the challenge of statelessness. On 21 October 2021, the UNHCR held a virtual roundtable engagement on *Equality and Non-Discrimination in Nationality Matters to End Statelessness*.⁵⁵⁶ There was a general indication that the granting of nationality would address the challenge of statelessness. Against this backdrop, it was concluded that "states ultimately have the responsibility to end statelessness and to remove all forms of discrimination from their nationality laws, policies and practices."⁵⁵⁷

A similar view has been advanced by the Committee on the Elimination of Racial Discrimination.⁵⁵⁸ The Committee on the Elimination of Racial Discrimination (CERD Committee) is a body of independent experts that monitors the implementation of the Convention on the

⁵⁴⁹ See for example the Global Action Plan to end Statelessness by 2024.

⁵⁵⁰ A Betts et al "The United Nations High Commissioner for Refugees (UNHCR): Politics and Practice of Refugee Protection" (2012) at 132.

⁵⁵¹ J Simeon "The UNHCR and the Supervision of International Refugee Law" (2013) at 1.

⁵⁵² See IBelong Campaign to end Statelessness <https://www.unhcr.org/ibelong/> (accessed 8 August 2023).

⁵⁵³ Ibid.

⁵⁵⁴ See Global Action Plan to End Statelessness: 2014-2024 <https://www.unhcr.org/ibelong/global-action-plan-2014-2024/> (accessed 8 August 2023).

⁵⁵⁵ Global Action Plan to End Statelessness: 2014-2024 <https://www.unhcr.org/ibelong/global-action-plan-2014-2024/> (accessed 8 August 2023).

⁵⁵⁶ Equality and Non-Discrimination in Nationality Matters to End Statelessness Outcome document prepared following the OHCHR/UNHCR Virtual Roundtable on Equality and Non-Discrimination in Nationality Matters to End Statelessness 21 October 2021, <https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf> (accessed 17 October 2022).

⁵⁵⁷ Ibid.

⁵⁵⁸ UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation 30 on Discrimination Against Non-Citizens 64th session 2004) CERD/C/64/Misc.11/rev.3.

Elimination of All Forms of Racial Discrimination by its state parties.⁵⁵⁹ The CERD Committee has called on States to reduce statelessness, particularly among children, by encouraging their parents to apply for nationality on their children's behalf.⁵⁶⁰

The African Committee of Experts on the Rights and Welfare of the Child has invoked a similar approach in vouching for nationality as a solution to statelessness.⁵⁶¹ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) is an African Union Organisation mandated to monitor the implementation of the ACRWC as well as to promote and protect children's rights in Africa.⁵⁶² In particular, the Committee

UDHR is expected to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.⁵⁶³ The Committee has noted that the ACRWC does not provide an explicit right to nationality, however, it asserts that Article 6 (4) of the ACRWC places an obligation on state parties to ensure that their constitutional legislation recognises the principles according to which, a child shall acquire the nationality of the state in the territory of which he has been born if, at the time of the child's birth, he was not granted nationality by any other state in accordance with its laws.⁵⁶⁴

The African Commission on Human and Peoples' Rights was established by the African Charter on Human and People's Rights in 1986. The Commission recognises the importance and the protection of the right to nationality under international law by emphasising its role in ensuring that states prevent statelessness within their borders.⁵⁶⁵ The Commission states that African states are bound to ensure that everyone enjoys the right to nationality without discrimination of any kind, particularly on grounds of gender, race, religion, ethnic group, disability, social status, or any other basis.⁵⁶⁶ On the right to nationality, the Commission provides that every person has the right to the nationality of the country in which he or she is

⁵⁵⁹ <https://www.refworld.org/publisher/CERD.html> (accessed 16 June 2023).

⁵⁶⁰ General Recommendation 30 on Discrimination Against Non-Citizens 2004 para 16.

⁵⁶¹ African Committee of Experts on the Rights and Welfare of the Child (ACERWC) General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality" para 84. See also, para 5, where the committee states "All African States have rules providing for the conferral of their nationality established in their constitutions and/or in other legislation. However, these laws often do not reflect the States' commitments to avoid statelessness established by Articles 6(3) and 6(4) of the African Children's Charter."

⁵⁶² Established in terms of article 32 of the African Charter on the Rights and Welfare of the Child.

⁵⁶³ Ibid Article 42 (a) (ii).

⁵⁶⁴ General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality" para 83.

⁵⁶⁵ Ibid 112.

⁵⁶⁶ African Commission on Human and Peoples' Rights 234: Resolution on the Right to Nationality 23 April 2013 <https://www.refworld.org/docid/51adbcd24.html> (accessed 18 June 2023).

born, either at birth or after living in the country for a predetermined length of time and, at the latest, on reaching majority.⁵⁶⁷

On 21 October 2021, the UNHCR held a virtual roundtable engagement on *Equality and Non-Discrimination in Nationality Matters to End Statelessness*.⁵⁶⁸ There was a general indication that the granting of nationality would address the challenge of statelessness. Against this backdrop, it was concluded that “States ultimately have the responsibility to end statelessness and to remove all forms of discrimination from their nationality laws, policies and practices.”⁵⁶⁹

One gathers from the views of these organisations that the acquisition of nationality remains an important factor in ensuring the protection of the rights of stateless people. The above initiatives demonstrate that international efforts have placed much emphasis on nationality as a means of protecting stateless persons. Commentators have alluded to this view by noting that, “since the late 1940s experts have acknowledged that this measure (granting nationality to children who would otherwise be stateless) is key to eventually eliminating statelessness.”⁵⁷⁰ However, the question remains whether there is a right to nationality and a corresponding obligation on States in terms of international law to grant stateless children nationality. The Inter-American Court of Human Rights underscored that:

“Even though it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction”.⁵⁷¹

Similarly, in its Advisory Opinion on the *Tunis and Morocco Nationality Decrees* of 1923, the Permanent Court of International Justice stated that “the question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations.” In effect, the Permanent Court of International Justice said that, while nationality issues were, in principle, within domestic ju-

⁵⁶⁷ Ibid 51.

⁵⁶⁸ Equality and Non-Discrimination in Nationality Matters to End Statelessness Outcome document prepared following the OHCHR/UNHCR Virtual Roundtable on Equality and Non-Discrimination in Nationality Matters to End Statelessness 21 October 2021, <https://www.ohchr.org/sites/default/files/2022-01/OHCHR-UNHCR-Event-Outcome.pdf> (accessed 17 October 2022).

⁵⁶⁹ Ibid.

⁵⁷⁰ Open Society Initiative “Children’s right to a nationality”, <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/RelatedMatters/OtherEntities/OSJI-ChildrenNationalityFactsheet.pdf> (accessed 17 October 2022).

⁵⁷¹ Inter-American Court on Human Rights, Advisory Opinion, “Amendments to the Naturalisation Provision of the Constitution of Costa Rica, para 32-34.

risdiction, states must, nonetheless, honour their obligations to other states as governed by the rules of international law. Treaties are some of the sources of international law.⁵⁷² Thus, state discretion on the issue of nationality may be limited by treaties that make certain that there is a right to nationality, and accordingly, an obligation on a state to grant nationality. The critical issue to be resolved is whether there is a right to nationality under treaty law and an obligation on states, South Africa in this regard, to grant nationality to stateless children. Differently put, does the wording of the various international treaties at the United Nations and African Union level create a strong presumption in support of the child's right to nationality and by necessary implication a guarantee against statelessness?

4. The Framing of Nationality under Treaty Law

4.1 International treaties and Conventions dealing with Nationality at the United Nations Level

The United Nations is an international organisation founded in 1945 through the United Nations Charter.⁵⁷³ It is currently made up of 193 member states.⁵⁷⁴ Amongst others, it seeks to develop friendly relations among nations, based on respect, for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace.⁵⁷⁵ It also seeks to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.⁵⁷⁶ Over the years, various human rights instruments have been adopted by the United Nations to guarantee the right to nationality, including the Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1976,

⁵⁷² See Article 38(1) of the Statute of the International Court of Justice 1945, which lists four sources of international law: treaties and conventions, custom, general principles of law, and judicial decisions and teachings. See also, L Shelton *Soft Law In Handbook for International Law* (2008) Routledge Press 1.

⁵⁷³ Article 1.

⁵⁷⁴ See <https://www.un.org/en/about-us>.

⁵⁷⁵ Article 1 (2) of the United Nations Charter 1945.

⁵⁷⁶ Article 1 (3) of the United Nations Charter 1945.

the Convention on the Rights of the Child 1989, and the African Charter on the Rights and Welfare of the Child 1990.⁵⁷⁷

The regulation of treaties under international law is governed by the Vienna Convention on the Law of Treaties 1969 (Vienna Convention). South Africa acceded to the Vienna Convention in August 1989.⁵⁷⁸ The Vienna Convention establishes rules, procedures, and guidelines for how treaties are defined, drafted, amended, interpreted, and generally operated.⁵⁷⁹ Article 31 of the Vienna Convention states the following:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In discussing and unpacking the various United Nations and African Union instruments, Article 31 of the Vienna Convention on the Law of Treaties will be a lens through which the discussion is conducted. In terms of this Convention, a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in its context and the light of its object and purpose.⁵⁸⁰ Amongst others, there is an obligation to enforce the treaties that states ratify in good faith.⁵⁸¹ It follows that where treaties make provisions for nationality, there is an obligation on states to enforce such provisions in good faith. The starting point, however, is to establish whether there is a right to nationality in terms of these treaties and instruments.

4.1.1 *The Universal Declaration of Human Rights 1948*

This section discusses treaties. However, although the Universal Declaration of Human Rights (UDHR) is not a treaty, a discussion of treaties under the UN system would be incom-

⁵⁷⁷ International Covenant on Civil and Political Rights 1976, Convention on the Rights of the Child 1989, African Charter on the Rights and Welfare of the child 1990. South Africa has not ratified the treaties on statelessness.

⁵⁷⁸ United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en (accessed 11 August 2023).

⁵⁷⁹ Vienna Convention on the Law of Treaties (1969).

⁵⁸⁰ Ibid Article 31.

⁵⁸¹ Article 26 Vienna Convention on the Law of Treaties 1969.

plete without discussing the UDHR. The UDHR was adopted in 1948 and is the most widely adopted declaration. It is considered the most influential and cited human rights document.⁵⁸² The significance of the UDHR is that it was the first document to clearly set out the fundamental rights that are to be protected universally. It set the pace for binding treaties including the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966. Furthermore, the UDHR has been influential in fostering the idea that all human beings have rights by virtue of being human beings. The UDHR is a living document, and as such, is still relevant to society today. However, with the changing needs and values of society, it becomes important to revisit this declaration especially as it relates to the rights of stateless persons. The most relevant right in the UDHR for this thesis is the right to nationality provided in Article 15.

Article 15 of the UDHR states that everyone has the right to nationality. This article is broadly formulated and does not state in detail how this right is to be interpreted and applied and which states bear the onus of ensuring the realisation of the right to a nationality. Various issues and questions arise from the wording of this article. In the first instance, Article 15 (1) makes no mention of which state bears the obligation to make this right a reality. Secondly, this provision does not make it clear which nationality a person is entitled to. The framing of nationality under the UDHR is in such a way that states are still left with the prerogative to decide who their nationals are. Furthermore, in contrast to a convention or a treaty, the UDHR is not a legally binding document and there is no obligation on states to give effect to it.⁵⁸³ During the drafting of the UDHR, Eleanor Roosevelt, the Chairman of the United Nations Commission on Human Rights, stated that:

“The UDHR is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations”.⁵⁸⁴

⁵⁸² Gordon Brown Global Citizens Commission Global Institute for advanced study at 13.

⁵⁸³ C Vlieks et al “Solving statelessness: Interpreting the right to nationality” (2017) 35 (3) *Netherlands Quarterly of Human Rights* at 158-175. H Huurman “The status of the universal declaration of human rights in national and international law” (1996) 25 *GA. J. INT'L & COMP. L.* at 289-392.

⁵⁸⁴ Quoted in Majorie Whiteman *Digest of International law* 243 (Washington, D.C.: Dept. of State Publication 7873 (1965)).

The status of the UDHR as a declaration means that it falls under, what is referred to as, soft law under international law.⁵⁸⁵ Soft law refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour.⁵⁸⁶ Soft law “expresses a preference and not an obligation that state should act, or should refrain from acting, in a specified manner.”⁵⁸⁷ The effectiveness and applicability of the rights contained in the UDHR have come under scrutiny in the past decades and, courts and human rights bodies hold different views.⁵⁸⁸ Some scholars and legal bodies have argued that the UDHR, although not binding, does impose a legal obligation on states to comply with its provisions.⁵⁸⁹ This, however, remains a debatable issue, making it implausible to argue that the UDHR, based on its guarantee of the right to a nationality, imposes an obligation on states to grant stateless children nationality.⁵⁹⁰

It is worth noting, however, that there have been instances where the courts have relied on the rights in the UDHR to find that there was a violation of human rights. For example, In the case of *Anudo v The Government of Tanzania*.⁵⁹¹ In this case, the authorities in Tanzania alleged that *Anudo* had obtained his Tanzanian identifying documents (birth certificate and passport) fraudulently. As such, they confiscated his documents, declared him an illegal immigrant, and deported him to Kenya. *Anudo* brought an application to the court arguing that the confiscation of his passport, the “illegal immigrant” status issued against him, and his expulsion from the United Republic of Tanzania deprived him of his right to Tanzanian nation-

⁵⁸⁵ United Nations The international Bill of Human Rights 1 (New York: UN Dept. of Public Information, 1988).

⁵⁸⁶ L Shelton *Soft Law In Handbook for International Law* (2008) at 3.

⁵⁸⁷ J Gold *Interpretation: The IMF and International Law* (1996).

⁵⁸⁸ Huurman GA. J. *INT'L & COMP. L.* at 517. Some see the UDHR as having given content to the Charter pledges, partaking therefore of the binding character of the Charter as an international treaty. Others see both the Charter and the Declaration as contributing to the development of a customary law of human rights binding on all states. See, L Henkin *The Age of Rights* (1990) at 19. See also, African Court on Human and People’s Right case of *Anudo v Republic of Tanzania* 012/2015 at para 76, the Court stated that the Universal Declaration of Human Rights is recognised as forming part of Customary international law. In some cases, government officials or judges have applied a provision of the Declaration inconsistently in different situations or have changed their minds as to whether a provision was even authoritative. See, C Tai-Heng “The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States” (2008) 41 (2) *Cornell International Law Journal* at 251-297.

⁵⁸⁹ Human Rights Watch “South Africa’s obligation under international and domestic law” <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 17 June 2023).

⁵⁹⁰ M Ganczer “The Universal Declaration of Human Rights: A Commentary” (2015) *Scandinavian University Press* at 233. Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), reprinted in 9 J. Intl Comm. Jurists Rev. 94 (1968). Declaration of Tehran, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (1968). J Humphrey “The International Bill of Rights: Scope and Implementation” (1976) 17 WM. & MARY L. REV. 527-529. Statement by Finland in the Third Committee of the U.N. General Assembly, Nov. 13, 1980, summarised in U.N. GAOR, 3d Comm., 35th Sess., 57th mtg., at 4, U.N. Doc. AIC.3/35/SR.57 (1980).

⁵⁹¹ *Anudo v United Republic of Tanzania* 012/2015.

ality, as guaranteed and protected Article 15 (2) of the Universal Declaration of Human Rights.⁵⁹² Similarly, the Inter-American Court of Human Rights has repeatedly reaffirmed the customary nature of the right to nationality. In its Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, it held that “[t]he right of every human being to a nationality has been recognised as such by international law”.⁵⁹³ In the ongoing debate regarding the status of the UDHR, what remains certain is that the UDHR does not impose an obligation on states to grant nationality.⁵⁹⁴ This study acknowledges that the UDHR provides for the right to nationality. However, the issue is not whether the UDHR provides for the right nationality but more about the extent of the obligation imposed on states to grant nationality to stateless children in terms of the UDHR.

From the analysis in this section, it can be concluded that the right to nationality as provided for under Article 15 of the UDHR does not, in itself, impose obligations on states to grant nationality to stateless children.⁵⁹⁵ As much as everyone has the right to nationality in terms of the UDHR, this right is not binding on any state, it is not qualified, and more importantly, it is a right contained in a declaration, which no state is bound by.⁵⁹⁶ There is no doubt that the UDHR has attained significant international legal status, however, its nature and character remain that of an international agreement.

4.1.2. *The International Covenant on Civil and Political Rights 1976*

⁵⁹² Ibid para 76.

⁵⁹³ Advisory Opinion OC-4/84 (n 1) para 34.

⁵⁹⁴ M Ganczer “The Universal Declaration of Human Rights: A Commentary” (2015) *Scandinavian University Press* at 233. Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), reprinted in 9 J. Intl Comm. Jurists Rev. 94 (1968). Declaration of Tehran, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (1968). J Humphrey “The International Bill of Rights: Scope and Implementation” (1976) 17 WM. & MARY L. REV. 527-529. Statement by Finland in the Third Committee of the U.N. General Assembly, Nov. 13, 1980, summarised in U.N. GAOR, 3d Comm., 35th Sess., 57th mtg., at 4, U.N. Doc. A/C.3/35/SR.57 (1980).

⁵⁹⁵ Human Rights Committee, ‘General Comment No. 17’ (n 8) para 8. See also *Denny Zhao v The Netherlands*, Communication No. 2918/2016 (2020) HRCttee UN Doc. CCPR/C/130/D/82918/2016 para 8.2.

⁵⁹⁶ According to Huurman GA. J. INT’L & COMP. L at 289, courts may explicitly or implicitly reject the relevance of the Declaration to domestic law; such opinions frequently cite the non-self-executing nature of the Declaration. The status of the Declaration when it was adopted in 1948 is described by the United Nations as that of “a manifesto with primarily moral authority,” see, United Nations, *The international Bill of Human Rights 1* (New York: U.N. Dept. of Public Information, 1988). Schwelb “The influence of the Universal Declaration of Human Rights on International and national law” In *Proceedings of the American Society of International Law at its annual meeting (1921-1969)* (1959) 53 *Cambridge University Press* 217-229.

South Africa ratified the International Covenants on Civil and Political Rights 1976 (ICCPR) in December 1998.⁵⁹⁷ The ICCPR was adopted to ensure the promotion and protection of civil and political rights.⁵⁹⁸ Some of the rights provided for by the ICCPR include; the right against discrimination, the right to equality between women and men, the right to human dignity, the right to freedom from torture, and the right to life. More importantly and for this discussion, Article 24(1) of ICCPR states that every child shall have, without any discrimination as to race, birth status, national or social origin, the right to protection based on his status as a minor. Moreover, Article 24(3) of the ICCPR guarantees the right to nationality in more specific terms by referring to children. It provides that every child has the right to acquire a nationality. However, the shortcoming of this provision follows the same pattern as the UDHR in that it makes no mention of which state bears the onus of realising this right and fails to clearly articulate which nationality the child has a claim to. One is left to wonder whether there are clear obligations set in this regard that ensure universal possession of a nationality. In addition, Article 24(3) of the ICCPR narrows down the right to nationality to children specifically, unlike the UDHR, which refers to “everyone.”

In as much as the ICCPR narrows down the right to nationality to children, it does not address the gap regarding clear obligations on which state bears the onus on granting nationality to children. According to the Human Rights Committee (HRC),⁵⁹⁹ there is no obligation for a state to grant nationality to all children born within its territories.⁶⁰⁰ In its comment on Article 24, the HRC has noted that states parties often underestimate their obligation to ensure that children are afforded special protection.⁶⁰¹ However, the HRC does concede that the measures to be adopted by states for the realisation of Article 24 of the ICCPR are not specified.⁶⁰² Therefore, it is left to states to adopt their own measures. Perhaps the most helpful guidance provided by General Comment 17 of the ICCPR which states that States are to ensure that there is no discrimination concerning the acquisition of nationality under international law between legitimate children and children born out of wedlock, or of stateless par-

⁵⁹⁷ South African Human Rights Commission: List of issues Report to the Human Rights Committee on South Africa’s implementation of the International Covenant on Civil and Political Rights (2015).

⁵⁹⁸ See Preamble to the ICCPR.

⁵⁹⁹ ICCPR General Comment No. 17: Article 24 (Rights of the Child) para 8.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid para 1.

⁶⁰² Ibid para 2.

ents, or based on the nationality status of one or both of the parents.⁶⁰³ Furthermore, the right of every child to a name and nationality at birth is also left to states to establish based on their own special measures of protection.⁶⁰⁴ In terms of the ICCPR, states are required to adopt appropriate measures to ensure that every child acquires nationality when they are born, however, there is no obligation on states to grant nationality to every child born within its territory.⁶⁰⁵ This is problematic considering that the current discourse is that granting nationality to children is the best way to protect and promote their rights. In terms of the ICCPR, member states have no obligation to grant every child born within their territory nationality. States are, however, obliged to take special measures to ensure that children are granted nationality. Consequently, the obligation is not that of granting nationality to every child born within a state's territory but rather, to ensure that there are special measures in place that make provision for children to acquire nationality.

Moreover, unlike the UDHR which frames the right as “the right to a nationality”, the ICCPR makes use of the wording “the right to acquire nationality.” An engagement with the drafting history of the ICCPR suggests that the drafters steered clear of using the “right to a nationality” because this risked undermining states' sovereignty in deciding who its nationals are.⁶⁰⁶ Thus, the phrase “right to acquire nationality” was favoured.⁶⁰⁷ Phrased this way, Article 24(3) does not prescribe to states the manner in which nationality is obtained. This means that Article 24(3) of the ICCPR does not provide the child with a right to nationality. Thus, despite guaranteeing the right to acquire a nationality, the wording of Article 24(3) of the ICCPR leaves it to the states to determine how individuals should acquire the nationality of a given country. Effectively, the framing of nationality under the ICCPR is state-centric to the

⁶⁰³ Ibid para 8.

⁶⁰⁴ Ibid para 7.

⁶⁰⁵ ICCPR General Comment 17 para 8. See also; Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2918/2016. The Human Rights Committee noted that while the purpose of article 24 (3) of the Covenant was to prevent a child from being afforded less protection by society and the State because he or she was stateless, this did not necessarily make it an obligation for States to give their nationality to every child born in their territory see, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2918/2016 para 8.2.

⁶⁰⁶ See, Report of the drafting committee to the commission of human rights (1947) E/CNA/21 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/GL9/000/26/PDF/GL900026.pdf?OpenElement> (accessed 19 June 2023). See also, J Doek “The CRC and the right to acquire and preserve a nationality” (2006) 25 (3) *Refugee Survey Quarterly* at 26-32.

⁶⁰⁷ According to Doek *Refugee Survey Quarterly* 26, “The drafters of the ICCPR felt that a State could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless of the circumstances”.

extent that it leaves it to the states to determine who its nationals are. This means that the acquisition of nationality is based on the operation of national law. When exercising its discretion, there is no guarantee that a given state will, in terms of its national laws, cater to all or any stateless children.

4.1.3. The Convention on the Elimination of All Forms of Racial Discrimination 1969

South Africa acceded to the Convention on the Elimination of All Forms of Racial Discrimination 1969 (CERD) on 10 December 1998.⁶⁰⁸ The CERD is the principal international human rights instrument that defines and explicitly prohibits racial discrimination in all sectors of private and public life.⁶⁰⁹ The CERD aims to eliminate racial discrimination in all its forms and manifestations and to prevent and combat racist doctrines and practices.⁶¹⁰ In terms of Article 5(iii) of the CERD, everyone has the right to nationality, irrespective of race, colour, or national or ethnic origin and gender. The shortcoming of CERD, like the UHDR and IC-CPR, is that it does not qualify for the right to nationality, nor does it place an obligation on any state to grant nationality. The committee on CERD has urged member states to reduce statelessness, among children, by encouraging their parents to apply for citizenship on their behalf.⁶¹¹ The Committee, however, fails to give clear guidance on whether states have an obligation to grant nationality to stateless children. Moreover, considering that the issue of nationality is subject to state sovereignty, the vagueness of the CERD in stopping at providing that everyone has “the right to nationality”, not only leaves it unclear which state is mandated to grant nationality, but also, leaves the obligation on states ambiguous. Consequently, the framing of the right to nationality in the CERD does not reflect the state's obligation to grant nationality to every child born within its territory.

4.1.4. The Convention on the Rights of All Migrant Workers and Members of Their Families 2003

⁶⁰⁸See, United Nations Treaty Collection

https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en (accessed 16 June 2023).

⁶⁰⁹ See, Preamble to The Convention on the Elimination of All Forms of Racial Discrimination.

⁶¹⁰ Ibid.

⁶¹¹ Committee on the Elimination of Racial Discrimination General Comment 30 Discrimination against non-citizens CERD/C/64/Misc.11/rev.3 para 16.

The Convention on the Rights of All Migrant Workers and Members of Their Families 2003 (Convention on Migrants) focuses on the protection of the rights of migrant workers and members of their families. It emphasises the link between migration and human rights. The Convention on Migrants determines the rights of migrant workers and their families and ensures that those rights are protected and respected.⁶¹² South Africa has not ratified the Convention on Migrants,⁶¹³ however, this Convention is relevant to the issue of statelessness because children of migrants often struggle to access rights due to a lack of documentation. It is thus important to discuss this Convention to establish the obligation to grant nationality to children born to migrant workers. Article 29 of the Convention on Migrants provides that every child of a migrant worker shall have the right to a name, to the registration of birth, and a nationality. However, it also fails to qualify the right to nationality in that it makes no mention of which State bears the onus of providing to a child born to a migrant a nationality. In this case, one can argue that the migrant's country of origin bears the onus of providing nationality status, however, the same argument can be made that the country where a migrant child is born bears the onus of granting nationality. This Convention is no different from the conventions discussed above, in that as much as the right to a nationality is guaranteed, there is no obligation placed on any particular state to ensure the realisation of this right.⁶¹⁴ States are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality when he or she is born. This is as far as the obligation relating to nationality goes.

4.1.5. *The Convention Relating to the Status of Stateless Persons 1954*

In noting the unsettling and increasing number of stateless persons as well as the lack of effort from states to prevent and end statelessness, this Convention was promulgated to reduce statelessness. The 1954 United Nations Convention on the Status of Stateless Persons (Hereinafter the 1954 Statelessness Convention) is a key international legal instrument that places a

⁶¹² Committee on the Protection of the Rights of All Migrant Workers and Members of their Families <https://www.ohchr.org/en/treaty-bodies/cmw/background-convention> (accessed 19 June 2021)..

⁶¹³ United Nations Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en (accessed 19 June 2023).

⁶¹⁴ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families concedes that 'there is no obligation on a state to grant nationality to all children born in their territory see, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return CMW/C/GC/4-CRC/C/GC/23 para 24.

clear obligation on states to protect stateless people, including children. The Convention aims to ensure that stateless people enjoy fundamental human rights and freedom from discrimination.⁶¹⁵ Despite various calls on South Africa to ratify the 1954 Statelessness Convention,⁶¹⁶ it has not done so. It is, however, important to discuss this convention considering that it provides the overarching legal framework on the status of stateless persons. Moreover, South Africa has pledged to ratify the convention,⁶¹⁷ therefore, it is necessary to discuss the obligation to grant nationality to a stateless person under this convention. Article 12 of the convention states that the personal status of a stateless person shall be governed by the contracting state. It is worth noting that the convention makes no mention of what nationality entails. It does not refer to nationality being a right nor does it mention the link between nationality and the enjoyment of rights. What the convention does is establish a legal framework for the protection of stateless people. It does not place an obligation on contracting states to grant nationality to stateless people. States are only obliged to put measures in place that allow for the recognition and protection of stateless people.⁶¹⁸

Several institutional bodies have urged states to ratify this convention to eradicate childhood statelessness.⁶¹⁹ This push for ratification is based on the fact that very few states have signed or ratified this convention. As of June 2023, there were only 29 signatories and 96 parties to the convention.⁶²⁰ The limited number of signatories and lack of interest in ratifying this con-

⁶¹⁵ Preamble of the 1954 Statelessness Convention.

⁶¹⁶ UPR of South Africa (4th Cycle - 41st Session) <https://www.ohchr.org/en/hr-bodies/upr/za-index> (accessed 20 July 2023).

The New Humanitarian “Solving Statelessness in Southern Africa” (30 January 2013) <https://www.thenewhumanitarian.org/analysis/2013/01/30/solving-statelessness-southern-africa> (accessed 19 June 2023).

⁶¹⁷ See, Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021 Statelessness and Nationality in South Africa https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (accessed 4 August 2023). Solving statelessness in Southern Africa, 30 January 2013. <https://www.refworld.org/docid/510bbe262.html> (accessed 4 August 2023).

⁶¹⁸ K Bianchini *Protecting Stateless Persons the Implementation of the Convention Relating to the Status of Stateless Persons Across EU States* (2018) at 112.

⁶¹⁹ See for example, Resolution 2099 (2016) issued by the Council of Europe on ‘The need to eradicate childhood statelessness’, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22556&lang=en>. Open Justice Initiative ‘Children’s Rights to a Nationality’ <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/RelatedMatters/OtherEntities/OSJI/ChildrenNationalityFactsheet.pdf>. (accessed 18 October 2023). The United Nations Refugee Agency <https://www.unhcr.org/ending-statelessness.html>. The UN Agency on Refugees Ensuring that no child is born stateless <https://www.refworld.org/pdfid/58cfab014.pdf>. UNHCR ‘Under the Radar and Under Protected: The urgent need to address stateless children’s rights (2012) <https://www.unhcr.org/509a6bb79.pdf>. (accessed 18 October 2023).

⁶²⁰ The United Nations Treaty Collections https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (accessed 19 July 2023).

vention is significant for two reasons. Firstly, it means that states are skeptical about committing to a convention that places an explicit obligation on them to protect stateless people. This skepticism may be due to various factors such as the lack of political will,⁶²¹ issues of xenophobia, and immigration policies. Secondly, states might not have the necessary resources that are required to give effect to the provisions of the convention. For example, Article 25 of the Convention requires member states to provide administrative assistance to a stateless person to obtain assistance from authorities of a foreign country to whom he cannot have recourse. This can be difficult for countries that lack the resources required for this kind of administrative assistance. Admittedly, Article 25 (4) allows for states to charge fees for these services, however, assisting a stateless person to obtain assistance from authorities of a foreign country requires more than financial resources. It also requires a state to have sufficient and well-trained officials who will be able to do this task efficiently. For childhood eradication, this convention does little to help us understand the issue of nationality and which states bears the onus of granting nationality to stateless children.

4.1.6. *The Reduction of Statelessness 1961*

Although South Africa has not ratified the Convention on the Reduction of Statelessness 1961, it is critical to discuss this convention considering that it provides the foundation of the international legal framework to address statelessness. The Convention on the Reduction of Statelessness 1961 (hereinafter the 1961 Statelessness Convention) was adopted with the specific aim of reducing and preventing statelessness.⁶²² The difference between the 1954 Statelessness Convention and the 1961 Statelessness Convention is two-fold. The 1954 Statelessness Convention acknowledged and recognised the legal status of stateless people and the need for them to be afforded rights. The 1961 Statelessness Convention went a step further by requiring contracting States to reduce and prevent statelessness within their territories. Article 1 of the 1961 Statelessness Convention requires a contracting state to grant nationality to a person born within its territory if the person would otherwise be stateless. Article 1 has two limitations. Firstly, Article 1 (a) provides that the acquisition of nationality at birth shall be granted by the operation of national law. This gives a contracting state the power to enact a

⁶²¹ T Bloom Problematising the Statelessness Conventions UNU-GCM Institute on Globalization, Culture and Mobility United Nations University <https://collections.unu.edu/eserv/UNU:1969/pdf0201BLOOM.pdf> (accessed 20 June 2023).

⁶²² See introductory Note by the Office of the United Nations High Commissioner for Refugees <https://www.unhcr.org/media/30028> (accessed 19 June 2023).

national law that sets out the requirements to be met by a potential stateless person born within its territory. These requirements may be structured in a manner that results in some stateless people not qualifying for nationality.

The wording of Article 1 (b) highlights the second limitation. In terms of this subsection, a contracting state has the power to enact national laws that provide the requirements on how an application for the acquisition of nationality may be lodged. Even though Article 1 is clear on who bears the onus of granting nationality to a potentially stateless person, states still have the autonomy to limit this right through national laws. Another shortcoming of this article is that it does not provide details and guidance on what it means for a person to be ‘otherwise stateless.’ This leaves room for states to decide what it means to be ‘otherwise stateless.’ Article 2 of the Convention falls short in that it merely recognises that an abandoned child found in the territory of a contracting state shall, in the absence of proof of the contrary, be considered to have been born within the territory of parents possessing the nationality of that state. The problem with this provision is that it does not guarantee that an abandoned child will be given nationality, rather, it merely speaks to the status of birth of such a child. Being born in a particular state does not guarantee the acquisition of nationality. Although this Convention provides better guidance on which states bear the onus of granting nationality to a stateless child, it limits the right to nationality by giving states the prerogative to give effect to this right through national law. Considering that nationality plays an important role in the enjoyment of rights, this convention does not impose an obligation on states to grant nationality to stateless children. Imposing an obligation on a state to grant nationality to everyone born within its territory is considered superfluous by some states.⁶²³

4.1.7. *The Convention on the Rights of the Child 1989*

The Convention on the Rights of the Child 1989 (CRC) is arguably more progressive as far as the rights of children are concerned. It has been ratified by 196 states (including South Africa, which ratified the CRC in 1995). It is one of the most widely ratified human rights conventions in history. It has been ratified by all states except for the United States and Soma-

⁶²³ See, United Nations Legislative History of the Convention on the rights of the child (2007) 1 at 171 <https://www.ohchr.org/sites/default/files/Documents/Publications/LegislativeHistorycrc1en.pdf>. (accessed 20 June 2021).

lia.⁶²⁴ It is the first convention that is legally binding and provides for norms and standards regarding the protection and promotion of children's rights. The fact that the CRC has received such widespread ratification speaks to the commitment of states to protecting and promoting children's rights. The drafting of Article 7 was contentious with some states making numerous reservations regarding the specific wording of Article 7.⁶²⁵ The drafters of the CRC departed from the phrasing of 'the right to a nationality' and opted for the phrasing of "the right to acquire a nationality" because using "the right to a nationality" risked undermining state sovereignty in deciding who its nationals are.⁶²⁶ The United States of America noted, for example, that using 'the right to acquire nationality' instead of the 'right to a nationality' would avoid any suggestion that the convention would automatically entitle stateless children entering the territory of a member state to the nationality of that state.⁶²⁷ Malawi raised the concern that nationality is a matter of municipal law and that it is for each state to decide who are to be its nationals.⁶²⁸ Germany noted that nowhere does the acquisition of nationality by birth depend solely on the natural fact of birth; all nationality laws require additional elements which must be related to the birth and which are the essential factors conferring nationality.⁶²⁹ Ultimately, the drafters of the CRC reached a compromise as reflected in Article 7. Article 7 of the CRC, just like Article 24(3) of the ICCPR, does not provide the child with a right to nationality. Article 7 of the CRC states:

- (1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality.

⁶²⁴ K Boumans "Filling the gaps: New proposals for the convention on the rights of child" (2015) 43 (1) *Syracuse Journal of International Law and Commerce* 191-222.

⁶²⁵ Germany noted that "article III of the draft gives rise to serious reservations. Unlike the texts of other provisions concerning nationality' (article 15 of the Universal Declaration of Human Rights of 10 December 1948 and article 24, paragraph 3 of the International Covenant on Civil and Political Rights of 19 December 1966), article III of the draft Implies that the Convention wishes to establish the child's nationality." Question of a convention on the rights of the child: report of the Secretary-General (E/CN.4/1324) 30 <https://digitallibrary.un.org/record/6629?ln=en#record-files-collapse-header> (accessed 20 June 2023).

⁶²⁶ In noting its reservation against 'the right to nationality,' Germany stated that "Nowhere does the acquisition of nationality by birth depend solely on the natural fact of birth; quite the contrary, apart from birth, all nationality laws require additional elements which must be related to the birth and which are the really essential factors conferring nationality. These correlative factors are sanctified as principles by international law" Question of a convention on the rights of the child : report of the Secretary-General (E/CN.4/1324) 30 <https://digitallibrary.un.org/record/6629?ln=en#record-files-collapse-header> (accessed 20 June 2023). See also, S Detrick "The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires" (1992) *American Journal of International Law* at 640.

⁶²⁷ Report of the Working Group to the Commission on Human Rights (1980) (E/CN.4/L.1542) para 37 <https://digitallibrary.un.org/record/12887?ln=en> (accessed 20 June 2023).

⁶²⁸ Question of a convention on the rights of the child: report of the Secretary-General (E/CN.4/1324) addendum at 4.

⁶²⁹ *Ibid* 170.

- (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

This provision is progressive because it not only recognises the right for a child to acquire nationality at birth, but it also requires states to ensure that this right is realised through the implementation of national law. More importantly, states are expected to ensure that the right to acquire nationality is especially realised where a child would otherwise be stateless. The obvious shortcoming of Article 7 of the CRC is that it does not place an obligation to grant nationality to a stateless child in any particular state. However, Article 7, though lacking in clarity, is an impressive development when compared to the provisions of other instruments, such as the UDHR and the ICCPR, which make no mention of statelessness.

The position remains that it is for States, based on the operations of their national laws, to determine which children will acquire a nationality. Moreover, the right to acquire nationality is not a right to a specific nationality.⁶³⁰ Thus, the overall limitation of Article 7 is that it still leaves states with the power to determine who their nationals are in accordance with the notion of state sovereignty. Effectively, states still enjoy the prerogative to decide the requirements that have to be met for a stateless child to be granted nationality. It is, thus, easy to see again how despite making mention of the term “nationality”, Article 7 of the CRC still places no binding obligation on states, including South Africa, to grant all stateless children nationality.

4.2. International treaties and policies dealing with Nationality at the African Union Level

The African Union (AU) was officially launched in 2002 as a successor to the Organisation of African Union (OAU).⁶³¹ The AU consists of 55 states that make up the countries of the

⁶³⁰ J Stein “The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: The Committee’s Role and Potential” (2014) 24 (3) *The International Journal of Children’s Rights* at 12.

⁶³¹ In May 1963, 32 Heads of independent African States met in Addis Ababa Ethiopia to sign the Charter creating Africa’s first post-independence continental institution, The Organisation of African Unity (OAU). The OAU was the manifestation of the pan-African vision for an Africa that was united, free and in control of its own destiny and this was solemnised in the OAU Charter in which the founding fathers recognised that freedom, equality, justice and dignity were essential objectives for the achievement of the legitimate aspirations of the African peoples and that there was a need to promote understanding among Africa’s peoples and foster co-operation among African states <https://au.int/en/overview>. See also; J Adibe *Editorial: African Union and the Quest for African Solution for Africa’s Problems* (2022) 11 (1) *Journal of African Union Studies* at 5-12.

African continent.⁶³² As the guardian of human rights and other related issues within the African continent, the AU has made progress in terms of human rights protection. However, as far as the issue of the right to nationality is concerned, the AU has fallen short. For instance, there is no regional African convention governing issues of nationality and statelessness. This is contrastable with other regions, such as Europe and Asia, which have continental legal instruments on the issue.⁶³³ It is pertinent to note that the AU admits that there is no right to nationality in the region.⁶³⁴ Moreover, the AU in Resolution 234 on the *Right to Nationality*, which called for a study on the issue of the right to nationality, observed that there is no continental treaty that recognises the right to nationality as an individual's basic right.⁶³⁵ Some treaties under the AU, however, make provisions for nationality in one way or another. These treaties are discussed to assess whether they provide a solid foundation for the right to nationality, with the potential to address the challenge of statelessness.

4.2.1 *The African Charter on Human and People's Rights 1986*

The African Charter on Human and People's Rights (ACHPR) came into effect in 1986 and has been signed and ratified by 54 states, including South Africa.⁶³⁶ The ACHPR recognises that fundamental human rights stem from the attributes of human beings which justifies their national and international protection. The ACHPR places an emphasis on the protection and promotion of human rights in Africa.⁶³⁷ The glaring shortcoming of the ACHPR is that it makes no mention of the right to nationality. The rising number of displaced, undocumented, and possibly stateless people necessitated collective standards and procedures for settling questions relating to the specific aspects of the right to a nationality and the eradication of statelessness in Africa.⁶³⁸ To this end, the Draft Protocol to the African Charter on Human

⁶³² Ibid.

⁶³³ See for example, The European Convention on Nationality 1997, The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession 2006, the Human Rights Declaration of the Association of Southeast Asian Nations 2012.

⁶³⁴ Department of Political Affairs: African Union Commission. The African Union Approach to the Right to Nationality: Statelessness Impact on Africa's Development and the need for its eradication presentation_approach_on_statelessness_in_africa_dpa_auc.pdf (achpr.org) para 7 (accessed 18 October 2023).

⁶³⁵ The African Commission on Human and Peoples' Rights adopted the resolution at its 54th Ordinary Session in 2013.

⁶³⁶ <https://www.achpr.org/ratificationtable?id=49> (accessed 18 October 2023).

⁶³⁷ See, Preamble to the African Charter on Human and People's Rights.

⁶³⁸ Member States Experts Meeting on the 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 (May 2018)

and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (Draft Protocol on Statelessness in Africa) was adopted by the African Commission on Human and Peoples' Rights (African Commission) in 2018. The aim of the Draft Protocol on Statelessness in Africa is to facilitate the inclusion of individuals within African states, by providing legal solutions to practical problems linked to lack of nationality, to eradicate statelessness, and above all, to identify the principles that should govern relations between individuals and states concerning these issues.⁶³⁹

Article 3 of the Draft Protocol on Statelessness states that each state has the prerogative to decide who its nationals are but must agree and recognise that every person has a right to a nationality. This wording is contradictory. It is problematic to recognise the right to a nationality and at the same make it explicit that it is for states to determine who their nationals are. The wording is not only state-centric but also, in allowing states the discretion to determine who their nationals are, such determination generally has the effect of making it impossible for certain individuals to meet the criteria for nationality in those states, thus, defeating the notion of a right to a nationality. Furthermore, in terms of the draft protocol, states have the obligation to act, both alone and in cooperation with each other, to eradicate statelessness and ensure that every person has the right to the nationality of at least one state where he or she has an appropriate connection.⁶⁴⁰ The framing of the right to nationality in the traditional state-centric approach which leaves nationality issues at states discretion is a common thread seen in the international conventions that have been discussed in the preceding sections. Article 3 reiterates state sovereignty and merely provides general principles for states to consider when deciding who their nationals are. Article 5 states that a state party shall, at a minimum, attribute nationality by operation of law from the moment of birth to a category of people, including a child, who would otherwise be stateless. Qualifying the acquisition of nationality by giving states the power to decide, by operation of national laws, who its nationals are, reinforces the lack of clear treaty obligation on states to grant nationality to stateless people.

https://au.int/sites/default/files/newsevents/conceptnotes/34197-cn-concept_note_abidjan-_statelessness-final_2.pdf (accessed 20 June 2023).

⁶³⁹ 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 Explanatory Memorandum para 2 https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_originalexplanatory_memorandum.pdf (accessed 20 June 2023).

⁶⁴⁰ Article 3 (2)(c).

There was undoubtedly an urgent need to adopt a collective legal framework relating to statelessness in Africa, however, the Draft Protocol on statelessness does not bring any new solution to addressing the ambiguity of whether or not there is an obligation on states to grant stateless children nationality. Instead, it reinforces the framing of the right of nationality as a matter of state prerogative. General principles do not automatically amount to an obligation; they merely serve as guiding principles that states are to consider when implementing a particular right.⁶⁴¹ The overall framing of the draft protocol on statelessness is similar to other conventions,⁶⁴² which follow a state-centric approach to the acquisition of nationality.

The enforcement of the African Charter on Human and Peoples' Rights is advanced through two organisations – the African Commission and the African Court on Human and Peoples' Rights. These two organisations have made certain pronouncements on the subject of nationality. Thus, it is critical to engage with these pronouncements to assess whether they have provided some clarity regarding the issue of whether the ACHPR places an obligation on states to grant nationality to stateless children.

4.2.2 *The African Court of Human and Peoples' Rights*

The African Court on Human and Peoples' Rights was established under Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 2004. The African Court is a continental court established by African countries to ensure the protection of human and people's rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights. Unlike the findings of the African Commission, which serve as recommendations,⁶⁴³ the decisions of the African Court are final and binding on state parties to the Pro-

⁶⁴¹ See; C Egget "The Role of Principles and General Principles in the 'Constitutional Processes' of International Law" (2019) 66 *Netherlands International Law Review* at 197–217. Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto and United Nations Human Rights (2016) https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ_PrinciplesBusinessHR.pdf (accessed 18 October 2023).

⁶⁴² For example, The International Covenant on Civil and Political Rights 1976, the Convention on the Status of Stateless Persons 1954, the Convention on the Reduction of Statelessness, the Convention on the Rights of the Child 1989 and the African Child on the Rights and Welfare of the Child 1990.

⁶⁴³ Pertinent to note that the recommendations of the African Committee can become binding if they are adopted by the African Union Assembly of Heads of State and Government, pursuant to article 59 of the African Charter on Human and Peoples' Rights.

to the African Charter on Human and Peoples' Rights.⁶⁴⁴ More importantly, the African Court's jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and the application of the African Charter on Human and Peoples' Rights, the Protocol on The Establishment of An African Court on Human and Peoples' Rights and any other relevant Human Rights instruments ratified by the states concerned.⁶⁴⁵

As far as the right to a nationality is concerned, the African Court has, thus far, adjudicated two cases. The first case was the 2018 decision in the case of *Anudo Ochieng Anudo v Tanzania*.⁶⁴⁶ In this case, the authorities in Tanzania alleged that Anudo had obtained his Tanzanian identifying documents (birth certificate and passport) fraudulently. As such, they confiscated his documents, declared him an illegal immigrant, and deported him to Kenya. Anudo brought an application to the court arguing that the confiscation of his passport, the "illegal immigrant" status issued against him, and his expulsion from the United Republic of Tanzania deprived him of his right to Tanzanian nationality, as guaranteed and protected under Articles 15 (1) and 17 of the Tanzanian Constitution and Article 15 (2) of the Universal Declaration of Human Rights. The court conceded that neither the African Charter on Human and Peoples' Rights⁶⁴⁷ nor the International Covenants on Civil and Political Rights⁶⁴⁸ guarantee the right to nationality.⁶⁴⁹ However, the Court held that the Universal Declaration of Human Rights⁶⁵⁰ forms part of customary international law and constituted a basis for Anudo's right to nationality to be protected.⁶⁵¹

It is worth reiterating that the right to nationality is among the rights entrenched in the UDHR. A conclusion by the African Court that the UDHR has attained customary international law status suggests that the right to nationality as contained in the UDHR also forms part of customary international law. In the *Anudo* case, having concluded that the UDHR is customary international law, the court found that Tanzania violated the right to nationality

⁶⁴⁴ Rule 80 of the Rules of the African Court.

⁶⁴⁵ Article 4 of the Protocol on The Establishment of An African Court on Human and Peoples' Rights.

⁶⁴⁶ Application 012/2015, African Court on Human and Peoples' Rights.

⁶⁴⁷ 1986.

⁶⁴⁸ 1976.

⁶⁴⁹ *Anudo* case para 76, the Court notes that neither the Charter nor the ICCPR contains an article that deals specifically with the right to nationality. However, the Universal Declaration of Human Rights which is recognised as forming part of customary international law provides under article 15 thereof that: "1. Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality..."

⁶⁵⁰ 1948.

⁶⁵¹ *Anudo v Tanzania* 12/2015 para 132.

under Article 15(2) of the UDHR. There has been debate regarding the status of the UDHR, with some authors and commentators arguing that the UDHR forms part of customary international law.⁶⁵² However, some have expressed some reservations about this view.⁶⁵³ It remains debatable whether rights under the UDHR have attained customary international law status. It is, however, generally agreed that some rights under the UDHR have attained customary international law status.⁶⁵⁴ As to what rights under the UDHR have attained customary international law status, the International Court of Justice has considered this on a case-by-case basis. Notables are⁶⁵⁵ the prohibition on genocide;⁶⁵⁶ freedom from racial discrimination, including apartheid, and the prohibition on slavery;⁶⁵⁷ freedom from arbitrary detention and the right to physical integrity;⁶⁵⁸ and protection against denial of justice.⁶⁵⁹ Generally, the International Court of Justice has found that the ‘rules concerning the basic rights of the human person’ in international law are *erga omnes* in nature. The implication of this is that they are deemed to be “the concern of all States”. Given the importance of the rights involved, all states can be held to have a legal interest in their protection.⁶⁶⁰ Thus, in addition to forming part of customary international law, the ‘basic rights of the human person’ constitute obliga-

⁶⁵² See H Hannun “The Status of the Universal Declaration of Human Rights in National and International Law” (1996) 25 *GA. J. Intl & Comp. L.* at 28. Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), reprinted in 9 *J. INT’L COMM. JURISTS REV.* 94 (1968). Declaration of Tehran, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (1968). J Humphrey “The International Bill of Rights: Scope and Implementation” (1976) 17 *WM. & MARY L. REV.* at 527-529. Statement by Finland in the Third Committee of the U.N. General Assembly, Nov. 13, 1980, summarised in U.N. GAOR, 3d Comm., 35th Sess., 57th mtg., at 4, U.N. Doc. A/C.3/35/SR.57 (1980).

⁶⁵³ See, E Irene & A Daes, *Freedom of the Individual Under Law, A study on the individual’s duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights* 50 (New York: United Nations, 1990). K Partsch “The Contribution of Universal International Instruments on Human Rights, in the limitation of human rights in comparative constitutional law” 65.

⁶⁵⁴ See Hurst, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, 25 *Georgia Journal of International and Comparative Law* (1996) at 287; Henkin, ‘Human Rights and State “Sovereignty”’ 25 *Georgia Journal of International and Comparative Law* (1996) 31 ; Kartashkin, ‘Working paper on the observance of human rights by States which are not parties to United Nations human rights conventions’, Sub commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1999/29 ; Kartashkin, ‘Observance of human rights by States which are not parties to United Nations human rights conventions’, Sub-commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/2 ; Ramcharan “The Concept and Present Status of the International Protection of Human Rights, Forty Years after the Universal Declaration” (1989) Schachter *International Law in Theory and Practice* (1991) at 335-345. L Sohn “The New International Law: Protection of the Rights of Individuals Rather than States” (1982) 32 *American University Law Review* at 1.

⁶⁵⁵ 176 East Timor case (*Portugal v Australia*) 1995 ICJ Reports 90, 101.

⁶⁵⁶ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ Reports 15 at 23.

⁶⁵⁷ Barcelona Traction Light and Power Co. Ltd (*Belgium v Spain*), 1970 ICJ Reports 3, 32, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 ICJ Reports 16, 57.

⁶⁵⁸ Diplomatic and Consular Staff in Tehran, 1980 ICJ Reports 3, 42.

⁶⁵⁹ *Belgium v Spain* para 47.

⁶⁶⁰ *Ibid* 2.

tions held by each state towards every other state, and their breach gives rise to a right on any state to invoke the responsibility of the violating party.⁶⁶¹

The International Court of Justice has also concluded that “a very widespread and representative participation” in a treaty can be an indication that a rule has attained customary international law status, particularly, if it is demonstrated that even states that are not parties act in a manner that indicates that they consider the rules to be generally binding.⁶⁶² Almost all states are party to the United Nations Charter. The United Nations Charter has been interpreted by the United Nations General Assembly to create obligations on states to abide by the UDHR.⁶⁶³ Additionally, the CRC entrenches the rights to acquire nationality for children in very strong terms as was discussed in one of the sections above. The CRC has almost received universal ratification, except for two countries – The United States of America and the Republic of Somalia. With such wide ratification, it would seem to follow from the reasoning of the International Court of Justice that the CRC, including the rights therein, such as the right to acquire nationality, have attained customary international law status. However, as noted, the CRC does not place any binding obligation on states to grant stateless children nationality. Moreover, although some rights guaranteed under the UDHR are considered by some to have attained customary international law status, it would be ambitious to conclude decisively that the right to nationality has attained customary international law status, thus, binding on all states. Hannun acknowledges that indeed, the “Universal Declaration of Human Rights has been the foundation of much of the post-1945 codification of human rights”.⁶⁶⁴ The author adds that “many of the Universal Declaration's provisions also have become incorporated into customary international law, which is binding on all States.”⁶⁶⁵ However, it cannot be confidently concluded that all the rights under the UDHR can have attained customary international law status.

⁶⁶¹ See Article 48(1)(b) and accompanying commentary: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) *Yearbook of the International Law Commission*, Vol. II, Part Two at 126-128.

⁶⁶² *North Sea Continental Shelf* para 73 and 76.

⁶⁶³ The United Nations Charter 1945.

⁶⁶⁴ Hannun (1998) 144-158.

⁶⁶⁵ *Ibid.*

Even with the stance that the African Court has taken regarding the UDHR's customary international law status, as far as the right to nationality is concerned, it is of little significance because as already discussed in section 4.1.1 above, the UDHR does not map out the clear obligation on which state bears the onus of granting nationality to stateless persons. Perhaps the significance of the African Court's decision is that it highlights the current discourse regarding the right to nationality, which is that the right to nationality is limited by state sovereignty.⁶⁶⁶ By its own admission, the African Court noted that while the deprivation of nationality has to be done in a manner that avoids statelessness, international law recognises that the granting of nationality falls within the ambit of the sovereignty of states and, consequently, each state determines the conditions for the attribution of nationality.⁶⁶⁷ Inadvertently, the African Court conceded that there is no right to nationality because this is a matter of states' own national laws based on the sovereign nature of states' discretion on this subject.⁶⁶⁸

The 2019 decision in the case of *Robert John Penessis v Tanzania* (*Penessis* case) is the second case in which the African Court dealt directly with the right to nationality. This judgement builds on the 2018 decision of the *Anudo* case. The *Penessis* case concerned Mr. John Robert Penessis (hereinafter Penessis) who was arrested by Tanzanian immigration authorities and subsequently found guilty of residing in Tanzania illegally. Penessis argued that he was born in Tanzania, to Tanzanian parents and is a citizen by birth in terms of the Tanzanian Citizenship Act 1995.⁶⁶⁹ In addition, he had a birth certificate that showed that he was born in Tanzania in 1986. The Tanzanian government argued that Penessis had acquired nationality from the United Kingdom and South Africa and as such had lost his Tanzanian citizenship. In its decision in this matter, the African Court restated that the UDHR forms part of customary international law as was the position in the *Anudo* case.⁶⁷⁰ The Court went a step further to rule that the right to nationality in the UDHR is covered by Article 5 of the African Charter of Human Peoples' Rights which guarantees the right to dignity. Thus, in the *Penessis* case, the African Court found that there was a violation of the right to nationality "as guaranteed

⁶⁶⁶ Para 17.7.

⁶⁶⁷ Para 77-78.

⁶⁶⁸ Ibid.

⁶⁶⁹ According to article 3(1) of the Tanzania Citizenship Act, a citizen by birth is any person who is a citizen of the United Republic of Tanzania under the following conditions: by virtue of the operation of section 4 which provides that persons born in Mainland Tanzania or Zanzibar are Tanzanian. Such persons must be born before Union Day by virtue of Section 5. Any person born in the United Republic of Tanzania on or after Union Day, by virtue of his birth in Zanzibar and of the Article 4(2).

⁶⁷⁰ Para 85.

by Article 5 of the Charter and Article 15 of the UDHR”.⁶⁷¹ The African Court reiterated that although states have the sovereign right to determine nationality, however, the arbitrary denial of the right to a nationality is contrary to the right to human dignity as guaranteed under the African Charter on Human and Peoples’ Rights.⁶⁷²

Again, one gathers from the decision in the *Penessis* case that the African Court conflated the right to nationality with the right to dignity and did very little to unpack the right to nationality and which state bears the obligation to grant nationality to those who are stateless. Such vagueness further left the right to nationality in limbo. Moreover, as the case was in *Anudo*, despite suggesting that the right to nationality had attained customary international law status, the African Court in the *Penessis* case failed to demonstrate how the criteria for recognition of rights as customary international law were met. The furthest that the African Court has gone is a blanket assertion that the entire UDHR forms part of customary international law.

Moreover, despite ruling that the UDHR, including the right to nationality, forms part of customary international law, the African Court made it explicit in the *Anudo* case that “conferring of nationality to any person is the sovereign act of states.”⁶⁷³ This viewpoint was reiterated in the *Penessis* case where the African Court noted that “while deprivation of nationality has to be done in a manner that avoids statelessness, international law recognises that the granting of nationality falls within the ambit of the sovereignty of states and, consequently, each state determines the conditions for the attribution of nationality.”⁶⁷⁴ It follows that recognition of the rights to nationality as customary international law by the African Court did not rule out states’ discretion to set conditions that left out some from enjoying the right to nationality. The discretion given to states, in this regard, makes it clear that there is no obligation on states to grant nationality to all stateless individuals, including children, considering that states reserve the right to determine who is a national and who is not. All that states need to ensure is that the conditions are not arbitrary.

⁶⁷¹ Para 168(v).

⁶⁷² Para 85.

⁶⁷³ *Anudo* case para 74.

⁶⁷⁴ *Penessis* case para 85.

4.2.3 *The African Commission on Human and Peoples' Rights*

The African Commission on Human and Peoples' Rights (African Commission) was established through Article 30 of the African Charter on Human and People's Rights 1986.⁶⁷⁵ The African Commission is tasked with formulating and laying down principles and rules aimed at solving legal problems relating to human and people's rights and fundamental freedoms upon which African governments may base their legislation.⁶⁷⁶ The Commission has made certain pronouncements on the subject of nationality. Thus, selected communications before the African Commission are discussed below to assess whether they provide clarity on the right to nationality and whether such clarity imposes an obligation of South Africa to grant nationality to stateless children.

4.2.3.1 *Open Society Justice Initiative v. Côte d'Ivoire*

The African Commission issued a decision regarding Côte d'Ivoire's alleged violation of the right to a nationality by referring to Article 5 of the African Charter on Human and People's Rights.⁶⁷⁷ The communication concerned the Dioula ethnic group which is split between Côte d'Ivoire and Burkina Faso. It was alleged that Côte d'Ivoire's domestic law on nationality was vague, rendering it impossible to determine the requirements for nationality and that this vagueness in the law allowed for authorities to exercise discretion in granting nationality, often resulting in the discriminatory denial of identity documents for Dioulas and others who were consequently left stateless.⁶⁷⁸ The African Commission found that Côte d'Ivoire had violated the right to a nationality as a legal status under Article 5 of the African Charter on Human and People's Rights.⁶⁷⁹ In this case, the African Commission linked the right to legal status with the right to nationality. Despite linking the right to nationality to the right to dignity, the African Commission did not come out clearly to state that there was an obligation on Côte d'Ivoire, in terms of the African Charter on Human and Peoples' Rights to grant nationality. The furthest it went was to make it explicit that states needed to ensure that national laws were clear and that these laws allowed people to apply for nationality.

⁶⁷⁵ Article 30.

⁶⁷⁶ Article 45 of the African Charter on Human and People's Rights 1986.

⁶⁷⁷ *Open Society Justice Initiative v Côte d'Ivoire* Communication No. 318/06.

⁶⁷⁸ Ibid para. 118-120.

⁶⁷⁹ Para 138.

4.2.3.2 *John K. Modise v. Botswana*

In *John K Modise v Botswana*,⁶⁸⁰ also referred to in chapter two, the applicant (Modise) was born in South Africa to Botswana parents before the independence of Botswana. Modise grew up in Botswana and held Botswana citizenship. When he became the leader of the opposing party in Botswana, his citizenship status came into question and the government decided that he did not qualify for citizenship based on descent. The president declared him an illegal immigrant and he was subsequently arrested and deported to South Africa with no opportunity to challenge this decision. Modise was forced to live in the then Bophuthswana Homeland because South Africa did not recognise him as a citizen either. After eight years of living in the homeland, Modise was again deported and for a few months, he lived in no-man's-land and was effectively stateless. He was allowed back to Botswana on a temporary residence permit that needed to be renewed every three months at the discretion of a government officer.

Modise made an application to the African Commission challenging his deprivation of citizenship by the government of Botswana. In 2000, the African Commission held that Botswana violated Modise's right to legal status in terms of Article 5 of the African Charter on Human and People's Rights⁶⁸¹. The African Commission, however, did not decide on Modise's right to nationality, which is unfortunate because he had been stateless due to his deportation. This would have been the opportune time for the African Commission to discuss the issue relating to Botswana's obligation to grant Modise nationality since he was evidently stateless.

What is important to note is that the African Commission conceded that in as much as everyone has a right to nationality, it is up to the states to decide who their nationals are.⁶⁸² It is, however, contradictory for the African Commission to consider nationality as a right and then proceed to rule that states decide who their nationals are. Such a pronouncement is akin to ruling that everyone has a right to freedom from torture, however, it is for every state to decide through its national laws what torture means. If nationality is indeed a right, meaning it accrues to an individual by virtue of being human, it should not be left to the discretion of states. Attempting to call it a right but still leaving it to states to determine its scope renders

⁶⁸⁰ Comm. No. 97/93.

⁶⁸¹ Para 96.

⁶⁸² Para 77-78.

the right illusory. Therefore, the African Commission in the *Modise* communication, as in the preceding Communication of *Open Society Justice Initiative*, fails to unpack the right to nationality and does not provide a basis for leading us to the conclusion that there is a right to nationality under the African Charter on Human and Peoples' Right and a corresponding obligation on states, including South Africa, to grant stateless people nationality.

4.2.3.3 *The Nubian Community in Kenya v. The Republic of Kenya*

The Nubians originated from Sudan.⁶⁸³ During the colonial period, the Nubian soldiers were taken to various parts of British East Africa, including present-day Kenya, to assist the British in their military expeditions. When the military expedition was over, the British authorities refused to return the Nubian soldiers to Sudan.⁶⁸⁴ The Nubians were thus left to settle in Kenya and have done so since the early 1900s.⁶⁸⁵ Following Kenya's independence in 1963, the government treated Nubians differently from other Kenyans. The government treated them as "aliens" for a long time.⁶⁸⁶ The case of *The Nubian Community in Kenya v The Republic of Kenya* (hereinafter *Nubian case*),⁶⁸⁷ concerns the issue of whether the action of the Kenyan government in, allegedly, requiring Nubians to go through a lengthy and rigorous vetting procedure before being issued national identity documents is contrary to the provisions of the African Charter on Human and People's Rights. The complaint was submitted by the Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA) on behalf of the Nubian community of Kenya.

According to the Complainants, Nubians are denied their right to nationality even though they qualify for Kenyan citizenship under the Kenyan Constitution.⁶⁸⁸ Nubians are discriminated against in that they are required to go through a long and complex vetting procedure to obtain the national identity card that is necessary for recognition of their citizenship and essential for everyday life. To qualify for an identity card, Nubians are required to provide additional documents in support of their claims to Kenyan nationalities, such as their grandpar-

⁶⁸³ *The Nubian Community in Kenya v The Republic of Kenya* Communication No. 317/2006 para 3-4.

⁶⁸⁴ Para 6-7.

⁶⁸⁵ Ibid.

⁶⁸⁶ Ibid para 27.

⁶⁸⁷ Communication No. 317/2006.

⁶⁸⁸ Para 22.

ents' identification documents. They must be questioned by the "vetting committee" and given their approval, they must visit the Magistrates' Court to swear an affidavit in support of their claim and they must pay a fee to the court.⁶⁸⁹ Only two other communities are subjected to vetting to obtain ID cards, namely Kenyan Somalis and Kenyan Arabs.⁶⁹⁰

The African Commission was called upon to determine, among others, whether Kenya had violated the Nubian's right to nationality. The African Commission found the Kenyan government to have violated the right to dignity and legal status as guaranteed by Article 5 of the Charter on Human and People's Rights. The African Commission further stated that Article 5 protects claims to nationality as a legal status.⁶⁹¹ In this regard, it emphasised that the discriminatory barriers Nubians face in obtaining or replacing identification cards are arbitrary, and that, due to those barriers, Kenya failed to prevent statelessness. The circumstances of this case, however, need to be placed into perspective to understand why the African Commission's recommendations, in this case, did little to map out the contours of the obligations of states regarding the right to a nationality. Notably, in reaching these recommendations, the African Commission based its findings on a procedure of nationality acquisition that already existed; meaning that there was already a process in place for the acquisition of nationality in Kenya. Therefore, the issue was not a failure to grant nationality, but rather, the African Commission's emphasis was on the process of acquisition of nationality that was flawed and resulted in the infringement of Nubians' right to acquire nationality.

4.2.4 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) came into effect in 2005. The overall aim of the Maputo Protocol is to promote and protect the human rights of women as well as promote gender equality.⁶⁹² The protocol addresses the inequalities that may limit women from passing on nationality in Article 6 by stating that, "a woman and a man shall have equal rights, concerning the

⁶⁸⁹ Para 64.

⁶⁹⁰ Ibid para 71.

⁶⁹¹ Para 40.

⁶⁹² See Preamble to Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005.

nationality of their children.” However, it qualifies this right by providing that this is on condition that it is not “contrary to a provision in national legislation.” Effectively, this equality imperative is subject to national legislation which may still deprive women of passing on nationality to their children. Such is the dilemma, for example, in the Kingdom of Eswatini as discussed in detail in chapter two. Consequently, the framing of nationality in the Maputo Protocol is state-centric, thus, leaving discretion to states and not providing clear obligations.

4.2.5 *The African Charter of the Rights and Welfare of the Child 1990*

As of June 2023, the African Charter on the Rights and Welfare of the Child 1990 (ACRWC) has been ratified by 50 out of the 55 member states of the African Union.⁶⁹³ It has undoubtedly enjoyed significant ratification by Member States. The ACRWC, unlike others like the UDHR, ICCPR, and CRC, makes it clear on which state the onus of granting stateless children rests. Article 6 of the ACRWC states:

“Every child has the right to be registered immediately after birth and the right to acquire a nationality at birth. Furthermore, states are to ensure that Constitutional legislation recognises the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth he is not granted nationality by any other State in accordance with its laws”.

The wording of Article 6 of the ACRWC provides a progressive and clear unpacking of the right to nationality at birth as far as the rights of the child are concerned. It places an obligation on states to ensure the realisation of this right through their constitutional legislation. What this means is that states need to enact legislative provisions that ensure that children born within their territory and are unable to acquire the citizenship of another state, are given the opportunity to acquire nationality especially if not doing so would render them stateless. This is significant progress compared to other international treaties⁶⁹⁴ which fell short when it came to placing an absolute obligation on a particular state to make provision for children to acquire nationality. Perhaps the most significant aspect of Article 6 of the ACRWC is that it is specific regarding the state that bears the obligation to protect children against statelessness - the state where the child is born. However, in as much as a clear obligation is placed on a State to grant nationality to a child born within its territory, this obligation does, nevertheless, not translate into the right to a nationality. By its own admission, the African Union has con-

⁶⁹³ African Union <https://www.acerwc.africa/en/member-states/ratifications> (accessed 20 June 2023).

⁶⁹⁴ Universal Declaration of Human Rights 1948, Internal Covenant on Civil and Political Rights 1996.

ceded that whilst the ACRWC provides the right to a name at birth and the right to acquire a nationality, it does not provide for the right to a nationality.⁶⁹⁵

The African Committee of Experts on the Rights and Welfare of the Child (Committee on ACRW) has given guidance regarding the interpretation of Article 6 of the ACRWC.⁶⁹⁶ The committee on ACRWC concedes that the right to grant nationality remains a state's prerogative, however, it urges states to ensure that national law relating to nationality is in line with international law principles. Regarding international law principles, mention can be made of the principle of the best interest of the child which is entrenched in very strong terms under the ACRWC.⁶⁹⁷ The Committee on ACRWC mandates state parties to make the principle "the primary consideration" in all actions concerning the child.⁶⁹⁸ It follows logically that exercising prerogatives at the national level in a manner that would deny nationality to children, who would otherwise be stateless, is not in the best interest of children. Moreover, the Committee on ACRWC asserts that the state in which a child is born bears the onus of providing nationality to the child if not doing so would render the child stateless.⁶⁹⁹ In a decision by the Committee on ACRWC,⁷⁰⁰ the Kenyan government was found to be in violation of Article 6 of the ACRWC.⁷⁰¹ The committee on ACRWC recommended that the government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, who would otherwise be stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.⁷⁰² The Kenyan government was also found to be in violation of Article 6 of the ACRWC. this was a result of no legislative measures in place that ensured that Nubian children obtained citizenship like

⁶⁹⁵ Department of Political Affairs: African Union Commission. The African Union Approach to the Right to Nationality: Statelessness Impact on Africa's Development and the need for its eradication presentation_approach_on_statelessness_in_africa_dpa_auc.pdf (achpr.org) (accessed 12 August 2023).

⁶⁹⁶ General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: ACERWC/GC/02 (2014).

⁶⁹⁷ See article 4 of the ACRWC.

⁶⁹⁸ Article 4 of the ACRWC. See also, General Comment 5 on State party obligations under the African Charter on the Rights and Welfare of the Child article (1) and systems strengthening for child protection CRC/C/GC/5 para 4.2.

⁶⁹⁹ ACERWC/GC/02 (2014) para 34-40.

⁷⁰⁰ *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya* 002/09.

⁷⁰¹ Para 54

⁷⁰² Para 52.

any other Kenyan child.⁷⁰³ The Kenyan government also failed to put measures in place to prevent Nubian children from becoming stateless.⁷⁰⁴ Therefore, the issue, in this case, was not whether Kenya had the obligation to grant Nubian children nationality. The pertinent issue, rather, was the lack of legislative measures to prevent childhood statelessness as required by Article 6.⁷⁰⁵ The *Nubian* makes it abundantly clear that the state where a child is born bears the onus of preventing that child from becoming stateless if the child is unable to obtain the nationality of any other country.

It must not be forgotten, however, that the ACRWC, just like the ICCPR and CRC, phrases nationality in a manner that gives discretion to states. The right is phrased as “the right to acquire nationality” rather than “the right to a nationality” Thus, although the ACRWC makes it clear that the state where a child is born has the obligation to grant nationality where a child would otherwise be stateless, its use of the term “acquire” which means that the discretion still rests with the state, confirms the view that there is no right to a nationality for stateless children in terms of treaty law.

5 Conclusion

In this chapter, an analysis of a range of international conventions was undertaken to determine how the notion of nationality has been framed and to decide whether such framing places an obligation on states to grant nationality. Various policies at the United Nations level and the African Union level have vouched for the acquisition of nationality as a means to advancing the rights of stateless children. Notables are the UNHCR, the African Committee of Experts on the Rights and Welfare of the Child, and the African Commission on Human and Peoples’ Rights. This chapter unpacked treaties at the United Nations level and the African Union level in order to assess whether there is a right to nationality and consequently whether there is an obligation on states to realise the right to nationality for stateless children. A detailed analysis and unpacking of United Nations and African Union treaties, coupled with engagement with decisions that have dealt with issues of nationality has shown that there is no absolute right to a nationality. Based on this analysis, it can be concluded that as long as

⁷⁰³ Ibid.

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid.

states retain the prerogative to decide how nationality is obtained and by whom, some children will not be able to acquire nationality and thus remain stateless.

The analysis further established that the CRC and ACRWC have made strides in the framing of nationality in comparison to other instruments such as the ICCPR and the UDHR. An analysis of the CRC illustrated that in as much as children have the right to acquire a nationality, it does not necessarily translate into every child having the right to nationality. Fundamentally, having a right to acquire a right is not the same as having a right to something. The legislative history of these treaties suggests that the wording of “right to acquire nationality” was specifically preferred to avoid making nationality an absolute right and instead, a right that is subject to the state’s discretion. Further analysis of the ACRWC demonstrated that children have the right to acquire nationality if they are unable to acquire the nationality of any other state. Accordingly, children who are unable to acquire the nationality of any other state have the right to be given the right, through a state’s nationality laws, to acquire the nationality of the state in which they are born. Consequently, this means that children do not necessarily have a right to the nationality of the state of their birth. Rather, this right now presents them with the opportunity to be dealt with in accordance with the laws of a given state, which laws may be crafted in a manner that excludes some stateless children from acquiring nationality. The wording of nationality as being a right to acquire nationality through the enactment of nationality laws of states rather than being an automatic right to a nationality is in line with the internationally accepted principle of state sovereignty. This principle has long been established in international law. It was emphasised in the renowned case of *Nottebohm, Liechtenstein v Guatemala*⁷⁰⁶ and it was reiterated in the 1985 International Court Judgment of *Continental Shelf, Libya v Malta*⁷⁰⁷, where the ICJ stated that each state has the prerogative to decide who its nationals so far as the laws are consistent with principles of international law.⁷⁰⁸

Therefore, despite the explicit entrenchment of nationality in various treaties, these treaties have not changed the position in international law established in the ICJ case of *Nottebohm*,⁷⁰⁹ which established that based on states’ sovereignty, it is for each state, based on its discretion, to determine who its nationals are. The most important contribution of the Af-

⁷⁰⁶ (1955) ICJ (4) 185.

⁷⁰⁷ *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, I. C.J. Reports 1985, p. 13.

⁷⁰⁸ Para 20.

⁷⁰⁹ (1955) ICJ (4) 185.

rican Charter on the Rights and Welfare of the Child on the subject of children and nationality is that it makes it clear that the state that bears the obligation to grant nationality to a stateless child if such a child would otherwise be stateless, is the state where the child is born. Although the issue regarding which state bears the onus has now been settled, the realisation of this right remains at the discretion of these states by the operations of their nationality laws. Considering the lack of clear obligation on states to grant nationality to stateless children, the question to be answered is whether international children's rights standards can be invoked to ensure that the nationality laws enacted by states ensure access to nationality by stateless children. The next chapter tackles this issue.

CHAPTER SIX: INTERNATIONAL CHILDREN'S RIGHTS STANDARDS AS A BASIS FOR CURTAILING SOUTH AFRICA'S DISCRETION ON ISSUES OF CHILDHOOD STATELESSNESS

1. Introduction

In chapter four, it was demonstrated that in the absence of nationality, stateless children in South Africa struggle to access basic rights including education, social security, and healthcare. Thus, despite the narrative that stateless children are protected by virtue of being human, actual access to basic rights is directly linked to nationality; the absence of which renders human rights an illusion. Effectively, nationality for stateless children is critical and should remain on the agenda of statelessness matters. In the preceding chapter, it was established that in terms of international law, there is no obligation on states, including South Africa, to grant nationality to stateless children. Such a decision on nationality is a matter of South Africa's discretion by virtue of the international law principle of state sovereignty. The question therefore arises, 'how can stateless children be guaranteed nationality, in the absence of an international law obligation on states to grant these children nationality?' This chapter explores international children's rights principles which reinforce the obligation of states, including South Africa, to exercise their discretion on issues of nationality at the national level in a manner that ensures that stateless children are granted nationality.

This chapter seeks to demonstrate that despite the absence of an obligation in terms of international law to grant stateless children nationality, there is an obligation for states to exercise their discretion in the enactment of national laws in agreement with international children's rights standards. States are obliged to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised, among others, in the Convention on the Rights of the Child 1989 and the African Charter on the Rights and Welfare of the Child 1990. Adhering to international children's rights standards including the best interest of the child, non-discrimination, and the right to life, survival and development lends support to the view that states should grant stateless children nationality despite there being no clear obligation in international law on this issue.

2. The Limits of the International Law Principle of Sovereignty

It is internationally acknowledged that each state has the legal right to determine its own internal life, regulate its own domestic affairs, and make laws for its own people within its own territory.⁷¹⁰ State sovereignty refers to the independence and supreme authority of a state.⁷¹¹ State sovereignty continues to be a foundational principle in international law.⁷¹² However, a state's power to regulate its own subjects and make its own rules and laws is, although recognised as important for a state's self-determination, not absolute. According to Juss,⁷¹³ a state's right to regulate its own domestic affairs is limited externally by the possibility of a general resistance, and internally it may be limited by the very nature of power itself.⁷¹⁴ The nature of state sovereignty, thus, limits the exercise of absolute power.

It has been long recognised that state sovereignty comes with the duty of states to exercise their prerogatives in a manner that does not violate the human rights of a state's subjects.⁷¹⁵ According to Article 6 of the Draft Declaration on Rights and Duties of States adopted way back in 1949,⁷¹⁶ it was established that every state has the duty to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language, or religion. Decades after this declaration was made, similar sentiments have been shared by the international community, with the position being that the international legal order cannot be understood anymore as being based exclusively on state sovereignty.⁷¹⁷ State sovereignty is determined and qualified by the human rights regime, which places a duty on states to protect and promote the rights of the people within their terri-

⁷¹⁰ J Garner "Limitations on National Sovereignty in International Relations" (1925) 19 (1) *The American Political Science Review* at 1-24.

⁷¹¹ M Ferreira-Snyman "The evolution of state sovereignty: a historical overview" (2006) 12 (2) *Fundamina* at 3. J Charvet "The Idea of State Sovereignty and the Right of Humanitarian Intervention" (1997) 18(1) *International Political Science Review* at 39-48. D Philpott *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (2001). L Brace and J Hoffman (ed) *Reclaiming Sovereignty* (1997). N Glazer *Sovereignty under Challenge: How Governments Respond* (2002). J Maftai "Sovereignty in International Law" (2015) 11(1) *Acta Universitatis Danubius* at 54. *The Nubian Community in Kenya v The Republic of Kenya*, Communication No. 317/2006. W Shan et al (ed) *Redefining Sovereignty in International Economic Law* (2008). N Winston "The changing character of sovereignty in international law and international relations" (2004) 43(1) *The Columbia journal of transnational law* at 141. B Tonga *State Sovereignty and Non-Interference in International Law: A Critical Appraisal* (Master's thesis, university of Beau, 2018).

⁷¹² L Brace and J Hoffman *Reclaiming Sovereignty* (1997) at 12.

⁷¹³ J Garner *The American Political Science Review* at 24.

⁷¹⁴ *Ibid.* See also, The Draft Declaration on Rights and Duties of States is annexed to UN Document A/RES/375(IV) (6 December 1949).

⁷¹⁵ J Garner *The American Political Science Review* at 24.

⁷¹⁶ The Draft Declaration on Rights and Duties of States is annexed to UN Document A/RES/375(IV) (6 December 1949).

⁷¹⁷ A Peters "Humanity as the A and Ω of Sovereignty" (2009) 20 (3) *The European Journal of International Law* at 513-544.

tory. Thus, at the very foundation of state sovereignty is the respect of human rights.⁷¹⁸ Cahn⁷¹⁹ also asserts that sovereignty gives each state the entitlement to administer its own territory independently, though within the limits that are imposed by international law. Moreover, it has been asserted that there are matters that are domestic, but which may later, due to their importance, reach the international level.⁷²⁰ A further view has been advanced that all matters may become the object of international regulation utilising treaties and whenever this happens, they cease to belong to the domestic jurisdiction of the states.⁷²¹ This applies to state sovereignty and indeed, international law standards and principles play a significant role in limiting state sovereignty.

The limitations on state sovereignty were affirmed by the Permanent Court of International Justice in 1923, which stated that “The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question: it depends on the development of international relations”.⁷²² The Permanent Court of International Justice, in this case, reiterated the fact that state sovereignty is relative and thus, in principle, is not absolute. Therefore, the development of international law is the operative and limiting factor as far as state sovereignty is concerned. It dictates the power and limitation of states when dealing with its subjects. The Permanent Court of International Justice stated that “in the present state of international law, questions of nationality, are in the opinion of the Court, in principle within this reserved domain.”⁷²³ The finding in this case not only confirmed the limited applicability of state sovereignty but also confirmed that the developments of international law, at a given point in time, are the determining factor when determining whether matters are out of the domain of international regulation. The international law standards in 1923 confined matters relating to nationality solely to the discretion of a particular state, however, this is no longer the prevailing discourse in international law.

As consistently noted, state sovereignty is a well-recognised principle under international law; however, this principle is, not absolute. The power to govern and make laws is not isolated but rather dictated and limited by prevailing international law principles and standards.

⁷¹⁸ Ibid.

⁷¹⁹ C Cahn *Human Rights, State Sovereignty and Medical Ethics: Examining Struggles Around Coercive Sterilisation of Romani Women* (2014) at 14.

⁷²⁰ A Trindade “The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations” (1976) 25 (4) *The International and Comparative Law Quarterly* at 715-765.

⁷²¹ Ibid.

⁷²² Ibid.

⁷²³ Ibid.

It could then be argued that matters that were reserved solely for a state's discretion in 1923 may well not be reserved solely for a state's discretion decades later. The international law standards may have previously not considered matters of nationality as warranting international regulation, however, current international law, and in particular international children's rights standards, require states to consider certain principles when issues of children and nationality come to the fore. Consequently, state sovereignty in matters concerning children and their rights is limited by the prevailing international children and human rights standards and principles.

3. Sovereignty on Issues of Nationality and Adherence to International Law

Principles

An essential first step in approaching nationality determination is to review relevant international principles and norms concerning nationality. There are indeed matters which, by their very nature, belong exclusively to the domestic jurisdiction of states.⁷²⁴ Underlying the system of nationality determination is the principle that it is for each state to determine which persons are its nationals. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, for example, states in Article 1:

“It is for each State to determine under its own law who its nationals are. This 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”.⁷²⁵

In general, international law does not provide guidance on how states should exercise their sovereignty regarding nationality matters, however, in 1923, the Permanent Court of International Justice stated that the question of whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question; it depends on the development of international law at a given point in time.⁷²⁶ In affirming the limitation of state sovereignty where nationality matters are concerned, the Inter-American Court on Human Rights, in the case of *Girls Yean and Bosico v Dominican Republic*,⁷²⁷ has stated the following,

⁷²⁴ Permanent Court of Justice Advisory Opinion No 4 para 24.

⁷²⁵ Ibid.

⁷²⁶ Ibid.

⁷²⁷ No. 130 (Sept. 8, 2005).

“Even though it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction”.⁷²⁸

In the Inter-American Court of Human Rights Case of the *Girls Yean and Bosico v Dominican Republic*,⁷²⁹ a petition was submitted to the Inter-American Court of Human Rights on behalf of the Yean and Bosico children who were being denied their birth certificates, and thus, denied the right to a name and nationality. The petition was brought against the Dominican Republic. The Yean and Bosico children were not able to access basic rights such as education because they were denied birth certificates. Challenges of access were because, without a birth certificate, it is not possible to attend school in the Dominican Republic.⁷³⁰ In its judgement, the Inter-American Court of Human Rights affirmed that the issue of nationality cannot be considered merely from the perspective of the state’s discretionary authority because states have the duty to protect.⁷³¹ Moreover, the Court held that although States have the sovereign right to regulate nationality, they are responsible for abiding by international human rights standards protecting individuals against arbitrary state action.⁷³² The Court pronounced that states are, particularly, limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid, and reduce statelessness.⁷³³

At the African Union level, the *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, (Nubian case)⁷³⁴ is notable. This case involved parents of Nubian-descent children who were having difficulty registering the birth of their children. Many of these parents lacked valid identity documents required to register their children’s birth. It was further alleged that even when birth certificates were issued to children of Nubians, Kenyan authorities would explicitly indicate that they were not proof of citizenship, thereby leav-

⁷²⁸ Ibid para 140.

⁷²⁹ Ibid.

⁷³⁰ Para 109.

⁷³¹ Ibid separate opinion by Judge A Trindade para 3.

⁷³² Para 142.

⁷³³ *The Girls Yean v Dominican Republic* (2005) para 140.

⁷³⁴ Decision No 002/Com/002/2009.

ing registered Nubian children in an ambiguous situation.⁷³⁵ The African Committee of Experts on the Rights and Welfare of the Child stated that:

“Although states maintain the sovereign right to regulate nationality, in the African Committee’s view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children’s Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness”.⁷³⁶

The Committee stated further that the Respondent State is bound by limitations imposed by human rights standards within international law.⁷³⁷

At the United Nations level, a recent decision by the Human Rights Committee is notable. On 28 December 2021, the Human Rights Committee published its views in a ground-breaking case of *Denny Zhao v The Netherlands*,⁷³⁸ finding that the Netherlands had violated a child’s right to a nationality by registering his nationality as “unknown” in his civil records, thus hampering his access to international protection as a stateless child. Consequently, the child was left with no prospects of acquiring Dutch nationality.⁷³⁹ The applicant, in this case (Mr. Zhao), was born in the Netherlands to an undocumented Chinese mother. The authorities in the Netherlands registered Mr. Zhao’s nationality as ‘unknown’ because his mother was unable to provide legal identifying documentation. Mr Zhao’s mother attempted to register him as a stateless child so that he could enjoy the international protections afforded to stateless children in the Netherlands, including the right to acquire the nationality of the State in which he was born – the Netherlands. However, because his nationality status at birth was registered as ‘unknown’, he was not able to do so. In its decision, the Human Rights Committee reaffirmed a child’s right to special measures of protection under Article 24 of the ICCPR Regarding the child’s right to acquire nationality. The Human Rights Committee referred to General Comment 17,⁷⁴⁰ according to which:

“States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between le-

⁷³⁵ Ibid para 3.

⁷³⁶ Ibid para 48.

⁷³⁷ Ibid para 48.

⁷³⁸ CCPR/C/130/D/2918/2016.

⁷³⁹ Para 8.3.

⁷⁴⁰ See Rights of the child (Art. 24): 07/04/89 CCPR General Comment No. 17.

gitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.”

It can be gathered that state sovereignty on matters of nationality is not absolute. A state’s discretion, in this regard, is circumscribed by the duty to guarantee individuals equal protection of the law and the obligation to avoid statelessness. The current international relations climate dictates that state discretion on matters pertaining to nationality is no longer absolute. Instead, states are obliged by different international instruments, such as the Convention on the Rights of the Child 1990, the African Charter on the Rights and Welfare of the Child 1990, and the International Covenant on Civil and Political Rights 1966, to ensure that they apply the best interest of the child, non-discrimination and the right to life, development, and survival when dealing with children on issues of nationality.

4. Key Principles in International Children’s Rights

The Convention on the Rights of the Child 1989 (hereinafter CRC), which is the most signed convention,⁷⁴¹ is the first document dedicated specifically to children as bearers of rights. It recognises that children are a vulnerable part of society that need special protection in order to survive and develop. The convention has four core “general principles” that guide the interpretation and implementation of the rest of the convention. The “general principles” of the CRC were introduced by the Committee on the Rights of the Child in the guidelines of the ‘initial reports’.⁷⁴² These ‘initial reports’ will be discussed in more detail in due course.

In 1990, the African Charter on the Rights and Welfare of the Child (ACRWC) was adopted and enshrines the same four core principles that were developed by the CRC in the preceding year. The realisation and implementation of both the rights in the CRC and the ACRWC require a holistic analysis of measures undertaken by state parties concerning every right, taking into account the convention’s four general principles.⁷⁴³ The four core principles are the best interest of the child principle, non-discrimination, the right to life, survival and development, and participation.⁷⁴⁴ Pertinent to note, that these core principles apply to every child

⁷⁴¹A Kanter “Do Human Rights Treaties Matter: The Case for the United Nations Convention on the Rights of People with Disabilities” (2019) *Vand. J. Transnat’l.* at 577.

⁷⁴² Committee on the Rights of the Child, 1991.

⁷⁴³ Z Vaghri et al *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes Children’s Well-Being: Indicators and Research*, 25 (2022).

⁷⁴⁴ Article 2,3, 12 of the CRC.

without exception.⁷⁴⁵ Notably, all four principles have a direct impact on the implementation of the rights of children. However, for the discussions on the rights and protection of stateless children, the analysis will only focus on three principles namely, the best interest of the child and the right to life, survival and development, and non-discrimination. This is because they are directly linked and relevant to the challenge of childhood statelessness. The principle of participation is indeed important for children and their rights. It underscores the right of children to freely express their views in all matters and decisions that affect them and to have those views considered at all levels of society. However, this principle will not be discussed in this chapter because of its limited link to stateless children's right to a nationality as discussed in this thesis.

4.1. *The Best Interest of the Child*

The principle of the best interest of the child is not a new concept or principle. It precedes the CRC.⁷⁴⁶ In 1924, the League of Nations first recognised the importance of the rights of the child by adopting the Geneva Declaration of the Rights of the Child (the Geneva Declaration).⁷⁴⁷ Although the Geneva Declaration did not specifically refer to the best interest of the child as being a particular right or principle, the rights of children were seen as primary in matters relating to slavery, child labour, and child trafficking.⁷⁴⁸ The Geneva Declaration was based on a vital principle which is that "mankind owes to the child the best it has to give."⁷⁴⁹ The catalyst for the Geneva Declaration was the recognition of the gross violation of children's rights during World War II, as well as the aftermath of the War.⁷⁵⁰ The Geneva Declaration emphasised children's material needs and proclaimed that children must have the requisite means for their development.⁷⁵¹ This included food for hungry children, nursing for sick children, due attention for the handicapped and shelter, and support - both physical and

⁷⁴⁵ Article 12 of the CRC.

⁷⁴⁶ For example, this principle was already enshrined in the 1959 Declaration of the Rights of the Child para 2, the Convention on the Elimination of All Forms of Discrimination against Women (arts. 5 (b) and 16, para. 1 (d)). 1924 Geneva Declaration of the Rights of the Child by the League of Nations.

⁷⁴⁷ Geneva Declaration of the Rights of the Child 1924 hereinafter Geneva Declaration.

⁷⁴⁸ A Degol and S Dinku "Notes on the Principle of the best interest of the child: Meaning, History and its place under Ethiopian Law" (2011) 5 (2) *Mizan Law Review* at 320-337.

⁷⁴⁹ See Preamble to the Geneva Declaration.

⁷⁵⁰ Ibid.

⁷⁵¹ Ibid.

emotional for orphans.⁷⁵² Perhaps the most important aspect of the Geneva Declaration can be found in its preamble which reads as follows:

“By the present declaration of the rights of the child, men and women of all nations, recognizing that mankind owes to the child the best that it has to give, declare and accept this as their duty. The phrase “mankind owes to the child the best it has to give” clearly underlines our duties towards children, and it entitles them to the best that mankind can give”.⁷⁵³

The best mankind can give has been interpreted to mean every action taken should consider the best interest of the child.⁷⁵⁴ Moreover, in 1959, the Declaration of the Rights of the Child was adopted and further affirmed the principle that “Mankind owes to the child the best it has to give,”⁷⁵⁵ which was also the principle recognised in the Geneva Declaration⁷⁵⁶. The 1959 Declaration on the Rights of the Child (Declaration on the Rights of the Child) was more comprehensive regarding the vulnerability of children and their need for special protection. It emphasised the need to have safeguards to ensure the care of the child.⁷⁵⁷ The preamble of the Declaration on the Rights of the Child further states that the child, because of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before and after birth.⁷⁵⁸ The Declaration on the Rights of the Child expressly recognises the principle of the best interest of the child. Article 2 of the Declaration on the Rights of the Child provides that:

“The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration”.

The principle of the best interest of the child is also embodied under Article 7 of the Declaration on the Rights of the Child, which states that the “best interests of the child shall be the guiding principle of those responsible for his education and guidance”. It is a proven fact that the best interest of the child principle is not a new concept under international law.⁷⁵⁹ It

⁷⁵² Ibid.

⁷⁵³ The Preamble of the Geneva Declaration 1949.

⁷⁵⁴ Ibid.

⁷⁵⁵ Preamble to the Rights of The Child 1959.

⁷⁵⁶ Preamble to the Geneva Declaration 1949.

⁷⁵⁷ See Preamble to the 1959 Declaration on the Rights of the Child.

⁷⁵⁸ Ibid.

⁷⁵⁹ Degol and Dinku *Mizan Law Review* at 321-337.

gained momentum and notoriety since the adoption of the CRC and the ACRWC but it is not a new term for international children's instruments.

The Best Interest of the Child principle has evolved over the decades and has been applied by some states even before the CRC came into effect, thus, its meaning has evolved and is often widely open for interpretation.⁷⁶⁰ It has been argued that since Article 4(1) of the ACRWC provides that the best interests of the child shall be “the primary consideration” and Article 3(1) of the CRC phrases it as “a primary consideration”. The CRC’s phrasing allows for other principles and considerations to be taken into account and, depending on the circumstances of the case in issue, thereby implying the best interests principle may be overridden.⁷⁶¹ However, the interpretation given by the CRC committee makes it clear that the best interest of the child is paramount and cannot be overridden by any other legal principle unless it is in the best interest of the child to do so. The CRC committee has described the principle of the best interests of the child as a threefold concept.⁷⁶² In the first instance, it is considered a substantive right. A substantive right has been described as the type of right that flows from a particular law. Consequently, at the international level, the best interest of the child flows from international instruments such as the CRC, ACRWC, and ICCPR.⁷⁶³ These instruments speak to the significance of the best interest of the child. This requires that the best interests of the child be assessed and considered as a primary consideration.⁷⁶⁴

According to the CRC committee, the best interest of the child is a self-executing norm.⁷⁶⁵ This means that there is an intrinsic obligation placed on states to ensure that the best interest of the child is placed paramount in all matters that concern children.⁷⁶⁶ For this reason, the best interest principle is an important and powerful principle for the protection of children's rights. Moreover, as a substantive right, it means that when a matter concerning a child comes before any form of tribunal, children's court, or the home affairs panel, to mention a few, the best interest principle must automatically be applied. Consequently, as far as state-

⁷⁶⁰ Ibid.

⁷⁶¹ M Gose *The African Charter on the Rights and Welfare of the Child: An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002).

⁷⁶² General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14, see also N Takács “The threefold concept of the best interests of the child in the immigration case law of the ECtHR” (2022) 62(1) *Hungarian Journal of Legal Studies* at 96-114.

⁷⁶³ Article 23 (4) and 24.

⁷⁶⁴ In *Minister of Welfare and Population Development v Fitzpatrick*, the Constitutional Court held that section 28(2) extends beyond and creates a right independent of the other rights listed in section 28(1) para 4.

⁷⁶⁵ Ibid.

⁷⁶⁶ Ibid.

less children and the acquisition of nationality are concerned, the best interest of the child should be taken as paramount. The question here is whether denying nationality to stateless children is in their best interest. The Institute on Statelessness and Inclusion concedes that statelessness is never in the best interest of the child.⁷⁶⁷ Moreover, the African Committee of Experts on the Rights and Welfare of the Child has stressed that “the acquisition of a nationality cannot be fully implemented unless the cardinal principles of children’s rights are carefully observed.”⁷⁶⁸ Additionally, The A Committee noted that “the implementation of children’s rights requires taking into account the best interests of the child, non-discrimination principles, his or her survival, development, and protection as well as his or her participation.”⁷⁶⁹

In the *Nubian* case,⁷⁷⁰ the African Committee of Experts on the Rights and Welfare of the Child held that Kenya’s actions violated the African Charter’s provisions protecting children’s right to nationality, observing that statelessness is against the best interests of the child.⁷⁷¹ Secondly, the best interest of the child is considered a fundamental, interpretative legal principle.⁷⁷² This means that if there is a legal provision that is open to more than one interpretation, the interpretation that most effectively serves the child’s best interests should be preferred.⁷⁷³ Lastly, the best interest of the child is applied as a rule of procedure.⁷⁷⁴ For example, where the procedure is concerned and a decision is to be made that will affect a specific child, an identified group of children, or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.⁷⁷⁵ Procedures were put in place to implement the best interest principle that needs to be assessed in order to ensure and guarantee the application of this principle.⁷⁷⁶ Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, states parties shall explain how the right has been

⁷⁶⁷ Institute for Statelessness and Inclusion (ISI) *Childhood Statelessness: Statelessness Essentials* (2014) <https://files.institutesi.org/childhood-statelessness.pdf> (accessed 25 June 2023).

⁷⁶⁸ General comment on article 6 of the African Charter on the Rights and Welfare of the Child: Right to birth, name and nationality para 13.

⁷⁶⁹ Ibid.

⁷⁷⁰ Para 42.

⁷⁷¹ Ibid.

⁷⁷² General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) Para 6(b).

⁷⁷³ Ibid.

⁷⁷⁴ Ibid Para 6(b).

⁷⁷⁵ Ibid.

⁷⁷⁶ Ibid. See also, UNHCR Best Interest Procedure (BIP) <https://emergency.unhcr.org/protection/protection-mechanisms/best-interests-procedure> (accessed 9 August 2023).

respected in the decision, that is, what has been considered to be in the child's best interest; what criteria it is based on; and how the child's interests have been weighed against other considerations, whether they are broad issues of policy or individual cases.⁷⁷⁷

One of the things emphasised by the African Committee of Experts on the Rights and Welfare of the Child is that the principle of the best interest of the child is flexible and adaptable, which allows it to be responsive to the situation of individual children, and to evolve knowledge about child development.⁷⁷⁸ Thus the best interest of the child goes beyond what it may seem like at face value. This principle is to be applied in all areas of the functioning of states where children are involved. This includes matters relating to national laws, policies, and procedures where children are concerned. One of the helpful explanations provided by the CRC committee is that a state needs to explain how the principle was considered, in a particular matter, and provide justification for the decision followed.⁷⁷⁹ In addition, there should be procedural guarantees that ensure that steps are taken to ensure the application of the best interest of the child principle in all matters concerning children.⁷⁸⁰

The best interest of the child is a widely accepted and important international children's rights principle.⁷⁸¹ Based on the best interest principle, being stateless and thus, being without a nationality is not in the best interest of any child. This is due to the difficulties that stateless children face in accessing basic rights as discussed in chapter four. As it has been highlighted in previous chapters of this thesis, children without a nationality face numerous challenges when trying to access basic rights such as the right to education, healthcare, and social security in South Africa. Consequently, the right to access basic rights is limited by a child's nationality status. The question, therefore, arises whether being without a nationality is in line with the best interest principle. In other words, is South Africa respecting and promoting the best interest of the child in its approach to nationality for stateless children? It is submitted that as much as South Africa has the sovereign power to decide who its nationals are, this power is not absolute and is curtailed by children's rights principles and standards. The best interest of the child is one such principle that obliges South Africa to consider the best interest of stateless children on the issue of nationality. As confirmed by the African

⁷⁷⁷ Ibid.

⁷⁷⁸ Ibid.

⁷⁷⁹ General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) Para 6(c).

⁷⁸⁰ Ibid.

⁷⁸¹ Degol and Dinku *Mizan Law Review* at 321-337.

Committee of Experts on the Rights and Welfare of the Child, it is never in the best interest of the child to be stateless.⁷⁸² South Africa is, thus, violating the best interest of stateless children by not granting them nationality.

The principle of the best interest of the child is one of the most widely used principles in child-related court cases in South Africa.⁷⁸³ It is enshrined in Section 28 of the South African Constitution. This principle is not new in South African jurisprudence.⁷⁸⁴ It has been used by South African courts pre-democracy,⁷⁸⁵ mostly in private law matters dealing with child custody cases.⁷⁸⁶ Through its judgements, the Constitutional Court has time and again demonstrated that Section 28 (2) is an independent right that informs other 28 rights.⁷⁸⁷ This is significant because other rights contained in Section 28 include the right to a name and nationality from birth, healthcare services, and social security. This means that in a matter concerning a stateless child, the interest of the stateless child is paramount. It would, therefore, be paramount to consider whether denying a stateless child nationality, access to healthcare and social services is in the best interest of a stateless child. The Constitutional Court has been criticised for failing to identify the content of section 28 (2).⁷⁸⁸ This is imperative because in any matter concerning a child, the Constitutional Court applies Section 28 (2) as a yardstick against which other relevant rights are measured. However, failure by the Constitutional Court, in this regard, does not negate the critical role played by the Constitutional Court in not only developing the concept of the best interest of the child but, also its success in using this principle to foster the protection and implementation of children's rights in South Africa. I will demonstrate through Constitutional Court jurisprudence how the court has given meaning to the content of the best interest of the child below.

⁷⁸² General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014) para 86.

⁷⁸³ A Skelton "Too much of a good thing? Best interests of the child in South African jurisprudence" (2019) 52 *De Jure Law Journal* at 557-579.

⁷⁸⁴ *Ibid* at 558 "The best interest of a child principle was established in South African law through case law in the early 1900s."

⁷⁸⁵ M Couzens "The best interests of the child and the Constitutional Court: A critical appraisal" (2019) 9 *Constitutional Court Review* at 363–386.

⁷⁸⁶ *Ibid*.

⁷⁸⁷ *Ibid*. See also, *Minister for Welfare and Population Development v Fitzpatrick* para 17, where the Constitutional Court declared that section 28(2) contains a right independent of the more specific rights contained in section 28(1) of the Constitution.

⁷⁸⁸ *Ibid* para 2.

The starting point in understanding the best interest of the child principle, as applied in South Africa, is to analyse the right itself. It is to be reiterated that in terms of Section 28 (2) of the South African Constitution 1996, in every matter concerning a child, the best interest of the child is paramount. The literal interpretation of this right suggests that whenever there is a matter that involves a child, the interest of the child takes precedence when making decisions about the child. The content of the child's best interests is encapsulated in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*,⁷⁸⁹ where the Constitutional Court held that although it is neither necessary nor desirable to define, the content of the right in section 28(2), the right imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions.⁷⁹⁰ Pertinent to note, section 28 (2) goes a step further⁷⁹¹ by adding the word 'paramount' to this principle. This is noticeable considering that the general wording of this principle is "a child's best interest shall be a primary consideration". The CRC provides only that a child's best interest shall be a primary consideration.⁷⁹² The ACRWC moves the standard higher when compared to the CRC, which merely provides that a child's best interest shall be a primary consideration.⁷⁹³

In the case of *Minister of Welfare and Population Development v Fitzpatrick*,⁷⁹⁴ the Constitutional Court found that section 28(1), which, lists a set of children's rights from name to nationality, social welfare, and access to healthcare is not exhaustive of children's rights. The court found that section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words indicates that the reach of section 28(2) cannot be limited to the rights enumerated in sections 28(1) and 28(2), and must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).⁷⁹⁵ The statement made by the Constitutional Court in this case reinforces the importance of section 28 (2). It makes it clear that the best interest of the child principle is more of a self-standing right than a principle and more im-

⁷⁸⁹ 2009 (4) SA 222 (CC).

⁷⁹⁰ Ibid para 73.

⁷⁹¹ Compared to the Convention on the Rights of the Child 1989 and the African Charter on the Right and Welfare of the Child 1990.

⁷⁹² Article 3(1) of the CRC. However, Art 21 of the Convention requires best interests to be treated as the paramount consideration in the context of adoption.

⁷⁹³ Article 4 ACRWC.

⁷⁹⁴ (2000) (3) SA 422 (CC).

⁷⁹⁵ Para 17.

portantly, it is also a right that strengthens other rights. Moreover, the Court emphasises that the best interest of the child is a right to be applied when dealing with all other rights concerning children. In a more recent judgment, the courts have been clear on the application of the best interest of the child principle, particularly where stateless and undocumented children are concerned. For example, in the *Centre for Child Law v Minister of Basic Education*,⁷⁹⁶ a circular was issued by the Department of Basic Education directed to a cluster of public schools in the Eastern Cape. The circular stated that every learner must provide an identifying document or proof that they have applied for such a document. Failure to adhere to this would result in the stateless/undocumented learner being dismissed from the school. The Court held that section 28 (2) does not only create a stand-alone right but strengthens the right to basic education as well.⁷⁹⁷ In seeking to uphold the best interest of the child in “every matter” it also serves to augment the right to education.⁷⁹⁸ The court went further to state that the South African government has through its signature and ratifying of several instruments, including the CRC and the ACRWC, committed to always giving primary consideration to children’s interests.⁷⁹⁹ These conventions recognise the importance of holding paramount to the best interest of the child in all matters concerning them.⁸⁰⁰

In the 2020 case of *AB v Pridwin Preparatory School*,⁸⁰¹ the Constitutional Court declared unconstitutional a clause in a private school’s contract with parents. The clause allowed the school, at any time, to terminate the contract between the school and the parents of the pupils.⁸⁰² The unconstitutionality related to the rights of children enshrined in sections 28(2) and 29(1)(a) of the constitution⁸⁰³ the Court held that the children’s best interests should have been considered before a decision was made that would have the effect of limiting their right to education.⁸⁰⁴ This judgment is significant because it brings into sharp focus the need to uphold the principles of the best interests of the child in all matters concerning children, along with the other core principles of children’s rights which include non-discrimination equality, life, survival, and development.

⁷⁹⁶ 2840/2017) [2019].

⁷⁹⁷ Para 77.

⁷⁹⁸ Ibid.

⁷⁹⁹ Ibid para 78.

⁸⁰⁰ Para 78-79.

⁸⁰¹ *AB v Pridwin Preparatory School* CCT 294/18.

⁸⁰² Ibid para 34-35.

⁸⁰³ The best interests of the child and the right to education respectively.

⁸⁰⁴ Ibid para 209.

4.2. Non-discrimination

The origin of the non-discrimination principle can be found in the 1945 United Nations Charter (United Nations Charter). This can be deduced from Article 1 (3) of the United Nations Charter which provides an equality guarantee and establishes the foundation for all subsequent human rights treaty development.⁸⁰⁵ Article 1 (3) of the United Nations Charter states that the purpose of the United Nations is to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction to race, sex, language, or religion. Discrimination has been defined by the Human Rights Committee as follows:

“Any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms”.⁸⁰⁶

Moreover, Article 23 of the CRC states the following:

“State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind. In addition, States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”

The principle of non-discrimination thus underpins the determination of the best interests of the child. States are not only obliged to prohibit all forms of discrimination in the enjoyment of rights under the CRC and the ACRWC but they are also required to take appropriate proactive measures to ensure effective measures aimed at redressing a situation of real inequality.⁸⁰⁷ Discrimination impedes the optimum development of the child, whether it takes the form of denial of services, based on equality of opportunity, prejudice, social exclusion, or

⁸⁰⁵ R Ruggiero Article 26: The Right to Benefit from Social Security In Z Vaghri *Monitoring State Compliance with the UN Convention on the Rights of the Child an Analysis of Attributes* (2022) at 219.

⁸⁰⁶ Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994)26. See also, article 24 of the Covenant on Civil and Political Rights provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

⁸⁰⁷ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration para 41.

physical and psychological abuse.⁸⁰⁸ The CRC committee also noted that discrimination on any of the grounds in Article 2 of the CRC violates a child's human dignity.⁸⁰⁹ Compliance with Article 2 of the CRC is integral to the meaningful implementation of Article 6 of the CRC.⁸¹⁰ It is thus clear that non-discrimination is a basic right under international law. It is a right that is contained in various conventions.⁸¹¹

Discrimination is more than just excluding certain groups of people based on a particular status such as race, gender, and religion.⁸¹² It is a non-passive right that requires states to proactively create an environment, policies circumstances and that eliminate discrimination and promote equality.⁸¹³ Regarding the right to a name and nationality, the African Committee of Experts on the Rights and Welfare of the Child states that non-discrimination, in the context of the rights to a name, birth registration and to acquire nationality, means that no child's birth should go unregistered whatever his or her parent's race, ethnic group, colour, sex, language, religion, national and social origin, fortune, birth or another status.⁸¹⁴ None of these grounds should justify a child's deprivation of his or her right to acquire a nationality under Article 6 of the African Charter. This means that children born in South Africa, to stateless or undocumented parents, should be registered at birth regardless of their parent's lack of legal documentation. Refusing to register the birth of children born to stateless or undocumented parents amounts to discrimination, which is in violation of Article 3 of the ACRWC.⁸¹⁵ The African Committee of Experts on the Rights and Welfare of the Child emphasises the fact

⁸⁰⁸ Lansdown *Article 2: The Right to Non-discrimination* at 11.

⁸⁰⁹ General Comment 1: The aims of education (CRC/GC/2001/1).

⁸¹⁰ Lansdown *Article 2: The Right to Non-discrimination* at 11.

⁸¹¹ See article 2 paragraph 1 of the International Covenant on Civil and Political Rights which obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, national or social origin, birth or other status. See also, The Elimination of All Forms of Racial Discrimination 1965, UN Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), UN Convention against Discrimination in Education (1960), African Charter on the Rights and Welfare of the Child (1990).

⁸¹² General Comment No. 25 (2021) on children's rights in relation to the digital environment para 9.

⁸¹³ Article 2 CRC, General Comment No.5 General Measures of implementation (CRC/GC/2003/5) para 12.

⁸¹⁴ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014)) para 16.

⁸¹⁵ See also, *ibid* para 54, where the ACRWC Committee states that, "denying the right to birth registration to children belonging to a specific category (refugees, IDPs and asylum seekers) is an act of discrimination against those children and constitutes a violation of their right to non-discrimination embodied in Article 3 of the African Children's Charter and in other international human rights instruments."

that discrimination on whatever grounds put in peril the principle of universality of birth registration.⁸¹⁶ Children have been discriminated against in South Africa, which is a clear violation of the children's principle of non-discrimination. This is evident in cases that have come before the courts. For example, in the case of *Centre for Child Law v Minister of Basic Education*,⁸¹⁷ a circular was issued by the Department of Education directed to a cluster of public schools in the Eastern Cape. The circular stated that every learner must provide an identifying document or proof that they have applied for such a document. Failure to adhere to this resulted in stateless and undocumented learners being dismissed from the school. The only reason that these learners were excluded from school was due to their lack of documentation.⁸¹⁸ In the final instance, the Court held that "it is an undeniable fact that the children affected by the impugned Circular are disadvantaged by their lack of documentation and emanate from the vulnerable, poor black community."⁸¹⁹

The issue of discrimination in birth registration came into scrutiny more recently in 2022 in the case of *Centre for Child Law v Director General: Department of Home Affairs*.⁸²⁰ The issue, in this case, pertained to the discriminatory nature of Section 10 of the Births and Deaths Registration Act 51 of 1992. Section 10 of the Birth and Death Registration Act did not permit a child born out of wedlock to be registered by the father without the mother's consent. In addition, a child born out of wedlock would be registered under the mother's surname, unless the mother consented to the child being registered under the father's surname. The effect of this provision was that an unmarried father did not have equal rights as a married father, as far as conferring nationality to their child was concerned. The court held that the provision discriminated against children born out of wedlock.⁸²¹ Furthermore, the provision discriminated against unmarried fathers.⁸²² In this instance, this discrimination contributed to statelessness in South Africa. This is because, under the Birth and Death Registration Regulations of 2014, an undocumented mother is unable to register the birth of their child. Consequently, a father, who has a child out of wedlock, with an undocumented mother, who refuses to give him consent to register his child has the potential to become stateless. The significance of this case is that the court also emphasised the interplay between the best inter-

⁸¹⁶ Ibid.

⁸¹⁷ (2840/2017) [2019].

⁸¹⁸ Para 85.

⁸¹⁹ Para 86.

⁸²⁰ SA) 131 (CC) 2022.

⁸²¹ Para 79.

⁸²² Para 52-53.

est of the child and other rights such as non-discrimination. In this regard, the court held that Section 10 of the Birth and Death Registration Act “is manifestly inconsistent with the best interests of the child as well as her rights to dignity and equality and her right to a name and nationality from birth”.⁸²³

4.3. *The Right to Life, Survival, and Development*

In terms of Article 6 of the CRC, children have an inherent right to life and state parties shall ensure to the maximum extent possible the survival and development of the child. Article 6 obliges states to protect a child’s right to life, survival, and development. Article 6 has separate rights to it in one article. In terms of Article 6, states are not only obliged to protect a child’s right to life but they must also ensure that a child survives and develops. Article 6 thus encompasses 3 rights, *visa* right to life, survival, and development. This article emphasises that the right to life is meaningless if there are no state resources in place to ensure that a child survives and develops. The right to development and survival for stateless children is affected by the challenges that stateless children face when accessing basic rights. A child may have the right to life but if the state fails to provide resources that a child needs to survive and develop, such as access to education, social welfare, and health, the right to life becomes almost meaningless.

Article 6 provides the most critical rights for children, especially stateless children. The reason for this is that the survival and development of a stateless child are often hindered from birth by the lack of nationality. The right to survival and development is connected to other rights as asserted by Principle 7 of the Declaration on the Rights of the Child 1959.⁸²⁴ According to Principle 7 of the Declaration on the Rights of the Child, a child shall be given an education that will promote and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of morality and social responsibility, and to become a useful member of society. Moreover, it has been argued by some scholars, rightly so, that Article 6 is a lens through which all other articles in the CRC should be interpreted.⁸²⁵ For a stateless child, this viewpoint cannot be overstated. For instance, without access

⁸²³ Para 79.

⁸²⁴ Declaration on the Rights of the Child.

⁸²⁵ U Kilkelly The Best Interests of the Child: A Gateway to Children’s Rights? In E Sutherland and L Macfarlane (Eds.) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-being* at (2016)51-66.

to the basic rights needed for survival and development such as education and healthcare, a stateless child's right to life is meaningless.⁸²⁶

Article 6 of the CRC is interdependent with other rights such as the right to free and compulsory primary education,⁸²⁷ the right for every child to benefit from social security⁸²⁸ and the right to access the highest attainable standard of health.⁸²⁹ Many children, in particular stateless and undocumented children, do not have access to health care, education, or a standard of living that optimises their opportunities for development. Sutherland asserts that, "in order for article 6 to be fulfilled, a first step is to understand the real content of what it guarantees to the world's children and the nature of the obligations it places on States Parties. That enquiry necessarily involves setting article 6 in the broader context of human rights obligations."⁸³⁰ Article 6 of the CRC needs to be seen in the broader context of human rights and not merely as a concept reserved for children's rights. This speaks to the significance of the right. The fact that there are children who are denied the basic rights that are essential for their survival and development means that states are not doing enough to promote or respect this very significant article. South Africa is a signatory to the CRC which means that it is obliged to adhere to Article 6 notwithstanding a child's nationality status. Stateless children in South Africa are often denied the rights needed for survival and development due to a lack of nationality. Consequently, without nationality, these children are affected in their development stages and their ability to survive is affected by not having a nationality.

The ACRWC has a similar provision. Article 5 of the ACRWC states that every child has an inherent right to life and state parties to the present charter shall ensure, to the maximum extent possible, the survival, protection, and development of the child. Article 5 of the ACRWC adds an extra layer to this provision by obliging states to recognise that every child has the right to life, survival, development as well as protection. State parties are, therefore, required to not only ensure that a child's right to life is respected, but also that a child's right to survival and development is protected. According to the African Committee of Experts on the Rights and Welfare of the Child, the rights of the child to survival, development, and protection require that he or she benefits from special measures of protection from his/her early in-

⁸²⁶ Sutherland states that, "It becomes apparent, then, that article 6(2) has the potential to touch all areas of a child's life and places a vast array of obligations on states." "The child's right to life, survival and development: evolution and progress" (2015) *STELL LR* at 279.

⁸²⁷ Article 28 CRC

⁸²⁸ Article 26 CRC.

⁸²⁹ Article 24 CRC.

⁸³⁰ Sutherland *STELL LR* at 279.

fancy.⁸³¹ Underscoring the right to life, survival and development is the fact that the chances of a child surviving and developing without access to education, healthcare services, and social welfare are undermined. The African Committee of Experts on the Rights and Welfare of the Child further asserts that a child's identity is one of the cornerstones to ensure survival, development, and protection.⁸³² For example, comprehensive information about births makes it easier for governments to plan for immunisation, and prevention of early infant diseases such as malaria, neonatal HIV, and other communicable diseases that contribute to the reduction of child mortality.⁸³³ The African Committee of Experts on the Rights and Welfare of the Child affirms that birth registration is directly linked to a child's survival and development.⁸³⁴

South Africa is a signatory to both the CRC and the ACRWC, which means that it has agreed to be bound by the provisions and principles of both conventions. Both conventions place an obligation on South Africa to ensure that every child within its territory survives, develops, and is protected. By directly or indirectly denying stateless children access to education, access to health, and social welfare, South Africa is not applying international principles and standards that are expected of them as signatories to the CRC and ACRWC. As much as South Africa enjoys sovereignty, as discussed in section 2 of this chapter, state sovereignty is not absolute and South Africa must exercise its sovereignty by taking into consideration key international principles. In the case of children, these principles are the general principles set out both in the CRC and the ACRWC, such as the best interests of the child principle and non-discrimination.

As a sovereign state, South Africa, has the discretion to decide who its nationals are, however, this discretion is not absolute. It is limited by international law principles and standards. In this instance, South Africa's discretion to decide how children acquire nationality is limited by international children's rights standards which include the best interest of the child, non-discrimination, and the right to life, survival, and development. Thus, decisions relating to the acquisition of nationality by children whether born in the territory or stateless, do not fall solely within the ambits of South Africa's discretion. Instead, international law standards and principles dictate that in exercising its discretion, South Africa must consider what is in the

⁸³¹ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014) para 17.

⁸³² Ibid para 17.

⁸³³ Ibid para 18.

⁸³⁴ Ibid.

best interest of children. Consequently, the best interest of the child obliges South Africa to grant nationality to stateless children. Not having a nationality is never in the best interest of any child. As demonstrated previously, stateless children struggle for basic rights due to a lack of nationality. The viable way to ensure that stateless children are able to access rights is to grant them nationality.

5. Children's Rights Principles and their Implications for Nationality for Stateless Children

5.1 Granting nationality to stateless children: the best interest of the child lens

The rights contained in the CRC are considered to carry equal weight. However, according to Freeman,⁸³⁵ the child's best interests principle underpins all the other provisions in the CRC. The best interest principle of the child can be considered a golden thread that runs through the fabric of children's rights,⁸³⁶ because it forms the basis for the interpretation of all rights and matters concerning children.⁸³⁷ The best interest principle is broad and extends to all areas of children's rights and any other matters where a child is involved. According to Pobjoy,⁸³⁸ the best interests of the child principle is taking a direction towards becoming an independent source of international protection.⁸³⁹ Moreover, Pobjoy⁸⁴⁰ argues that the best interest of the child principle in the CRC may be used as an independent basis for protection outside the traditional refugee protection regime. An assessment of the best interests of the child may preclude the return of a child to her home country even though the child is not eligible for protection under the Refugee Convention 1951.⁸⁴¹ This broad application and extension of this principle has a major impact on state sovereignty.

Although the best interest of the child principle is not explicitly defined in the CRC and the ACRWC, the CRC committee has noted that the elements to be taken into account when as-

⁸³⁵ A Freeman *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: the Best Interests of the Child: Freeman Article 3: the Best Interests of the Child* (2007).

⁸³⁶ B Bekink and M Bekink "Defining the standard of the best interest of the child: Modern South African perspectives" (2004) (2) *De Jure* at 22-40.

⁸³⁷ Freeman *A Commentary on the United Nations Convention on the Rights of the Child* at 1.

⁸³⁸ J Pobjoy "The Best Interests of the Child Principle as an Independent Source of International Protection" (2015) 64 *International and Comparative Law Quarterly* at 327-363.

⁸³⁹ *Ibid.*

⁸⁴⁰ J Pobjoy *The International and Comparative Law Quarterly* at 333.

⁸⁴¹ *Ibid.*

sessing and determining the child's best interests, as relevant to the situation, including the child's identity, protection and safety of the child, a situation of vulnerability, the child's right to health and the child's right to education.⁸⁴² A state may have the power to exercise its discretion, however, international standards curtail this power by placing an obligation on states to ensure that, when making rules and laws that affect children, the best interests of the child are considered paramount. This is one of the most effective ways in which state discretion is limited. According to the CRC committee, Article 3(1) of the CRC creates an intrinsic obligation for states, is directly applicable (self-executing), and can be invoked before a court.⁸⁴³ The committee also acknowledges the role of Article 3 as an interpretative legal principle, stating that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen.⁸⁴⁴

In terms of Sections 39(1)(b) and (c) of the Bill of Rights, a court, tribunal, or forum must consider international law and may consider foreign law in its deliberations.⁸⁴⁵ Section 28 (2) of the South African Constitution guarantees the paramountcy of a child's best interest, to which every child is entitled regardless of nationality status.⁸⁴⁶ South Africa is thus obliged, not only by its own constitution but also by international standards, to ensure that the best interest of the child is paramount. Consequently, South Africa's discretion in matters pertaining to children is limited by both the constitution as well as international standards provided for by conventions, such as the CRC and the ACRWC.

Pertinent to note, that the best interest principle is not only a substantive right but also extends to the procedural aspects of children's rights.⁸⁴⁷ This means that the procedure used when applying or implementing a child's right must also consider the best interest of the child principle.⁸⁴⁸ Consequently, the administrative procedure for the acquisition of nationali-

⁸⁴² Ibid.

⁸⁴³ Ibid.

⁸⁴⁴ Ibid.

⁸⁴⁵ South African Constitution 1996.

⁸⁴⁶ Article 2(1) CRC. See also, CRC General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) para 21.

⁸⁴⁷ B Bekink and M Bekink *Dejure* at 239. See also, CCT 294/18, where the court held that in other contexts, section 28(2) incorporates a procedural component para 78. See also *Centre for Child Law v The Governing Body of Hoërskool Fochville* (2015) ZASCA 155; 2016 (2) SA 121 (SCA) para 22.

⁸⁴⁸ CRC General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014). UNHCR Emergency Handbook: The best interest of the Child Procedure (2020) <https://emergency.unhcr.org/protection/protection-mechanisms/best-interests-procedure> (accessed 25 June 2023). See also, Para 42 Nubian case.

ty (including birth registration requirements), should consider what is in the best interest of stateless children. This was reiterated in the *Nubian* case where the African Committee of Experts on the Rights and Welfare of the Child noted that the obligation to ensure that all children are registered immediately after birth is not only limited to passing laws and policies but also extends to addressing all *de facto* limitations and obstacles to birth registration.”⁸⁴⁹

The best interest principle dictates that a child’s birth should be registered since birth registration is a gateway to so many other rights.⁸⁵⁰ This would also be in line with South Africa’s obligation imposed by the CRC and the ACRWC to ensure that state parties undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the convention.⁸⁵¹ In terms of the Birth and Death Registration Act Regulations of 2014, a parent who intends to register a child’s birth must provide identifying documents such as an identity document, a copy of a certified passport, permit, or visa. It is obvious that an undocumented or stateless parent is not in a position to provide the required identifying documentation and will thus be unable to register the birth of their child.

Fundamentally, the question becomes whether this requirement is in the best interest of the child. As much as South Africa has the prerogative to decide who its nationals are, this prerogative must be exercised per international standards.⁸⁵² Birth registration is in the best interest of every child; it provides a gateway to other rights. In terms of the best interest of the child principle, South Africa has an obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child’s best interests have been a primary consideration.⁸⁵³ The practice of requiring certain documentation for birth registration is logical, however, it fails to accord due regard to the primacy or paramountcy of the child’s best interests. Children born to undocumented parents will

⁸⁴⁹ Para 40.

⁸⁵⁰ CRC General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) para 44. *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya* para 37. General Comment No. 2 on Article 6 of the ACRWC: “The Right to a Name, Registration at Birth, and to Acquire a Nationality para 89.

⁸⁵¹ Article 4 CRC and Article 1 ACRWC respectively.

⁸⁵² International standards dictate that State must ensure a reduction of statelessness. See General CRC Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) para 87. *Kaunda v President of the Republic of South Africa* (CCT 23/04) [2004] para 38. *The Girls Yean v Dominican Republic* (2005) para 140. *Anudo v The Republic of Tanzania* (2015) para 78. *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya* para 48.

⁸⁵³ CRC General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) para 14.

not be registered and as such will potentially become stateless, which is not in their best interest. What would be in the best interest of a stateless child, in these circumstances, would be to make provision for a child's birth to be registered even when a parent is stateless and thus not able to provide valid identifying documentation. This is not to say that it is not in the best interest of a child to require a parent's documentation. This requirement does serve to protect children from human trafficking. However, it should not be an all-or-nothing requirement.

The best interest principle is a significant curtailing factor of South Africa's discretion when it comes to children and their right to acquire nationality. This principle is enshrined in the constitution as well as international instruments. It requires South Africa to take all legislative measures to ensure that the rights of stateless children are respected and protected. The obligation to ensure that a child's best interest is considered extends to the implementation of all rights relating to children. South Africa is thus obliged to actively ensure that the procedure for the acquisition of nationality for children is in line with the best interest of the child principle. This obligation requires South Africa to ensure that all children are registered immediately by not only implementing enabling laws but also addressing all *de facto* limitations and obstacles to birth registration.⁸⁵⁴ In this instance, this can be through making an alternative provision to allow a child's birth to be registered where a parent lacks valid identifying documentation.⁸⁵⁵

5.2 Granting Nationality: the Right to Life, Survival, and Development Lens

A child's identity is one of the key elements that ensure that a child survives and develops.⁸⁵⁶ It also provides a way to ensure that a child is protected from harmful practices, such as child trafficking, sexual exploitation, early marriage, illicit adoption, and child enrolment in the armed forces.⁸⁵⁷ The right to life, survival, and development is an all-encompassing right that extends beyond a negative obligation of non-interference.⁸⁵⁸ It imposes a proactive obligation to take all comprehensive legislative, administrative, and other positive measures to ensure

⁸⁵⁴ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya* para 40.

⁸⁵⁵ P Praudlock and P Martin (ed) *South Africa's Progress in Realising Children's Rights: a law review* (2014).

⁸⁵⁶ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014) para 17.

⁸⁵⁷ *Ibid* para 18.

⁸⁵⁸ Z Vaghri, *Article 6: The Rights to Life, Survival, and Development* at 31. See also, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2019) para 3.

the inherent and indivisible right to life and survival of the child.⁸⁵⁹ Without a nationality, children in South Africa are denied access to education.⁸⁶⁰ Without an education, it is difficult for a stateless child to survive and develop. To illustrate the importance of children being able to attend school in South Africa, the National School Nutrition Programme serves as a notable example. Children who are enrolled in government-funded schools have access to free education, as well as food, through the National School Nutrition Programme (NSNP). The NSNP is a government program that provides one nutritious meal a day to all learners in poorer primary and secondary schools.⁸⁶¹ The objective of the NSNP is to provide nutritious meals to learners to improve their ability to learn. It is premised on the idea that children cannot learn when they are hungry.⁸⁶² Access to a government school in South Africa, thus, contributes to a child's overall development and survival. As has been demonstrated in chapter four of this thesis, stateless children in South Africa are denied access to basic rights that contribute to their survival and development. Having a nationality is thus key for children to access basic rights including education and nutrition, which are crucial for their survival and development.

South Africa's discretion to decide who its nationals are, is limited by its obligation to ensure that all children live, survive, and develop. Creating a world fit for children is about creating an enabling environment⁸⁶³ that prioritises children and their right to survival and development.⁸⁶⁴ A stateless child who is denied education will not be able to benefit from the school nutrition program thereby limiting such a child's right to live, survive and develop. Granting nationality to stateless children is the best way to ensure their survival and development because it is difficult for a child to survive and develop without a nationality in South Africa.

⁸⁵⁹ Ibid 25

⁸⁶⁰ See Stephanie Buckland *Lost in transition: The barriers to educational access for school-age Zimbabwe migrant children in South Africa and the influences of institutional and social networks on overcoming them* (PhD-Thesis, University of Sussex, 2011) at 59-60. Tricia Callender *Thank you for coming? policy, politics, and polity: How education stakeholders interpret post-apartheid education policy for immigrants in South Africa—the case of Cape Town* at 99. J Schenner "Stateless Persons and the Question of Rights" (2016) 7 (1) *Global policy* at 123.

⁸⁶¹ National School Nutrition Programme

<https://www.education.gov.za/Programmes/NationalSchoolNutritionProgramme.aspx> (accessed 27 June 2023).

⁸⁶² Kellogs "A lost education: The reality of hunger in the classroom"

https://www.kelloggs.co.uk/content/dam/europe/kelloggs_gb/pdf/R2_Kellogg_A_Lost_Education.pdf (accessed 27 June 2023). Inside Education *Hungry Children can't concentrate in class* (14 March 2018)

<https://insideeducation.co.za/hungry-children-cant-concentrate-class/> (accessed 27 June 2023). "African Children's Charity Hungry children cannot learn, so let's feed them" (30 May 2016)

<https://africancharity.org/hungry-children-cannot-learn/> (accessed 27 June 2023).

⁸⁶³ General Assembly official records, 27th special session: 6th meeting, Friday 10 May 2002, New York A/S-27/PV.6 <https://digitallibrary.un.org/record/464536?ln=en> (accessed 26 June 2021).

⁸⁶⁴ See article 19 of the World Declaration on the Survival, Protection and Development of Children 1990.

The right to survive and develop is directly linked to a child being able to access education, healthcare and social welfare. Without an education, a child's prospects of survival is diminished as such a child will struggle to find employment.⁸⁶⁵ Without access to basic healthcare, a child is at risk of not fully developing.⁸⁶⁶ Thus, despite the absence of obligation in terms of international law to grant stateless children nationality, as discussed in chapter five, the principle of survival and development imposes an obligation on South Africa to enact laws and policies that make way for nationality to be granted to stateless children in order to ensure their survival and development. Moreover, these laws and policies should not have clawback clauses such as requirements of identification documentation, which make access to nationality illusory.

5.3 *Granting Nationality to Stateless Children: A non-discrimination lens*

Non-discrimination, in the context of the rights to a name, birth registration and acquire nationality, means that no child's birth should go unregistered, whatever his or her parents' nationality, birth, or other status.⁸⁶⁷ Admittedly, South Africa has the discretion to decide how children acquire a nationality, however, this discretion has to be exercised in a way that does not amount to discrimination.⁸⁶⁸ This is not the case in South Africa, as far as birth registration is concerned. For instance, a parent who wants to register their child's birth must provide identifying documentation such as a valid passport, identity card, or valid visa.⁸⁶⁹ Parents who do not have any of these documents will not be able to register their children. There is, therefore, an unfair distinction between a child who is born to a documented parent and a child born to an undocumented and or stateless parent. This distinction amounts to structural discrimination based on the nationality status of a parent.⁸⁷⁰ It also amounts to arbitrary deprivation of nationality.⁸⁷¹ South Africa is obliged to implement the provisions of the CRC

⁸⁶⁵A Hillman and E Jenkner "Educating Children in Poor Countries"(2004) 33 International Monetary Fund: Economic issues <https://www.imf.org/external/pubs/ft/issues/issues33/> (accessed 16 October 2023). L Rodriguez "Understanding How Poverty is the Main Barrier to Education February"2020 <https://www.globalcitizen.org/en/content/poverty-education-satistics-facts/> (accessed 18 October 2023).

⁸⁶⁶ Ibid.

⁸⁶⁷ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014)) para 16.

⁸⁶⁸ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014)) para 4.

⁸⁶⁹Section 3 (1) Regulations to the Birth and Death and Registration Act 2014.

⁸⁷⁰ Human Rights Council Thirty-first Session (A/HRC/31/29) Agenda items 2 and 3 Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless para 15.

⁸⁷¹ Ibid para 8.

without discrimination of any kind.⁸⁷² In implementing the right for children to acquire a nationality, South Africa has policies in place that discriminate against children born to undocumented and stateless parents. This goes against South Africa's international obligation to ensure non-discrimination in nationality their laws and more importantly, that stateless children are not denied nationality based solely on the nationality status of one or both of the parents.⁸⁷³ South Africa has the obligation to remove any barriers to access to registration procedures and the fulfillment of the right to nationality for children born to undocumented or stateless parents.⁸⁷⁴ South Africa is also in violation of its international obligation to treat all children equally and without discrimination based on their parents' nationality status.⁸⁷⁵

Additionally, South Africa is obliged to issue birth certificates to all children born in their territory, without discrimination and irrespective of the parent's nationality, statelessness, or other legal status.⁸⁷⁶ The general practice in South Africa was that children born to non-South African citizens were issued with handwritten birth certificates.⁸⁷⁷ However, in 2013, the Department of Home Affairs declared that the practice of issuing handwritten birth certificates to children born to non-citizens would stop.⁸⁷⁸ However, this is not the case and handwritten birth certificates are still being issued to children born to non-citizens.⁸⁷⁹ These handwritten birth certificates pose numerous challenges. For example, due to the high risk of forgery, they are not accepted as proof of birth in other countries.⁸⁸⁰ As a result, foreign children born in South Africa are vulnerable to becoming stateless. It is also challenging for applicants to ob-

⁸⁷² Article 2.

⁸⁷³ UN Human Rights Committee (HRC), *CCPR General Comment No. 17: Article 24 (Rights of the Child)* para 8. Human Rights Council Thirty-first Session (A/HRC/31/29) Agenda items 2 and 3 Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born if they otherwise would be stateless para 11.

⁸⁷⁴ Ibid para 15.

⁸⁷⁵ H Kruger "The Invisible Children Protecting Children-Protecting the Right to Birth Registration in South Africa" *Journal of Juridical Justice* at 65.

⁸⁷⁶ Ibid.

⁸⁷⁷ H Kruger *Journal of Juridical Justice* at 55-87. Intergate Immigration "Birth Certificate Disaster" <https://www.intergate-immigration.com/blog/birth-certificate-disaster/> (accessed 27 June 2023). Scalabrini Centre "Birth Registration in South Africa" 26 September 2019 <https://www.scalabrini.org.za/birth-registration/> (accessed 27 June 2023). Sonke Gender Justice "What South African law exists around birth registration in South Africa?" <https://genderjustice.org.za/card/birth-registration-of-non-national-children-in-south-africa-explained/what-south-african-laws-exist-around-birth-registration-in-south-africa/> (accessed 27 June 2023).

⁸⁷⁸ Regulations on the Registration on Births and Deaths, 1992 (GN R2139 Government Gazette 1992(14182)): reg. 6(3)(b).

⁸⁷⁹ Sindiswa Moyo "South Africa: birth but no birth right" 18 January 2018 <https://rosalux-geneva.org/south-africa-birth-but-no-birthright/> (accessed 27 June 2023).

⁸⁸⁰ Kruger *Journal of Juridical Justice* 65.

tain reproductions of the original birth certificates from the Department of Home Affairs.⁸⁸¹ Issuing children with handwritten birth certificates amounts to discrimination since it is based solely on a parent's nationality status. This discrimination affects the rights of stateless children negatively and goes against international standards that oblige all states to treat all children equally. South Africa can argue that it has taken necessary measures that ensure that a child born in South Africa, who would otherwise be stateless, is granted nationality. This assertion would not be entirely incorrect. However, as stated in the *Nubian* case, Article 6(4) of the ACRWC is not an obligation of conduct but an obligation of result.⁸⁸² It is thus, not merely about protecting a child's right to acquire nationality. It is more about making sure that when this right is being implemented, it produces the desired result. In this instance, the primary purpose of protecting the right of every child to acquire a nationality is to prevent a child from being afforded less protection because he or she is stateless.⁸⁸³

Having established that there are standards in international children's rights that have an impact on state sovereignty, it becomes imperative to discuss and analyse what implications this has on South Africa, concerning the operation of its nationality laws and the rights of stateless children. The best interest of the child principle, non-discrimination, and the right to life, survival, and development are core principles at the forefront of international children's rights. They are also critical to ensuring that the rights of stateless children are protected and respected. Pertinent to note, the African Committee of Experts on the Rights and Welfare of the Child has noted that the acquisition of nationality is an important enabling right. The African Committee of Experts on the Rights and Welfare of the Child is of the view that the rights to a name, birth registration and the right to acquire nationality cannot be fully implemented unless the cardinal principles of children's rights are respected and fulfilled. The implementation of those rights requires taking into account the best interests of the child, non-discrimination principles, and his/her survival, development, and protection. Moreover, the implementation of the CRC and the ACRWC also depends on a good understanding of the principle of interdependence and indivisibility of children's rights in general and the interdependence and indivisibility of the rights provided in the ACRWC.⁸⁸⁴

⁸⁸¹ Ibid 68.

⁸⁸² Ibid 52.

⁸⁸³ Ibid 8.

⁸⁸⁴ Ibid para 13.

As discussed in Chapter Four, stateless and undocumented children have difficulty accessing basic education because of educational policies that require children to provide identifying documentation in order to be enrolled in school. In instances where an undocumented child is permitted to enrol for school, it is only on a provisional basis provided that the parent or guardian of the undocumented child provides a birth certificate within a stipulated period.⁸⁸⁵ Requiring that a child provide identifying documentation in order to enroll in school is not just unreasonable, but also detrimental to a child's rights where such documentation does not exist. The CRC committee asserts that it is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education, and related activities, free of charge.⁸⁸⁶ It is, therefore, not in the best interest of a stateless child to be denied access to education simply because they lack nationality, and thus have no access to identifying documentation. Not only is such a requirement contrary to the best interests of stateless children, but it also amounts to discrimination based on nationality status. Denying stateless children access to education based on their lack of documentation has a ripple effect. This emphasises the point regarding the interdependence and indivisibility of children's rights. A stateless child who is denied access to education has their rights to education and non-discrimination violated. The violation of these rights has a tremendous effect on the survival and development of stateless children. Denying stateless children access to healthcare because they are not able to provide documentation amounts to discrimination based on nationality status, it is not in the best interest of stateless children, and it also impedes their right to survival and development. If the core principles of the CRC and the ACRWC were to be properly and effectively applied in South Africa, stateless children would have access to the right to nationality and effectively, other basic rights such as education, healthcare, and social welfare.

The African Committee of Experts on the Rights and Welfare notes that all African states have rules providing for the conferral of their nationality established in their domestic law. However, these laws often do not reflect the states' commitments to avoid statelessness es-

⁸⁸⁵Section 4 Admission Policy for Ordinary Public Schools Notice No. 2432 OF 1998 states: to enrol a child in a public school, a parent must present an official birth certificate of the learner to the principal of the public school. If the parent is unable to submit the birth certificate, the learner may be admitted conditionally until a copy of the birth certificate is obtained from the regional office of the Department of Home Affairs.

⁸⁸⁶General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) para 79.

established by Articles 6(3) and 6(4) of the African Children's Charter.⁸⁸⁷ South Africa's birth registration requirement is a classic example of how nationality law can perpetuate childhood statelessness instead of eradicating it. As consistently noted, in terms of the Regulations to the Birth and Death Registration Act,⁸⁸⁸ (the BDRA Regulations) a parent who wants to register the birth of a child must provide identifying documentation (identity document, valid passport, or visa).⁸⁸⁹ If the child's parent is unable to provide any of this identifying documentation, then the child will not be registered in terms of the BDRA Regulations. Consequently, the child will not be able to apply for citizenship in terms of the Citizenship Act. Both the Citizenship Act and BDRA deal with matters that concern a group of identified and unidentified children. The best interests of the child, being a substantive right, require that both acts, on account of their impact on children, consider children's best interests as paramount.⁸⁹⁰ In this instance, the requirements for identifying documentation to register a child's birth are not in the best interest of children born to stateless or undocumented parents.

This was also affirmed in the *Inter-American Court of Human Rights Case of the Girls Yean and Bosico v. Dominican Republic*,⁸⁹¹ where the court held that when establishing the requirements for late birth registration of birth, the state should take into consideration the particularly vulnerable situation of Dominican children of Haitian origin.⁸⁹² The requirements for birth registration should not constitute an obstacle to obtaining Dominican nationality and should only be those essential for establishing that the birth occurred in the Dominican Republic.⁸⁹³ In this regard, the identification of the father or the mother of the child cannot be restricted to the presentation of the identity card; rather, for this purpose, the state should accept another appropriate public document.⁸⁹⁴ Moreover, the Court emphasised that requirements for birth registration should be reasonable and not represent an obstacle for acceding to

⁸⁸⁷ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014) para 5.

⁸⁸⁸ Regulations to the Birth and Death Registrations Act 2014.

⁸⁸⁹ Ibid section 3.

⁸⁹⁰ The best interest of the child places an obligation on South Africa to ensure that the child's best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children. See, CRC General Comment on the right of the child to have his or her best interests taken as a primary consideration (2013) para 14.

⁸⁹¹ Para 141.

⁸⁹² Ibid.

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

the right to acquire a nationality.⁸⁹⁵ The requirement that a parent must provide identifying documentation for a child's birth to be registered, without making an alternative provision for the registration of a child where the required documentation cannot be provided, is unreasonable and constitutes a hurdle for birth registration. This requirement is not only a hurdle for birth registration but such a criterion results in the exclusion of stateless children, the perpetuation of statelessness, and the manufacturing of statelessness.⁸⁹⁶

In the *Nubian* case,⁸⁹⁷ it was noted that one of the main purposes of Article 6 of the ACRWC, in particular the right to birth registration, is to prevent and or reduce statelessness, therefore, birth registration plays a significant role in preventing and eradicating statelessness. An alternative provision should be provided to permit the registration of a child's birth and thus the acquisition of nationality where documentation cannot be provided by a parent. Failure to produce valid identifying documentation should not be a hurdle or limitation for birth registration. South Africa must make sure that all necessary measures are taken to prevent the child from having no nationality. As stated in the *Nubian* case, Article 6(4) of the ACRWC is not an obligation of conduct but an obligation of result.⁸⁹⁸ Moreover, South Africa is under obligation to adhere to international norms and standards that require states to refrain from adopting laws and practices that lead to an increase in statelessness.⁸⁹⁹ Birth registration is the main hurdle that prevents a stateless child from being able to acquire nationality,⁹⁰⁰ and as such, possibly remaining stateless for the rest of their lives.

Considering that nationality is, in most instances, a gateway to accessing other rights, as rightly argued by Arendt, it surely is not in the best interest of a child to deny them birth registration, based on the fact that their parents are themselves undocumented or stateless. The indivisibility of rights in the CRC and the ACRWC is underscored by the consequential impact of the denial of the right to birth registration. For example, failing to register a child's birth has a ripple effect on other rights. As discussed in chapter three of this thesis, without

⁸⁹⁵ Ibid.

⁸⁹⁶ N Jain "Manufacturing Statelessness" (2022) 116 (2) *The American Society of International Law* at 237-288.

⁸⁹⁷ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya* (2009) para 44.

⁸⁹⁸ Ibid 52.

⁸⁹⁹ General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality para 142.

⁹⁰⁰ In this respect, the African Committee is of the view that there is a strong and direct link between birth registration and nationality. See, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*. African Committee of Experts on the Rights and Welfare of the Child (ACERWC) para 42.

being registered at birth, a child in South Africa cannot acquire a nationality. Without a nationality, a child struggles to access education, healthcare, and social security. Consequently, a child's right to life, development, and survival is impacted. It has also been noted that it is not in the best interest of a child to have to wait until they reach the age of 18 to be able to apply for citizenship.⁹⁰¹ This is, unfortunately, the case in South Africa. One of the requirements of 2(3) the Citizenship Act is that in order for a child to apply for citizenship, they must have reached the age of 18 years. Consequently, a stateless child will remain stateless until they are 18 years old. This does not coincide with South Africa's pledge to end childhood statelessness, nor does it put the best interest of the child as paramount. Based on the principle of the best interest of the child, South Africa is obliged to grant nationality to stateless children and remove provisions that place age barriers for the acquisition of nationality for minors.

A further issue of major concern is that the Minister of the Department of Home Affairs is given the discretion to make the requirements for how citizenship is acquired. The BDRA is silent on the requirements for the registration of a child's birth instead, it is left to the Minister of the Department of Home Affairs to promulgate regulations⁹⁰² providing the requirements that are to be met for birth registration. The concern here is that this discretion involves making decisions on how children acquire citizenship. It has been established that this discretion is limited by international rights standards such as the best interest of the child and non-discrimination. Currently, there is no established procedure to give effect to the substantive right of the best interest principle where birth registration and the acquisition of nationality are concerned. South Africa, as a signatory of the CRC and ACRWC, is under the obligation to take all necessary, deliberate, and concrete measures for the full implementation of this right. Concrete and deliberate measures require that in every policy decision where children are involved, there is a procedure regarding how this right will be fully implemented and, that balances and checks should be in place to ensure that this right is fully implemented. Stateless children should, through policies that are informed by international principles, be granted nationality despite a lack of documentation. South Africa is a party to various international children's rights and human rights conventions, among others, the CRC, ICCPR, and the ACRWC, and is thus obliged to take these conventions into account when exercising its state sovereignty. The best interest of the child principle, non-discrimination, the right to life, and

⁹⁰¹ Ibid.

⁹⁰² See Regulations to the Birth and Death Registration Act 2014.

development and survival are just some of the international principles that South Africa must consider when making decisions relating to children and nationality.

The current prevailing international standards emphasise the urgent need to end childhood statelessness.⁹⁰³ State discretion must be and is indeed limited by international human rights standards. The African Committee of Experts on the Rights and Welfare of the Child affirms this view, noting clearly that state discretion is limited by international human rights standards, as contained in the ACRWC, the CRC, customary international law, and general principles of law that protect individuals against arbitrary state actions.⁹⁰⁴ In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness. Guiding principles relating to ending childhood statelessness require that states contribute towards ending childhood statelessness by taking proactive measures to prevent discrimination, registering children at birth, and granting nationality to children who would otherwise be stateless, without imposing any qualifications.⁹⁰⁵

6. Conclusion

In this chapter, the concept of state sovereignty, as it relates to nationality, was discussed. It was demonstrated that even though states have the discretion to decide who their nationals are, this prerogative is not absolute. This chapter established and demonstrated that in the past, matters relating to nationality fell solely within a state's discretion based on the international relations of the time. However, it was demonstrated through international and regional judgments, as well as general comments of different international bodies, that the current international relations climate dictates and acknowledges that matters relating to nationality no longer fall solely within a state's domestic discretion. Therefore, the acquisition of nationality is now a matter that extends beyond domestic discretion and states are now required to consider international principles and standards when making policies and laws pertaining to nationality. To this end, international principles, such as the best interest of a child, non-discrimination, and the child's right to life, survival, and development were discussed. More-

⁹⁰³ UNHCR The Urgent Need to end Childhood Statelessness https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf (accessed 9 August).

⁹⁰⁴ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*.

⁹⁰⁵ Ibid para 69.

over, this chapter discussed the fact that adhering to international children's rights standards including the best interest of the child, non-discrimination and the global agenda on the reduction and elimination of childhood statelessness lends support to the view that states should grant stateless children nationality despite the absence of a clear obligation in international law on this issue.

CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

1. Introduction

A stateless child is born somewhere in the world, at least, every 10 minutes.⁹⁰⁶ This state of affairs is alarming considering the devastating effect that statelessness has on children. Having no nationality means facing hurdles when attempting to access basic rights such as education, healthcare, and social welfare. These are basic rights that are crucial to the survival and development of a child. Being denied access to these basic rights has a direct impact on a child's future. Perhaps more devastating is the fact that most stateless children are born into statelessness and from the very beginning of their lives, they have an unequal start to life. In a world where children are the future of tomorrow, being stateless is possibly one of the cruellest acts of mankind towards an innocent child. Mankind owes the child the best it has to give.⁹⁰⁷ Living without nationality and not being able to access basic rights that are critical for development and survival is the worst mankind can give to children. With an estimated six million stateless children globally,⁹⁰⁸ the need to address the rights of stateless children has never been more urgent.

Statelessness is man-made, thus at the very core of this devastating state of being, is the fact that mankind manufactures statelessness in various ways and through different mechanisms and practices. All children need to be given a fair chance at life, survival, and development. This is the very least that mankind can do to ensure that no matter the race, origin gender, or religion of a child, all children have a chance of surviving, developing, and thriving in a world that has almost become difficult to navigate through without a nationality status. Without access to education, healthcare, and social welfare, amongst other basic rights, a stateless child's future is most likely bleak.

⁹⁰⁶ UNHCR IBelong <https://www.unhcr.org/ibelong/the-urgent-need-to-end-childhood-statelessness/> (accessed 25 June 2023).

⁹⁰⁷ Preamble of the Geneva Convention.

⁹⁰⁸ UNHCR Under the Radar and Under: The urgent need to address stateless children's rights Protected https://www.ohchr.org/sites/default/files/Documents/Issues/Children/BirthRegistration/PlanInternational1_birthRegistration.pdf (accessed 25 June 2023).

The study undertaken has addressed the problem of childhood statelessness in South Africa. It has been premised on the challenges that stateless children face in accessing rights in South Africa. To this end, the study set to explore the prospects of nationality as a solution to childhood statelessness in South Africa amidst a lack of clear obligation in international law for South Africa to grant nationality to stateless children. A synopsis of the findings and conclusions drawn concerning the study undertaken is now discussed.

1.1 Chapter One: Findings and Conclusions

Chapter One highlighted the problem statement, how the research was to be undertaken, and the gaps between guaranteed rights and accessing rights were also highlighted. It was noted that despite constitutional provisions that guarantee rights for everyone in South Africa, stateless children are often denied access to basic rights such as education, healthcare, and social security. The chapter highlighted that although nationality could provide a solution to the eradication of childhood statelessness, it was undermined by the fact that there is no international obligation on states to grant stateless children nationality. The chapter also raised the issue of whether various international children's rights standards could provide an entry point for South Africa to exercise its discretion on nationality to ensure that stateless children acquire nationality.

1.2 Chapter Two: Findings and Conclusions

Chapter two provided an in-depth understanding of the problem of statelessness by tracing its history and causes. An analysis of the effects of statelessness on the rights of children was undertaken. The enigma of statelessness was investigated in detail to give the reader an in-depth background into the global problem of statelessness.

This chapter set out to define the concept of statelessness to provide an understanding of what it means to be stateless. To fully understand statelessness, the chapter outlined the concept of statelessness, its causes, and more importantly, the history of statelessness. In the first instance, the discussion outlined the history of statelessness globally to give a background to statelessness and its causes in the global context. Having regard to the core of this thesis, it was necessary to narrow down the discussion to the history of stateless as it relates to Africa and more specifically, to South Africa. Moreover, the discussion sought to delve into an in-depth discussion of colonisation and how it contributed to the nationality laws in most African states including South Africa. Keeping in mind that the focus of this thesis is South Africa, a discussion of the different stages of colonisation was conducted and how this informed

the laws on nationality in South Africa. The unique state of apartheid that South Africa underwent was discussed as it related to the stripping of nationality among the black people of South Africa through discriminatory nationality laws. The causes of statelessness were discussed from a continent-wide perspective and then the discussion narrowed down to South Africa which is the focus of the study. What is evident from the discussion in this chapter is that statelessness is an old age problem that has taken different dimensions over the years. The bulk of this chapter placed emphasis on the fact that statelessness is not a new concept. Political theorists, such as Arendt, spoke of the concept of statelessness 60 years ago,⁹⁰⁹ the irony being that she spent 30 years of her life as a stateless person. Yet, decades later we are not only still attempting to fully understand the concept of stateless, but also dealing with increased numbers of stateless persons at a global level.

Chapter Two also highlighted the causes of statelessness in the African region and globally in general. Some of the causes that were highlighted included a lack of birth registration, conflict in nationality laws, discrimination in nationality laws, and ineffective implementation of international standards and norms. One of the major factors that were identified, as largely contributing to the problem of statelessness, was the issue of a conflict in nationality laws. The case of the *Director of Home Affairs Minister v DGLR*⁹¹⁰ was used to demonstrate how conflict in nationality laws can contribute to childhood statelessness in South Africa. This case involved a child born in South Africa to Cuban parents. The Department of Home Affairs refused to give the child South African nationality, stating that she is entitled to Cuban nationality. However, the child was unable to get Cuban nationality due to the nationality laws in Cuba that did not recognise her as Cuban. This case demonstrated how the conflict in nationality laws contributes to the perpetuation of childhood statelessness.

Discrimination in nationality laws is another factor that was discussed as a cause of statelessness in South Africa. Up until the end of 2022, fathers of children born out of wedlock were unable to register the births of their children. This was the case for unmarried fathers who fathered children with South African mothers and unmarried fathers who fathered children with undocumented and stateless mothers. However, the Constitutional Court found the specific provisions of the Birth and Death Registration Act to be discriminatory and thus uncon-

⁹⁰⁹ H Arendt "The Decline of the Nation-State and the end of Rights for Men" (1966) at 268-302. H Arendt *The Origins of Totalitarianism* (1906).

⁹¹⁰ 1051/2015 SCA.

stitutional. The devastating effects of this provision are evident currently and will take years to recover from.

1.3 Chapter Three: Findings and Conclusions

Chapter three sets out to demonstrate the apparent conflict between international treaty law and the decision of lawmakers, policymakers, and politicians within South Africa, as far as the issue of nationality is concerned. It was noted that in as much as nationality is a subject of international law, the implementation and regulation of nationality remains within a state's domain. Thus, it is for South Africa to implement and regulate the acquisition of nationality by creating laws that provide for how nationality is acquired. Chapter three also sets out to inquire whether South Africa falls short of any international obligations relating to nationality. This inquiry aimed to illustrate the tension that arises between South Africa's nationality laws and the ability of stateless children to acquire nationality through those laws. The relevant provisions that were analysed in chapter four included the South African Constitution of 1996, the Citizenship Act 88 of 1995, the Birth and Death Registration Act 51 of 1992, and the Regulations of the Department of Home Affairs, being the custodian of nationality laws.

Following an inquiry into the different nationality laws it became apparent that not all stateless children will be able to acquire nationality at birth. This is due to several reasons, the first and most notable one, being that South Africa uses a state-centric approach to nationality which leaves it with wide discretion to decide who acquires nationality. Secondly, in terms of international treaties, there is no absolute obligation on South Africa to grant nationality to every child born within its territory. South Africa is thus given enough leeway to enact nationality laws and, in some instances, these laws result in gaps and loopholes that result in some children not being able to acquire nationality. Other critical factors that perpetuate statelessness in South Africa include gaps in nationality laws that fail to make provision for the acquisition of nationality for stateless children. This goes back to South Africa's discretion to decide who its nationals are without making provision for stateless children who fall within the loopholes created by law and policymakers.

The rational choice theory was used to determine South Africa's compliance with international law standards relating to nationality and eradicating statelessness. The rational choice

theory asserts that in deciding whether to enforce rights and various international principles at the national level, states are calculative, guided by three factors, which are: reputation, reciprocity, and retaliation.⁹¹¹ In applying the rational choice theory, it was demonstrated that South Africa fails to prioritise nationality for stateless children as evident in its laws and policies. While the South African Constitution guarantees the right of every child to nationality from birth, this guarantee does not equate to nationality for every child. An engagement with the laws that give effect to the right to nationality for children born in South Africa demonstrated that the freedom provided by state sovereignty to the lawmakers and policymakers to decide the scope and content of nationality laws and policies has been an obstacle to the attainment of nationality by stateless children. Another issue of concern is the fact that the procedure for children to acquire nationality falls within the ambit of lawmakers and politicians. This power has often been exercised in a manner that excludes some stateless children from acquiring nationality. For example, this is evident with the provision requiring non-citizens to provide documentation in the form of a passport, visa, or permit to register their child's birth. Failure to produce any of these documents will result in a child not being registered and thus rendered stateless. A child who is not registered at birth will also not be able to apply for citizenship in accordance with the Citizenship Act because birth registration is the main requirement that needs to be met to qualify for a South African nationality.

The discretion given to the Department of Home Affairs also brought into light the potential pitfalls of the implementation of nationality laws in South Africa and to the detriment of stateless children. The Department of Home Affairs' misplaced interpretation of the law was also highlighted as a contributing factor to childhood statelessness in South Africa. The magnitude of this problem was best illustrated in the case of *DGLR v the Minister of Home Affairs*⁹¹² where a stateless child who qualified for citizenship in terms of Section 2 (2) Citizenship Act was denied citizenship by the Department of Home Affairs. The biggest issue of concern for the court was how the Minister of the Department of Home Affairs denied the child citizenship based on a misinterpretation of the relevant nationality law. What was more alarming was the fact that the child in question met all the requirements of Section 2 (2) of the Citizenship Act. The minister based his decision on the misplaced view that the stateless child in question could not rely on Section 2 (2) of the Citizenship Act. The minister was of

⁹¹¹ Guzman *How international law works* at 33.

⁹¹² 38429/13 of 3 July 2014.

the view that since the child's mother was a permanent resident, she could be granted permanent citizenship through her mother in terms of the Immigration Act of 2002.

This chapter also underscored that the root cause of childhood statelessness is a result of South Africa's state sovereignty. This was further demonstrated by the fact that law and policymakers have exercised this discretion in a manner that undermines the right to acquire nationality for stateless children. This, despite a strong guarantee of this right under South Africa's Constitution, supports this conclusion. The takeaway from this chapter was that for as long as nationality is removed from the realm of international regulation, guaranteeing the right to nationality for all stateless children remains a myth because states will determine the laws and policies applicable, and, in some instances, these laws, either directly or indirectly, will exclude stateless children from the acquisition of nationality. In the final instance, chapter three underscored that despite the global agenda to end statelessness, states only comply with such agendas when there is some benefit attached to such compliance, or, if non-compliance comes with serious consequences. This has not been the case for South Africa where statelessness is concerned.

1.4 Chapter Four: Findings and Conclusions

In chapter four, an analysis of selected laws on basic rights including healthcare, education, and social security was conducted to demonstrate the unviability for stateless children to access basic rights amidst a lack of nationality. Various studies have been advanced that suggest that under the current international human rights regime, stateless persons can be protected and enjoy basic human rights based on the fact that rights are entitlements that accrue to an individual by virtue of being human. This view advances the notion that the enjoyment of basic rights has nothing to do with nationality or lack thereof. However, following an inquiry into the lived experiences of undocumented and stateless children, this narrative was challenged and proven to be wrong. Following an analysis of the experiences of stateless children, it was demonstrated that stateless children struggle to access basic rights such as education, healthcare, and social security due to a lack of documentation and in essence a lack of nationality. To illustrate this point, the South African Schools Act 84 of 1996 (SASA) provided a notable example of the disconnect between the enjoyment of basic human rights and the practical realities faced by stateless children. In terms of the provisions of the SASA, parents are required to provide, among other documentation, a learner's birth certificate to enrol their child in a public school. The consequence of this requirement is that children

without birth certificates are unable to enrol for compulsory primary education at a public school. Another example used to illustrate the struggles faced by stateless children. Therefore, in the absence of nationality, access to basic rights for stateless children is next to impossible. To further illustrate this point, Arendt's renowned "*right to have rights*" was used to advance the argument that nationality is a condition precedent to access basic rights in South Africa, despite the glamorous notion of the universality of human rights. Through Arendt's concept of the '*right to have rights*', it was underscored that the framing of legislation and policies sometimes has the effect of limiting access to rights for stateless children. The result is that stateless children are still excluded on account of lacking a nationality. Even though the constitution and the South African Schools Act guarantee free compulsory basic education for all, subsequent policies, such as the Admission Policy and other government circulars, make this right impossible to attain for stateless children.⁹¹³ The case of *Centre for Child Law v Minister of Basic Education*⁹¹⁴ best illustrates this point. In this case, a circular was issued by the Department of Education directed to a cluster of public schools in the Eastern Cape. The circular stated that every learner must provide an identifying document or proof that they have applied for such a document. Failure to adhere to this resulted in the stateless and undocumented learners being dismissed from the school. This case illustrates the disconnect between the constitutional right to education and government policies that are often in conflict with it. Therefore, the framing of legislation and policies, sometimes, has the effect of limiting access to rights for stateless children.

1.5 Chapter Five: Findings and Conclusions

This chapter sets out to assess whether there are any prospects for nationality as a solution to statelessness. This was done by analysing treaties at the UN level, and the AU level and it was established that there is no such right. This chapter also examined international, regional, and national policies to determine how solutions to childhood statelessness have been framed. The laws and policies that were analysed include policies of international and regional organisations, such as the United Nations High Commissioner for Refugees, the Human Rights Council, the Committee on the Rights of the Child, the African Committee of Experts on the Rights and Welfare of the Child, the United Nations General Assembly, the International Law Commission, the African Commission of Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child to assess their stance on the nexus between

⁹¹³ Sayah et al. *Journal of Education: Durban* at 145.

⁹¹⁴ (2840/2017) [2019].

nationality and childhood statelessness. A complete analysis and unpacking of international and regional treaties as well as policies showed that there is no right to nationality. Consequently, there is no international law obligation on states to grant stateless children nationality. This is because states have the discretion to decide who acquires nationality and how nationality can be acquired. Consequently, not every stateless child will be able to acquire nationality through national laws.

1.6 Chapter Six: Findings and Conclusions

Chapter six resolved the issue of how stateless children can be guaranteed nationality in the absence of an international law obligation on states to grant these children nationality. This chapter explored international principles that reinforce the obligation of states including South Africa, to exercise their discretion on issues of nationality in a manner that ensures that stateless children are granted nationality. Chapter six sought to demonstrate that despite the absence of an obligation, in terms of international law, to grant stateless children nationality, there is an obligation on states to exercise their discretion in agreement with international children's rights standards despite state sovereignty. It was further demonstrated that the current international law regime requires states to exercise their sovereignty in line with international children's rights. States are obliged to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised, among others, in the CRC and the ACRWC. Adhering to international children's rights standards, including the best interest of the child, non-discrimination, and the right to life, development, and survival lends support to the view that states should grant stateless children nationality despite there being no clear obligation in international law on this issue.

South Africa is a party to various international children's rights and human rights conventions, among others, the International Covenant on Civil and Political Rights 1966, the CRC, and the ACRWC, and is thus obliged to take these conventions into account when exercising its discretion. The best interest of the child principle, non-discrimination, and the right to life, development, and survival are some of the international principles that South Africa must consider when making decisions relating to children and nationality. These international children's rights standards serve to curtail South Africa's discretion on matters relating to children and nationality. The current prevailing international standards emphasised the urgent

need to end childhood statelessness.⁹¹⁵ The African Committee of Experts on the Rights and Welfare of the Child asserts that state discretion is indeed limited by international human rights standards including those contained in the ACRWC, customary international law, and general principles of law that protect individuals against arbitrary state actions.⁹¹⁶ In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.⁹¹⁷ Guiding principles relating to ending childhood statelessness require states to contribute towards ending childhood statelessness by taking proactive measures to prevent discrimination, registering children at birth, and granting nationality to children who would otherwise be stateless.⁹¹⁸

In this chapter, it was demonstrated that South Africa's discretion to decide who its nationals are is not absolute. Rather, it is limited by international law principles and standards. This chapter underscored that South Africa's discretion to decide how children acquire nationality is limited by international children's rights standards which include the best interest of the child, non-discrimination, and children's survival and development. Thus, decisions relating to the acquisition of nationality by children whether born in the territory or stateless, do not fall solely within the ambit of South Africa's discretion. Instead, international law standards and principles dictate that in exercising its discretion, South Africa must consider what is in the best interest of children, ensure that no children are discriminated against, and that all children enjoy the right to life, development, and survival.

2. RECOMMENDATIONS

2.1 Alignment of Laws with the Constitution

One of the biggest challenges regarding the protection of the rights of stateless children in South Africa is the disconnect between the constitution and national legislation and policies. South Africa needs to align its nationality laws with its policies to ensure that there is no disconnect or conflict. This requires an overhaul of all laws that concern children and policies that affect children in practice. The guiding factor should be the basic international law

⁹¹⁵ See for example, *UNHCR The urgent need to end childhood statelessness* (2015) <https://www.unhcr.org/ibelong/the-urgent-need-to-end-childhood-statelessness/> (accessed 25 June)

⁹¹⁶ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya* para 48.

⁹¹⁷ *Ibid.*

⁹¹⁸ General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality (2014) Para 88. *The Girls Yean v Dominican Republic* para 140.

standards that relate to children, which are - the best interest of the child principle, non-discrimination, and survival and development. The issue of concern is evident mostly in policies, governmental circulars, and national legislation that affect the basic rights of children.

2.2 Granting nationality to stateless children

Granting nationality to stateless children is a solution to the problem of childhood statelessness in South Africa. South Africa does already have a provision in the Citizenship Act that makes provision for children born in South Africa, who would otherwise be stateless, to be granted citizenship. This is in terms of Section 2 (2) of the Citizenship Act 88 of 1995.⁹¹⁹ However, this provision is only applicable to children whose birth was registered in accordance with the Birth and Death Regulations, which require parents to provide documentation. This requirement is problematic as children born to undocumented parents will not be able to register their births. In applying the principle of non-discrimination, South Africa needs to amend this provision to allow a stateless child to rely on it regardless of birth registration status.

South Africa also has no provision to automatically grant nationality to foundlings or children found abandoned in the country. This is a huge injustice for orphaned children. Although there is a procedure to register the birth of an orphaned child, it is not automatic. The procedure is long and requires that the child be first recognised as an orphan or abandoned child, and then follow the same procedure that an orphan child follows in order to be registered and obtain nationality.⁹²⁰ Article 12 of the BDRA states that for an abandoned child to be registered, they must first be recognised as such by a social worker, after compiling a comprehensive report. The social worker must then submit the report to the Children's Court in terms of Section 9 of the BDRA Regulations of 2014. The court, after making the necessary inquiry, will then issue a court order declaring that the child in question is indeed an abandoned child. After obtaining the court order, the social worker applies for notice of birth, in terms of Section 9 of the BDRA Regulations, and must provide the court order, a report, and the social worker's identity document. In line with the best interest of a child, South Africa must

⁹¹⁹ Hereafter the Citizenship Act.

⁹²⁰ See an example of how long the process may take in "Orphaned child's 10-year battle for a birth certificate" GroundUp 17 November 2017).
<https://www.groundup.org.za/article/orphaned-childs-10-year-battle-birth-certificate/> (accessed 9 August 2023).

amend nationality legislation to make room for a provision that automatically grants abandoned children nationality.

It is in the best interest of every child to be registered at birth. In keeping with international standards and norms, every child should be registered at birth without being discriminated against. The Department of Home Affairs should make provision for the registration of the births of children born to undocumented or stateless parents. Currently, the Regulations of the Birth and Death Registration Act do not make provisions for undocumented and stateless parents to register the birth of their children⁹²¹ This is a huge problem that stateless children face. It goes against the principle of non-discrimination because it discriminates against children based on the nationality status of their parents. The law should allow for an alternative procedure to be followed in a situation where a parent is unable to provide the required documentation. The Department of Home Affairs should allow undocumented parents to be able to register their child's birth in the absence of valid documentation as long as they can show that the child was born to them.

2.3 Accessibility of nationality procedures to stateless children

The process of granting nationality to stateless children in South Africa must be simplified and made accessible. The Department of Home Affairs must promulgate the forms to be used by a child who wishes to initiate the process of applying for nationality, in terms of Section 2 (2) of the Citizenship Act. This form should be clear regarding the required documents. It should also make provision for alternative documentation to be accepted if the required documents are not available.

It is in the best interest of stateless children that the application for nationality, in terms of Section 2 (2) of the Citizenship Act, is not only made accessible but that there are no hurdles to acquiring nationality.

2.4 Education and Community Outreach

A lack of birth registration has been identified as a huge contributing factor to childhood statelessness. Therefore, community outreach and advocacy are vital tools that can help to increase knowledge about the importance and the need to ensure birth registration. Some parents, especially in rural areas, give birth at home and are not aware of the importance of reg-

⁹²¹ "Invisible children: Onerous registration requirements leave countless without birth certificates" Mail & Guardian 3 February 2023 <https://mg.co.za/opinion/2023-02-03-invisible-children-onerous-registration-requirements-leave-countless-without-birth-certificates/> (accessed 26 June 2023).

istering their children⁹²². Some parents report that financial constraints hinder them from accessing birth registration offices ⁹²³ This has resulted in many children finding themselves stateless. The Department of Home Affairs can spread awareness of the importance of birth registration in various ways, such as:

- Developing and producing public educative materials (for example, posters, and pamphlets). These educational materials should be disseminated at all public health facilities and the Department of Home Affairs.
- Making use of community radio stations and television stations to disseminate birth registration educative materials.
- The public educative materials should state clearly what the consequences of late birth registrations are as well as the consequences of failure to register a child's birth.
- Providing mobile registration offices that can be easily accessed by parents who live in rural areas.

2.5 Best Interest Procedure

The Best Interests Procedure (BIP) is a mechanism that the UNHCR uses to ensure that the best interest principle is respected in working with individual children.⁹²⁴ It describes the standards and processes for doing individual case management with children at risk. The BIP framework provides guidelines on how states can establish and implement a BIP framework. A BIP includes comprehensive child protection case management through six key steps:

- identification
- best interest assessment
- action planning
- implementation

⁹²²Hombisa Seko *The impact of unregistered births of children in South Africa and how their rights to essential services and basic education are affected* at 18. See also, UNICEF What is birth registration and why does it matter <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter> (accessed 9 August 2023).

⁹²³A Ebbers and J Smits "Household and context-level determinants of birth registration in Sub-Saharan Africa" (2022) 17 (4) *PLoS ONE*.

⁹²⁴ UNHCR Best Interest Procedure (BIP) emergency (2020) handbook <https://emergency.unhcr.org/protection/protection-mechanisms/best-interests-procedure#:~:text=A%20best%20interests%20procedure%20includes,follow%20up%20and%20case%20closure> (accessed 27 June 2023).

- follow up
- case closure

South Africa should consider developing a BIP framework to ensure that the best interest of the child principle is applied at all levels of government and by all organisations that deal with issues related to children. Two key procedural elements that need to be considered for decision-making during the implementation of a BIP framework.⁹²⁵ These are discussed below.

i. *Best Interest Assessment*

The best interest assessment is an assessment of an individual child designed to ensure that the child's best interests are the foremost consideration. The best interest assessment must be conducted by staff with adequate training and with the participation of the child in the process.

ii. *Best Interest Determination*

The best interest determination is a formal process with strict procedural safeguards. It determines the child's best interests on the occasion of particularly important decisions that affect the child. The best interest determination should permit the child to participate, be conducted by decision-makers with relevant expertise, and balance all relevant factors to determine the best option.

A BIP framework can be used as a guideline in all sectors of government that deal with all issues concerning children. This framework can be especially helpful to the Department of Home Affairs because they are tasked with implementing nationality laws. Functionaries at the Department of Home Affairs can use this framework as a guideline and checklist when dealing with any matters that relate to children and nationality. A BIP framework is in line with South Africa's obligation to take measures that ensure that all children enjoy and benefit from the rights provided by the CRC and the ACRWC. This kind of framework will ensure that measures are put in place at all levels of government that deal with matters related to children. This will ensure that children's best interests are given primary consideration. The effective implementation of a BIP framework can guarantee the development and survival of stateless children by ensuring that stateless children are not discriminated against.

⁹²⁵ Ibid.

2.6 Statelessness Determination Procedure (SDP)

South Africa has no system or procedure for identifying or protecting stateless children or those children who are at risk of becoming stateless. There are, thus, no accurate statistics regarding the number of stateless children in South Africa. To promote the best interests of children, South Africa needs to establish a system of identifying stateless children. It is in the best interest of children that they are protected and that they can access basic rights, such as education, healthcare, and social security. To ensure that stateless children are protected and not discriminated against and that they develop and survive, South Africa needs to be able to identify them and provide the necessary resources that will ensure that they are granted nationality. Without a framework of identification, stateless children are at risk of falling through the cracks thereby failing to be given equal recognition and protection, similar to that of children with nationality status. An SDP framework for children is in line with South Africa's obligation to take all necessary measures in order to ensure that children are protected and are able to access basic rights. Legislation needs to make provision for the establishment of an SDP framework whereby children's rights experts are appointed to create an SDP framework for South Africa. There needs to be a similar framework adopted like the refugee framework. Government must provide the resources (e.g. office space) needed whereby stateless children can go to and a procedure created for stateless children to follow in order to be identified as stateless.

When establishing an SDP, the appropriateness of the procedure is dependent on what the causes of statelessness are, the state concerned, and what procedure to follow if the person is not stateless but undocumented.⁹²⁶ The aim of having an SDP is for states to be able to distinguish between stateless persons and undocumented migrants and citizens.⁹²⁷ Examples of states with SDP that will be used are Moldova and the United Kingdom.

2.6.1 *The Statelessness Determination in Moldova*

⁹²⁶ Yeukia Mahleza *The interplay of citizenship, nationality and statelessness: Interrogating South Africa's legal framework in light of its international obligations* (LLD thesis, UNISA, 2022) at 141.

⁹²⁷ Ibid.

Moldova's SDP is considered an example of good practice by the European Network on Statelessness (ENS)⁹²⁸ and the UNHCR.⁹²⁹ It has one of the most successful SDPs in Europe.⁹³⁰ It, for example, grants identified stateless people permanent residence and rights in line with nationals, and particular consideration is given to those in need of special protection, for instance, persons with mental disabilities and unaccompanied minors.⁹³¹ Before 2011, the country did not have any SDP and it had also not acceded to both the 1954 and 1961 Statelessness Conventions.⁹³² The increase in migration flows was a catalyst for the country's commitment to addressing statelessness through identifying and protecting stateless people.⁹³³ In 2011, Moldova established an SDP which is considered to be effective and accessible, and stateless people are readily assisted in acquiring legal status. It is estimated that by the end of 2020, a total number of 1905 people were recognised as stateless persons and registered in Moldova's government database.⁹³⁴ Moreover, training is provided on statelessness and relevant procedures to several government bodies, judges, and lawyers.⁹³⁵ This way, authorities confronted with statelessness can identify potential applicants and refer and assist them to the appropriate channels.⁹³⁶ Moreover, no stateless persons are put into immigration detention.⁹³⁷ Instead, when someone is in the deportation procedure and a nationality problem is discovered, the person is released from detention and transferred to the SDP.⁹³⁸ Moldova adopted its current SDP by introducing Chapter X in the Law on the Regime of For-

⁹²⁸ The Statelessness Index is a comparative tool that assesses European countries' law, policy, and practice on the protection of stateless people and the prevention and reduction of statelessness, against international norms and good practice, see <https://index.statelessness.eu/about> (accessed 9 August 2023).

⁹²⁹ ENS Statelessness Index, Moldova accessed 9 August 2023 and OSCE and UNHCR, Handbook on Statelessness in the OSCE Area: International Standards and Good Practices (2017) (accessed 9 August 2023).

⁹³⁰ Ibid.

⁹³¹ ENS Statelessness Index, Moldova and OSCE and UNHCR, Handbook on Statelessness in the OSCE Area: International Standards and Good Practices (2017) (accessed 9 August 2023).

⁹³² Nina Pilmeyer *Statelessness Determination Procedures: towards a durable procedure for stateless individuals in the Netherlands: A comparative analysis of the statelessness determination procedures of the Netherlands and Moldova* (Master's thesis, Tilburg University, 2021).

⁹³³ Ibid 38.

⁹³⁴ Ibid 37

⁹³⁵ ENS Statelessness Index Survey 2020: Moldova https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Moldova-2020.pdf (accessed 9 August 2023). Council of Europe Moldovan professionals on statelessness enhanced their skills on essential elements regarding the rights of stateless persons and the practice of the EctHR <https://www.coe.int/en/web/chisinau/-/moldovan-professionals-on-statelessness-enhanced-their-skills-on-essential-elements-regarding-the-rights-of-stateless-persons-and-the-practice-of-the-ecthr> (accessed 9 August 2023).

⁹³⁶ Pilmeyer *Statelessness Determination Procedures* at 37.

⁹³⁷ Ibid. See also, ENS Statelessness Index Survey 2020: Moldova https://index.statelessness.eu/sites/default/files/ENS_Statelessness_Index_Survey-Moldova-2020.pdf (accessed 9 August 2023).

⁹³⁸ Ibid.

eigners⁹³⁹ The Refugee Directorate which is part of the Bureau for Migration and Asylum is responsible for determining refugee status.⁹⁴⁰ Within this Bureau, a specialised administrative unit, the Statelessness and Documentation Unit, deals with examining statelessness claims.⁹⁴¹ One of the most significant features of Moldova's SDP is that during the application process, the applicant is granted the right to stay and is given documentary proof.⁹⁴² In Moldova, those recognised as stateless are granted permission to stay and obtain legal status. This includes the issuance of an identity card and travel documents, unrestricted access to the labour market and all levels of education, and the same access to healthcare and social benefits as nationals.⁹⁴³

Moldova's SDP is not perfect but there is a lot that South Africa can learn from Moldova. The SDP in Moldova has proved that one of the most effective ways to protect stateless people is to have a system in place that identifies them and then issues them with legal status. Thus, South Africa does not necessarily have to give every stateless person nationality but at least give them a legal status that will allow them to acquire identity documents and passports. The document can also be similar to that of a refugee permit. This will address the issue of a lack of documentation that often hinders stateless children's ability to access education, healthcare, or social security.

2.6.2 *Statelessness Determination Procedure in the United Kingdom*

The United Kingdom (UK) established its SDP in 2013 and can provide a good comparison because it has had an SDP for an extended period. It also provides a good comparison because of the shortcomings that the UK SDP has experience and that South Africa can learn from. The UK is one of the few states worldwide with an SDP, which offers the possibility of identifying problems within specific identification mechanisms.⁹⁴⁴ In the UK, a person can apply as a stateless person, if they are not recognised as a citizen of any country and are unable to live permanently in any other country.⁹⁴⁵ In terms of the UK SDP, a person who is suc-

⁹³⁹ Pilmeyer *Statelessness Determination Procedures* at 37. Law No. 284 of 2011 on Amendment and Completion of Certain Legislative Documents 2011.

⁹⁴⁰ Pilmeyer *Statelessness Determination Procedures* at 39. *European Network on Statelessness, Statelessness Determination and the Protection Status of Stateless Persons* (accessed 9 August 2023)

⁹⁴¹ Nina Pilmeyer *Statelessness Determination Procedures* at 39.

⁹⁴² Article 873 (1) and (2) Law No. 284 on the Amendment and Completion of Certain Legislative Documents 2011.

⁹⁴³ Article 877 (4) Law No. 284 on the Amendment and Completion of Certain Legislative Documents 2011.

⁹⁴⁴ K Bianchini "Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom" (2020) 32 (3) *International Journal of Refugee Law* at 440–471.

⁹⁴⁵ Section 407 Home Affairs Immigration rules: part 14

cessfully granted a statelessness status will be eligible to remain in the UK for five years,⁹⁴⁶ following which, they will have to make another application to remain indefinitely in the UK as a stateless person.⁹⁴⁷ Regardless of its shortcomings. The UK SDP provides an avenue by which stateless persons can be determined and afforded protection. This is a crucial first step in addressing the issue of statelessness globally.

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⁹⁴⁶ Ibid section 405.

⁹⁴⁷ Ibid section 407-408.

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