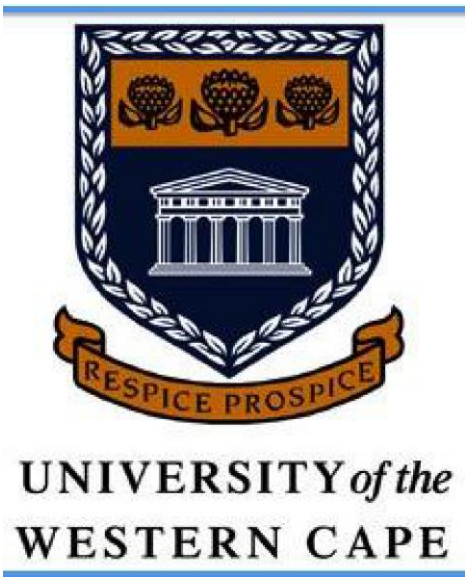

Preventing the statelessness of refugee children through the statelessness determination procedure: Lesson for South Africa.

by

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A Full-Thesis submitted in partial fulfilment for the degree

LL.M in the Faculty of Law of the

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Supervisor: Wessel le Roux

DECLARATION

I declare that this work: Preventing the statelessness of refugee children through the statelessness determination procedure: Lesson for South Africa is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Sinovuyo Janda

Date: 20 December 2022

Signed: …  ……

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DEDICATION

To the world’s stateless refugee children, I see you.

ABSTRACT

By exploring the different causes of childhood statelessness in displaced children on a global scale, this thesis aims to highlight the urgent need to end childhood statelessness. The importance of statelessness determination procedures will also be considered, and in turn the lessons South Africa can gain will be explored. The thesis argues, based on a literature review, that there are patterns that contribute to statelessness, and if these patterns are recognised, laws and policies can be implemented to combat them.

ABBREVIATIONS

- African Charter on the Rights and Welfare of the Child, 1990 (ACRWC).
- American Convention on Human Rights, 1969 (AmCHR).
- Association of Southeast Asian Nations (ASSEAN).
- Births and deaths Registration Act (BDR).
- Convention on the Reduction of Statelessness, 1961 (the 1961 Convention).
- Convention on the Rights of the Child, 1989 (CRC).
- Convention relating to the Status of Refugees, 1951 (the 1951 Convention).
- Convention relating to the Status of Stateless Persons, 1954 (the 1954 Convention).
- Economic Community of West African States (ECOWAS).
- European Convention on Nationality, 1977 (ECN).
- International Covenant on Civil and Political Rights, 1966 (ICCPR).
- International Organization for Migration (IOM).
- Kenya National Commission on Human Rights (KNCHR).
- National Human Rights Commission of Nepal (NHRCN).
- National Human Rights Commission of Thailand (NHRCT).
- Non-governmental organisation (NGO).
- Refugee Reception Offices (RRO).
- Statelessness determination procedure (SDP).
- The United Nations Refugee Agency (UNHCR).
- United Nations Children's Fund (UNICEF).
- United Nations High Commissioner for Refugees (UNHCR).
- United Nations Human Rights Committee (HRC).
- Universal Declaration of Human Rights, 1948 (UDHR).

KEYWORDS

- Refugee Children
- Citizenship
- International human rights law
- Migration
- Nationality
- Refugees
- Statelessness

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CHAPTER ONE

INTRODUCTION

1.1 Research background

In elaborating on the work of the well-known political philosopher, Hannah Arendt, [1] Marcus explains that for individuals to have rights, they need not merely exist. They have to be members of a political community. As member of such a community, they have enforceable rights to education, work, voting, healthcare, culture, and so on. Because the right to be a citizen is the only right that allows the enjoyment of all specific rights, Arendt dubbed this right the 'right to have rights'.[2]

The political community that Marcus speaks of can be understood as a nation state.[3] The nation state is a system in which people with a common identity live in an organised manner, inside a country with firm borders and a single government.[4] The nation-state has a huge influence on the way the people within it live their lives. It is how, as a people, they identify themselves, for example: "I am South African"; "I am Russian"; and so forth. It also determines the language the people speak and what laws are followed. The nation state is a system of political, geographic, and cultural organization. Nationality remains one of the most important parts of a person's life.[5] The nation state is held together by its physical boundaries, its government, and the fact that the people within it believe they are connected to each other as a nation.[6] Children who find themselves in the situation where they are forced to leave their country of

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[1] Arendt H *The Origins of Totalitarianism* (1973) Harcourt Brace: Jovanovich.
[2] Marcus S 'The Right to Have Rights' (2018) available at: *https://www.publicbooks.org/the-right-to-have-rights/* (accessed on 20 August 2021).
[3] 'A country considered as an organized political community controlled by one government'. See reference: Oxford English dictionary 'State' available at *https://www.oxfordlearnersdictionaries.com/definition/english/state_1?q=state* (accessed on 24 November 2022). State and country are used interchangeably in this thesis.
[4] Feinstein Y 'Britannica' available at: *https://www.britannica.com/topic/nation-state* (accessed on 23 August 2021).
[5] Nationality is defined as the status of belonging to a particular nationality. See reference: Collins English dictionary 'Definition of nationality' available at *https://www.igi-global.com/dictionary/nationality/56138* (accessed on 23 November 2022). In line with the common practice found in literature on statelessness, nationality and citizenship are used interchangeably in this thesis, although they can bear different meanings in other contexts.
[6] Muscato C 'Nation State: Definition, Examples & Characteristics.' (2015) available at: https://study.com/academy/lesson/nation-state-definition-examples-characteristics.html (accessed on 14 June 2022).

origin or nation-state to search for refuge elsewhere, loose a very important part of their life.[7] Their ability to exercise their rights is often at risk. As such, children outside their state of nationality need the most protection during that time as they are amongst the most vulnerable people in the world.

It is against this background that the Committee on the Rights of the Child (CRC) impresses on member states to ensure that children in the context of international migration are treated 'first and foremost as children'.[8] Statistics show that more than half of the world's refugees are children and a percentage of them are unaccompanied.[9] Due to the devastating nature of war, persecution or natural disasters, children who are forced to flee, will most of the time have to leave everything behind, this includes documents, such as a proof of birth registration. The lack of birth registration documents for refugee children puts them at a higher risk of statelessness.[10] When a child who is a refugee becomes stateless,[11] their situation becomes more dire, as it means that they are not considered a national by any state under the operation of its laws.[12]

The United Nations aims to protect these individuals and thus article 15 of the Universal Declaration of Human Rights (hereafter UDHR) states that: '[e]veryone has the right to a nationality'.[13]

This declaratory right was later embedded in several other international instruments, including the 1989 Convention on the Rights of the Child (hereafter the CRC), which provides that every child should be registered at birth and has the right to a name and nationality.[14]Similarly, article 6 of the African Charter on the Rights and Welfare of the Child (hereafter the ACRWC) states that every child has the right to acquire a nationality.[15] This is a safeguard as children who are lacking a nationality find themselves in situations whereby their basic human rights are denied because they are, in many cases, without the documentation which comes with having a

[7] The overreaching definition of a child is every human being below the age of eighteen years. This is the definition this thesis follows, unless under the law applicable to the child, majority is attained earlier. See reference: Article 1 of the Convention on the Rights of the Child.
[8] CRC General comment No. 22 'Human rights of children in the context of international migration' (2017) 11 CRC/C/GC/22 (CRC General Comment No 22).
[9] Hodal, K 'Nearly half of all refugees are children, says UNICEF' Available at: *https://www.theguardian.com/global-development/2016/sep/07/nearly-half-of-all-refugees-are-children-unicef-report-migrants-united-nations* (accessed 4 March 2021)
[10] Statelessness is the lack of any citizenship. See reference: Oxford English Dictionary.
[11] A stateless person is someone who is not considered to be a national by any state under its laws. See reference: Article 1 of the 1954 Convention on statelessness.
[12] Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons.
[13] Article 15 of the Universal Declaration of Human Rights, 1948 (UNHR).
[14] Article 7(1) of the Convention on the Rights of the Child, 1989 (CRC).
[15] Article 6 of the African Charter on the Welfare and Rights of the Child, 1990 (ACRWC).

nationality. These children are deprived of an education, health care, employment and the ability to just be a child.

However, protection of stateless persons is not the primary aim of these treaties. The treaties that have a primary role on the protection of stateless persons are the 1954 Convention Relating to the Status of Stateless Persons (hereafter the 1654 Convention) and the1961 Convention of the Reduction on Statelessness (hereafter the 1961 Convention). However, both the 1954 Convention and the 1961 Convention do not aim to prevent childhood statelessness for displaced children. The purpose of the 1954 Convention is to define statelessness and provide the minimum standard of treatment that stateless people should receive by the State they reside in.[16] The 1961 Convention's primary focus is on providing States with a guideline on how to implement the safeguards against statelessness in their domestic law.[17] The 1951 Convention relating to the Status of Refugees (hereafter the 1951 Convention), does however cover stateless persons who are also refugees, even though there are many scenarios of statelessness that are not covered by this 1951 Convention.[18]

In 2014 the United Nations High Commissioner for Refugees (hereafter UNHCR) highlighted the terrible consequences of statelessness and subsequently unveiled a global action plan to end it (hereafter the 'UN Action Plan').[19] Action 6 of the UN Action Plan is to identify stateless persons and naturalise them. The ultimate objective of the UN Action Plan is that by 2024, 70 States should identify stateless migrants through determination procedures which lead to a legal status that permits residence, guarantees the enjoyment of basic human rights, and facilitate naturalization for stateless migrants. South Africa still does not have a method for determining statelessness with less than two years remaining untill the deadline. The aim of this thesis is to draw lessons for South Africa from statelessness determination procedures elsewhere which could be used to reduce statelessness in the country before the 2024 target date set by the UNHCR.

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[16] Preamble of 1954 Convention relating to the Status of Stateless persons.
[17] Preamble of 1961 Convention of the Reduction on Statelessness.
[18] Article 39 of the 1951 Convention Relating to the status of Refugees.
[19] The plan consists of ten steps or actions: Resolve existing major situations of statelessness; Ensure that no child is born stateless; Remove gender discrimination from nationality laws; Prevent denial, loss or deprivation of nationality on discriminatory grounds; Prevent statelessness in cases of State succession; Grant protection status to stateless migrants and facilitate their naturalization; Ensure birth registration for the prevention of statelessness; Issue nationality documentation to those with entitlement to it; Accede to the UN Statelessness Conventions; and Improve quantitative and qualitative data on stateless populations.
See reference : UNHCR 'Global Action Plan to End Statelessness' available at: *https://www.refworld.org/docid/545b47d64.html* (accesed on 25 November 2022).

This study is of significance as the exact number of stateless people worldwide and in South Africa is not known. The study will consider different international, and regional laws that have been put in place to make sure that children do not become stateless, the statelessness determination procedure and its significant role in identifying stateless persons and the benefits that have come from using this procedure.

1.2 Problem statement

Human rights are rights that everyone has, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. These are rights that are awarded to you for the mere fact that you are human.[20] However when someone is stateless, in a legal sense they do not exist, they are basically invisible in the eyes of the law. It will thus be very easy for them to not be awarded protection by the law. While the majority of stateless individuals remain in their nation of origin, others leave and become migrants or refugees. Allowing children who still have a life and a future to be stateless is inhumane, and proper actions should be taken to eliminate this issue.

UNICEF estimates that there are more than sixty-five million children around the world who are on the move fleeing from conflict, poverty and extreme weather conditions. [21] At least a third of the estimated 10 million stateless people around the world are children. Childhood statelessness is a growing problem, especially among displaced children.

Research has shown that existing laws in some countries are not sufficient. It could be the case that South Africa is one of the states whose laws do not effectively safeguard stateless children. Due to the lack of appropriate statutory protection, children who are forced to flee for their lives are extremely vulnerable, making them more susceptible to issues like trafficking and child labour. Some of them are not even aware that they lack a nationality and will unfortunately, because of their status or lack of it, end up facing a lifetime of discrimination. Being stateless will have a severe impact on their ability to learn, grow, fulfil their ambitions and dream for the future. These children's access to their basic human rights, such as education, is at many times limited, which in turn has an effect on their future prospects. Further,

[20] United Nations 'Human Rights' Available at *https://www.un.org/en/sections/issues-depth/human-rights/* (accessed 4 January 2021).
[21] UNICEF 'Children on the Move: key facts and figures' available at *https://data.unicef.org/resources/children-move-key-facts-figures/* (accessed 4 January 2021).

statelessness can be passed on from parent to child which can lead to generations of stateless people confined to the margins of society. An unfortunately good example of this perpetual statelessness is provided by the Rohingya nation of Myanmar, who are refugees that have been living in a realm of statelessness for over six generations.[22]

South Africa has not acceded to both the 1954 Convention and the 1961 Convention. Furthermore, there are no statistics available on statelessness in South Africa due to a lack of established procedures to capture data on the issue. Nonetheless, there are indicative estimations of the prevalence of stateless persons or persons at risk of statelessness in the country. There are just over 15 million unregistered or undocumented people in South Africa, of which almost 3 million are under the age of 18.[23] How then do you prove statelessness in a country like South Africa? How does one then prove their existence in a country that does not see them? The problem is that South Africa have instituted extensive status determination processes aimed at conclusively determining the public law status of every person within the state but does not have a separate statelessness determination process. Under section 1 of the Immigration Act 13 of 2002, for example, 'status' is defined as 'the status of the person as determined by the relevant visa or permanent residence permit granted to a person in terms of this Act'. Section 41 of the Act proceeds to provide as follows:

> When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

Under the Immigration Act, every person is subject to a status determination procedure as citizen, permanent resident, or foreigner.[24] Foreigners are further divided into legal and illegal

[22] Milton A, Rahman M, Hussain S, Jindal C, Choudhury S, Akter S, Ferdousi S, Mouly T, Hall J and Efird J 'Trapped in Statelessness: Rohingya Refugees in Bangladesh' (2017) 14 *International Journal of Environmental Research and Public Health* 1.
[23] Lawyers for Human Rights *'Statelessness and Nationality in South Africa' Presentation to the Department of Home Affairs Portfolio Committee'* (2021).
[24] Section 1 of the Immigration Act 13 of 2002 defines a 'foreigner' as 'an individual who is not a citizen'.

foreigners;[25] and illegal foreigners into prohibited foreigners,[26] and undesirable foreigners.[27] Illegal foreigners are liable to arrest, detention and deportation.[28] The Refugees Act 107 of 1998 adds additional statuses to that recognised under the Immigration Act and institutes an even more elaborate status determination process.[29] Under the Refugees Act, a foreigner can obtain the status of an asylum seeker,[30] and refugee.[31]

Neither of the two Acts makes explicit reference to 'statelessness' as an official migration status under South African law. This means that a person can be classified as an 'illegal foreigner' under the Immigration Act while also being stateless without being recognised as such. The same applies under the Refugees Act. A person may be classified as an asylum seeker while also being stateless without being recognised as such. The effect is that stateless persons are often treated in law under the status of illegal foreigner or asylum seeker. Depending on the rights of illegal foreigners and asylum seekers this failure to identify and respond to such foreigners as stateless persons can have all the negative risk mentioned above. A stateless person who is treated as an illegal foreigner may be liable to detention and deportation but might end up languishing in indefinite detention because there is no foreign state willing to participate in the deportation process. A stateless person who is treated as an asylum seeker or refugee might remain subject to the termination of refugee status and might eventually become caught up in the same indefinite deportation crisis. At best for the stateless person, the failure to recognise her as such might deprive her from benefiting from local integration and naturalisation processes outside the refugee protection framework. These problems are compounded in the case of stateless children.

[25] Section 1 of the Immigration Act defines an 'illegal foreigner' as 'a foreigner who is in the Republic in contravention of this Act'.
[26] Section 29 of the Immigration Act.
[27] Section 30 of the Immigration Act.
[28] Section 34 of the Immigration Act.
[29] See Chapter 3 of the Refugees Act of 1998.
[30] Section 1 of the Refugees Act defines an 'asylum seeker' as 'a person who is seeking recognition as a refugee in the Republic'.
[31] Section 1 of the Refugees Act defines a 'refugee' in formal terms as 'any person who has been granted asylum in terms of this Act'. Section 3 proceeds to define a refugee is substantive terms as follows: 'Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or (c) is a spouse or dependant of a person contemplated in paragraph (a) or (b)'.

Having identified the broader background and problem, I now proceed to formulate the specific research questions that this thesis seeks to answer as a means of addressing the larger problem.

1.3 Research questions

This thesis centrally seeks to determine how South Africa can address the problem of statelessness among children while adhering to international best practices. The main research question is whether South Africa must subject children who are already part of a refugee status determination procedure to an additional statelessness determination procedure? A number of related research questions arise: First, is South Africa under a legal obligation to introduce a statelessness determination procedure for the benefit of all refugee children, if so, what is the source of this obligation? Second, would it be in line with international best practice to introduce a statelessness determination procedure for the benefit of all refugee children, if so, what can South Africa learn from other countries who have already done so?

In addressing the research questions mentioned above, the thesis will also deal with the following smaller background questions:

- What is statelessness?
- What are the causes of statelessness?
- What is the current legal regime on statelessness in South Africa and what are the inadequacies?

1.4. Argument or thesis

The thesis I defend in this study is that it is imperative to remove stateless persons or persons facing the risk of becoming stateless, and in particular stateless refugee children, from migrant populations and migration status determination processes. This means that refugee children should be subjected to an additional statelessness status determination procedure as an essential first step to a more secure legal status and protection.

We cannot look at statelessness as a problem that only effects the individual, it is also a threat to international relations and a threat to individual states. As such it becomes imperative to view the problem through social, political, economic, moral, demographic, ethical, and psychological lenses. The use of a supra-legal perspective could assist navigate possible pathways to resolve statelessness through an ontological framework. An ontological framework seeks to identify the need to determine a person's residential status, the changes in

status to and from statelessness, and the process involved. It also addresses the effects of statelessness locally, nationally, and internationally.[32]

In a theoretical sense, while the source of law and governance could be reduced to the individual sovereignty of human beings, the real source of law and governance is the people of a particular territory and not the individuals. As a result of that the human rights that are inherent to individuals can only find their guarantee in the collective right to self-governance, which is possessed by the people of a particular territory: the nation. Because the nation-state is the only authority that can effectively acknowledge and ensure human rights, the whole human rights discussion loses its significance for those who, as a result of expatriation and emigration, cease to belong to any nation-state. Therefore, when someone ceases to count as a citizen of a particular state they lose not only her civil rights in that particular state, but also their inherent human rights. This, in turn, proves that rights *are*, in fact, 'alienable' from human beings when they lose their political context. This implies that belonging to a political community is needed for the realisation of the fundamental conditions of a dignified human life and the effective protection of 'human' rights. Put in basic terms, human rights are 'the rights of those who are part of a political community'.[33]

Essentially a person has to belong to a certain state, or be recognised by the laws of that state as belonging to such state. A statelessness determination procedure allows states to identify those persons that have become stateless. States usually use this procedure to identify people in their territories that are stateless, this is usually done to ensure the human rights of these people are upheld.[34] The same procedure can be used as an aid in identifying patterns and the reasons why certain children in forced migration are stateless. With the relevant data and literature from legal scholars we will be able to identify the trends that are present when it comes to refugee children becoming stateless, the importance of this procedure and the need for South Africa to establish a similar procedure.

It needs to be clarified that it is not an easy process for people to establish their statelessness. This is because they usually have no documents or other evidence to prove that they are not considered a national by any state.[35] That is why it is important for people to be informed of

[32] Reddy S and Ramaprasad A 'Reframing the Problem of Statelessness: Quest for a Supra-Legal Perspective.' (2019) 20 *Or Rev Int'l L* 364 (hereafter Reddy S and Ramaprasad A).
[33] Azar LF 'Hannah Arendt: The Right to Have Rights.' available at *https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights/* accessed (8 January 2021).
[34] UNHCR 'Statelessness determination procedures' (2014) 1.
[35] UNHCR 'Statelessness determination procedures' (2014) 5.

the existence of the procedure and to have easy access to it. This could be done through institutions and organisations that provide services to refugees and children. These institutions include the Refugee Reception Offices (RRO), Departments of Home Affairs and various NGO's such as the United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund (UNICEF) and the International Organization for Migration (IOM). These determination procedures will need to have safeguards in them in order to ensure that these children's fundamental rights are still upheld throughout the process.

Practically this will be a challenge as a few organs of state and non-governmental organisations will have to work together to achieve this goal of collecting the data needed, however the Committee on the Rights of the child again states that parties should develop a systematic rights-based policy on the collection and public dissemination of qualitative and quantitative data on all children in the context of international migration in order to inform a comprehensive policy aimed at the protection of their rights.[36] Many people will have to be accountable to make sure this procedure is carried out in a manner which still advances human rights. Interpreting the data and then applying the solutions will be a difficult task, however, the goal of preventing statelessness is much more important than the difficulties faced.

1.5. Chapter outline

The thesis is divided into six chapters. In addition to this Introduction, which introduces the issue, formulates the research questions, and clarifies the methodology, chapters two and three provide more context and explanation of the issue of childhood statelessness

Chapter two deals with 'Refugee childhood statelessness: An intersectional phenomenon with multiple causes'. This chapter considers the global phenomenon that is childhood statelessness. The focus falls on displaced children and how forced migration has led to them becoming stateless. The various pathways to statelessness for children are also covered in this chapter. The intersection between child law, refugee law, nationality law, and state sovereignty is highlighted.

Chapter three deals with the 'Plight and precarious position of stateless refugee children'. This chapter highlights the challenges faced by stateless children. The discussion of these challenges covers areas such as education, health, employment, safety and being a child. Chapters two and

[36] CRC General comment No. 22 'Human rights of children in the context of international migration' (2017) CRC/C/GC/22 (CRC General Comment No 22).

three should be read together as they seek to introduce refugee childhood statelessness as an intersectional phenomenon with multiple causes and consequences.

Having provided a broader context to the problem, chapter four finally turns to various 'Legal responses to statelessness'. This chapter examines the legal identity for all stateless refugee children, the international standards and agreements set to protect these children and South Africa's nationality laws when it comes to their protection. The general principles regarding the human rights of these children in the context of international law and forced migration is also covered. After the general overview of the legal regulation of statelessness the attention zooms into the statelessness determination procedure.

Chapter five deals with 'Prevention methods and the statelessness determination procedure. The chapter details how international institutions have mobilised to address childhood statelessness with particular focus on displaced children. The statelessness determination procedure is introduced in this chapter as a solution on how stateless refugee children can get nationality or a form of documentation so that they are not eluded from receiving their basic human rights. Examples from other countries are explored.

The final chapter 'Summary and Recommendations' provides an overview of the thesis and then makes recommendations for legal reform that could contribute to the drafting of a statutory amendment before the deadline set by the UNHCR.

1.6. Methodology

A desktop study will be used for the research done in this thesis. International treaties and Conventions, the laws of different regions and South Africa's legal system will be my primary sources, along with legal case studies. Further, the thesis will be based on studying all available literature on childhood statelessness and refugee children, the main focus will be on scholarly research, reports and articles released by organisations such as the United Nations Refugee Agency.

This thesis will build its arguments through deductive reasoning on the basis of existing studies and literature. There are various fields of literature that cover statelessness, this thesis will only focus on the legal sphere.

1.7. Scope and delimitations

This thesis explores the problem of childhood statelessness among one section of the migrant population only. The focus falls on childhood statelessness, in both the de jure and de factor sense, among refugees and asylum seekers in general and in South Africa in particular.

The thesis will further discuss the laws that protect children and deploy the state to avoid childhood statelessness. The thesis will not be discussing the Children's Act of South African in any detail.

This thesis touches briefly on children's rights, but will go even deeper into statelessness and the UNHCR’s global action plan to eliminate statelessness by 2024.

CHAPTER 2

REFUGEE CHILDHOOD STATELESSNESS: AN INTERSECTIONAL PHENOMENON WITH MULTIPLE CAUSES

2.1. Introduction

While there has been extensive research on statelessness,[37] fewer scholars have considered this issue in relation to refugee children specifically. This chapter will thus discuss the phenomenon of childhood statelessness among refugees and asylum seekers. Understanding the concept of childhood statelessness is an essential first step to proposing how the issue can be addressed. The chapter will discuss what it means to be a stateless child, enumerate the various causes of statelessness of children, and explain the concept of the best interest of the child. These various issues are addressed in order to identify the main considerations that should guide states (South Africa in particular) in recognising, identifying and addressing the issue of childhood statelessness among refugees and asylum seekers.

2.2. Statelessness

The term 'statelessness' is authoritatively defined in article 1 of the 1951 Statelessness Convention as 'a person who is not considered as a national by any State under the operation of its law'. A stateless person falls outside the dominant distinction between nationals (or citizens) and foreigners, because a stateless person is not a national or citizen of any state. She is a citizen nowhere in the world.[38] Later in this chapter, I explore various causes of statelessness and explain how people could be born stateless or later in life end up becoming stateless. I also explain that people can actually be stateless or be at risk of becoming stateless. Finally, I examine how some individuals who lack nationality under the laws of any nation (de jure statelessness) may really no longer benefit from the protection and aid of their national authority (de facto statelessness).

A person is stateless if no state recognises and protects that person as a national or citizen. This definition suggests that the stateless person will be inside the territory of a state that sees the stateless person as an undocumented national or citizen of another state in the majority of cases.

[37] See generally Bloom T, Tonkiss K and Cole P (Eds) 'Understanding statelessness' (2017) 4; Weis P 'Nationality and statelessness in international law' (1979) 28 *Brill* and Siegelberg ML 'Statelessness: A modern history.' (2020) *Harvard University Press*.

[38] Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons.

From this perspective, most stateless persons find themselves in a migration situation and subject to migrations laws and state sovereignty on that basis. Statelessness as a formal legal status often overlaps with some other formal migration status, such as being an illegal or undocumented foreigner, or being an asylum seeker or refugee. Stateless persons might become caught up in the flow of undocumented or illegal labour migration, on the one hand, or forced migration flows induced by persecution or war, on the other. In this thesis the focus falls on the overlap between statelessness and the last two migration statuses.

It is my thesis that it is imperative to remove stateless persons or persons facing the risk of becoming stateless, and in particular stateless children, from these migrant populations and their regulation by migration laws. This is because being stateless brings with it its own set of problems and challenges that must be addressed on its own. This thesis thus implies a radical limitation on state sovereignty in the following sense. States have very few international human rights obligations when it comes to affording a legal status to economic migrants and can largely decide as a sovereign entity who to grant a status and who not. However, state sovereignty over border control is limited by the principle of *non-refoulment*. States are under an international human rights obligation to admit (not return) asylum seekers and refugees but only for as long as they cannot return to their country of nationality. My thesis is that states have an equally strong international human rights obligation to identify stateless children among migration flows and to grant them some form of permanent residence protection if not nationality or citizenship itself.[39] Stateless persons must be recognised as such and not treated and regulated as migrants. This human rights obligation on states is closely related to the best interests of the child standard. The argument is not that stateless refugee children are universally deprived of protection under cover of the status as a refugee or asylum seeker, even if this remains a real risk under many migration and nationality regimes around the world, but that that refugee protection for stateless children is often misdirected and insufficient to accommodate the best interest of the child who is also stateless and then to guarantee a stable future as a locally integrated citizen.

[39] Article 3 of the Convention on the Rights of the Child (CRC) enshrines the principle of the best interests of the child.

The point of these comments is to highlight that childhood statelessness in refugee populations involves an overlap of many legal and socio-political considerations. I briefly comment on some of these intersections below.

Statelessness is often caused by complex historical, social and political factors. Indeed, as discussed further in this thesis, it is an intersectional concept or phenomenon. It is important to underscore that a stateless person can also be a refugee and that this intersection is the primary focus of this study. A stateless person can be a refugee if the person does not hold any nationality and in addition, such person meets the definition of Article 1 of the 1951 Refugee Convention.[40] Among the refugees who are also stateless the problem of childhood statelessness deserves particular attention, as in these situations, children are more vulnerable. For this purpose, I understand the terms 'child' to pertain to any human being under the age of 18 years in line with the authoritative definition in article 1 of the CRC. Addressing the issue of childhood statelessness in refugee populations thus involves a consideration of the rules and principles of three distinct bodies of law: children's rights; refugee law; nationality law and immigration law.

This shows how interrelated forced displacement and statelessness can be. Statelessness can be both a root cause and a product of forced displacement. The 1961 Convention on the Reduction of Statelessness requires signatories to confer nationality on their residents. However, in recent years there seems to be an increase in the numbers of those who are stateless. This is directly attributable to the actions and policies of some nation-states.[41] The rise of the number of statelessness persons is unjustifiable as statelessness is a violation of human rights. A person who is stateless lacks membership of a state and 'will be seen and treated as a foreigner by every country in the world'.[42] The effects statelessness has on an individual are inhuman and cannot be accounted for. These effects are considered in more detail in chapter three below.

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[40] 'Article 1 of the Convention contains the relevant definition , and reads as follows: 'For the purpose of the present Convention, the term refugee shall apply to any person who:
As a result of events occurring before 1 January 1951 and owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

[41] Campbell J 'The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Courts (Re) Define Nationality' (2011) 23 *International Journal of Refugee Law* 656.

[42] Bhatnagar K 'Citizens of the World but Non-Citizens of the State: The Curious Case of Stateless People with Reference to International Refugee Law' (2019) XVI *Social Change and Development* 1 (hereafter Bhatnagar K).

In order to apply the internationally established definition of a stateless person in practice, it is important to keep the following in mind. First, the notion of 'belonging' within a state is determined by membership. One can only be admitted into the state on the basis of the rules of admission or nationality law. These rules are determined either from birth, domicile or marriage. Citizens belonging to a territory are typically seen as members if they meet these admission requirements. The state determines the rules of inclusion or exclusion of rights. For a person to be 'stateless' it is not relevant how the person came to be without a nationality or whether there is the possibility for the person to acquire a nationality by taking action. The only thing that matters is whether, at the present moment, the person is not considered as a national by any state.[43]

The collective social involvement of what makes a state cannot be overlooked when discussing the issue of statelessness. This is further highlighted in the 1955 *Nottebohm* case whereby the International Court of Justice said the following:

> 'According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, 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. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national'.[44]

Traditional literature had the tendency of assuming that statelessness is an unusual, abnormal, and exceptional situation that is found only in marginal or border areas of a state's sovereignty, for example, in refugee camps. However, recent studies have shifted their focus from geopolitical margins to the inside of nation states. Previously, literature dealt with statelessness as a result of the world wars; the focus was on groups of people who had previously possessed a nationality but which was useless to them, the problems of refugees and stateless people

[43] Bhatnagar K (2019) 6.
[44] *Liechtenstein v Guatemala ICJ* (1955) ICJ 1. See also Manby B *Citizenship law in Africa: a comparative study* (2016) 5.

tended to be compounded.[45] Literature has now started to argue that statelessness is a phenomenon found 'at the heart of liberal democracies'.[46] Statelessness can exist in the centre of any industrialised, liberal and democratic state.

It has been estimated that more than 50,000,000 children and youth have migrated across borders. Most of these children are refugees, asylum seekers, economic migrants, and exploited trafficked children. These children are deprived of the protective structures of the state and family, and they are unrecognized by either their country of origin or the international community.[47] The modern approach to statelessness thus has to be viewed with a broader lens in order to accommodate all these different situations.

The statelessness of children is likely not a mainstream issue because nationality is normally acquired at birth. It is a human right and human rights are inalienable rights - one has them simply because they are human.[48] International human rights frameworks assert that 'all human beings are born free and equal in dignity and rights' and therefore have rights simply because they are human. However, in reality, there are clear linkages between citizenship status and one's ability to access fundamental rights. As a result, stateless individuals face a plethora of human rights violations.[49] From the point of view of international law, statelessness is a grave anomaly particularly because nationality is the link between the individual and the Law of Nations. The stateless person has been called flotsam, a *res nullius*, basically a vessel on the open sea, not sailing under any flag.[50] Since no human being should feel like an unwanted object, those who are without a nationality should be given attention and protection, while waiting to receive their nationality.

Citizenship and nationality are not static concepts. The approach to statelessness must be formulated against the changing understandings of citizenship rights. One of the dominant tendencies is the disaggregation of citizenship. Focusing on the European Union (EU), Seyla Benhabib argues that with the disaggregation of citizenship rights, stateless people will seize

[45] Vukas B 'International instruments dealing with the status of stateless persons and of refugees' (1972) 8 *Revue Belge de Droit International Belgian Review of International Law* 143.
[46] Ishii SK 'Transnational regimes of labor and statelessness: Intersections of citizenship regimes and local norms in East and Southeast Asia' (2020) *College of Sociology* 5.
[47] Oberg C 'The Rights of *Children on the Move* and the Budapest Declaration' (2018) *Divisions of Global Pediatrics and Epidemiology & Community Health, University of Minnesota* 1.
[48] Stein J *The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: the Committee's Role & Potential* (LLM thesis, Leiden University, August 2014) 1.
[49] Kingston LN 'Statelessness as a Lack of Functioning Citizenship.' (2014) 19 *Tilburg Law Review* 128 (hereafter Kingston LN (2014)).
[50] Weis P 'The United Nations Convention on the Reduction of Statelessness' (1961) 11 *The International and Comparative Law Quarterly* 1073.

to exist.[51] As explained by Benhabib, the disaggregation of citizenship suggests the entitlement to rights is no longer dependent upon the status of citizenship. If citizenship is no longer the only basis of rights then the absence of citizenship is no longer as destructive of rights as it used to be. Benhabib explains that the disaggregation of citizenship rights proceeds along several axes. First the entitlement to civil and social rights, such as health care, unemployment compensation, old-age pensions, is no longer dependent upon the status of citizenship alone. Second illegal immigrants, refugees and asylum seekers find themselves in a position which is between legal and illegal. This is because until their applications are approved, they are limited as to where they can be domiciled and they cannot accept employment. For example, in line with the disaggregation logic mentioned by Benhabib, the EU's Council of Ministers has recently accepted a resolution that permit those who have been resident for three months and are awaiting the outcome of their applications to seek employment. In addition, children of refugees and asylum seekers are sometimes allowed to attend school. As a whole, legal migrants are afforded increasing levels of protection. This suggests that the real issues around statelessness affect those outside the formal refugee regime, such as undocumented labour migrants and their undocumented children. In contrast, however, to asylum seekers and refugees, undocumented or illegal migrants are cut off from any rights and benefits[52] and when they do work, they have to do so in secret.

While the disaggregation of citizenship rights identified by Benhabib must be recognised and considered, at best it might secure some rights protection to stateless persons and children but fails to reckon with the fundamental fact that a stateless person is not strictly speaking a migrant who find herself temporarily outside her country of nationality. Any progressive system of disaggregated citizenship rights would still treat stateless persons as migrants in need of temporary protection. Disaggregation as a strategy also does not align with the contemporary realities of globalisation as it fails to recognise the sovereignty of the nation and the international cooperation that is at this stage not attainable. Each state has the right to choose who its nationals are, the clearest route would be to align each states nationality laws with the international best practises that protect stateless persons.

Currently the least understood and most challenging rights to realise for children, are arguably, their civil rights. Children are primarily the responsibility of their parents, thus the realisation

[51] Benhabib S 'Disaggregation of Citizenship Rights' (2005) 11 *Parallax* 14.
[52] In the case of: Centre for Child Law and Others v Minister of Basic Education and others (2840/2017) [2019] ZAECGHC, The Department of education was taken to court for its refusal to allocate funds to students who are undocumented.

of their civil rights tend to be through the guidance and direction of their parents or even the community at large. The CRC is the first international human rights instrument to explicitly recognize civil rights of children. Together with the general principles of non-discrimination; best interests of the child; the right to life, survival and development; and respect for the views of the child; there are eight articles that cover the civil rights and freedoms of children in the CRC.[53] Civil rights begin from the moment you are born, as soon as your birth is registered with the relevant authorities. These rights provide the basis for all subsequent rights to which the child is rightfully entitled, such as access to health and education, protection from all forms of economic and sexual exploitation, and justice when a child comes in conflict with the law. Citizenship can be defined as the legal right to belong to a particular country.

However, for the purpose of this thesis it would be important to define and understand citizenship as the possession by members of a community of a range of social and cultural rights and responsibilities by virtue of their membership of that community.[54] These rights and responsibilities mean that members are legally empowered, they are able to attain justice when need be, they can participate in the decision making and they have access to the resources that the state provides. All children are born with civil, political, social and economic rights. These rights enable them to practice their citizenship – at least to some extent since they are still minors. These rights are important as the protection provided by civil rights is particularly important in situations of conflict and emergencies.[55]

As previously stated in chapter one, in the South African context there is no data on childhood statelessness. However, a 2019 study conducted by the Scalabrini Centre of Cape Town found that 27 per cent of children who entered South Africa were unaccompanied minors. A large portion of these children are undocumented. Those who are at risk of statelessness, that is, in terms of not having documentation, represent 40 per cent of the children and 27 per cent are at considerable risk of statelessness. A further 23 per cent of children held documentation as dependants under the Refugees Act but many were no longer in contact with the principal applicant whose presence is required to extend and finalise asylum claims.[56] Due to their

[53] These include Article 7 (Name and Nationality); Article 8 (preservation of identity) of the CRC.
[54] Phillips D and Berman Y 'Social quality and community citizenship' (2010) 4 *European journal on social work* 17.
[55] Gerison L'The participation of children' In Heather M, Burr R, Woodhead M (eds) *Changing Childhoods: Local and Global* (2002) 6.
[56] Scalabrini 'Foreign children in care: South Africa- a comparative report of foreign children placed in child and youth care centres in Gauteng, Limpopo and Western Cape provinces of South Africa' (2019) 6.

invisibility and the lack of a dedicated system in the country to protect them, these children tend to fall outside a country's protection system,[57] or might remain trapped in migration systems which are remised on temporary absence from a country of nationality, such as immigration and refugee law. Stateless children should arguable have a right to exist these regimes which are not designed to deal with their unique plight. Even though they are just children, having a nationality is often the most important matter to them, it is the key that opens the door to attaining human rights and a stable and predictable future as adults.[58]

Victimhood tends to make us see things through a negative lens and slow down our efforts and progress when trying to eradicate the problems associated with it. Child migrants, especially those who are refugees and are at risk of statelessness, are universally viewed as victims. Dominant discussions on children that are migrating tend to be influenced by the 'trafficked', 'separated', 'asylum seeker' or 'refugee' child, emphasising neediness and difference, rather than situating them as rights-holding individuals.[59] States who are faced with dealing with these problems tend to then put up a wall, one that not only differentiates between those who are citizens and those who are non-citizens,[60] but one that also causes a blockage which prevents those who are deemed as victims from having access to basic human rights.

Even countries that claim to have some of the most rigorous systems for protecting children and promoting their rights fall short when it pertains to migrant children, or children who find themselves as non-existent in the eyes of the law.[61] Further, the fact that an asylum applicant may be stateless is often critical when assessing their claim for international protection. Being stateless not only impacts on the initial assessment of the claim, but it can also affect access to procedures such as family reunion, resettlement, or naturalisation because stateless refugees are unlikely to have documentary proof of identity and family links.[62]

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[57] Stein J *The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: the Committee's Role & Potential* (LLM thesis, Leiden University, August 2014) 1.
[58] Milbrandt J 'Stateless' (2011) 20 *Cardozo Journal of International and Comparative Law* 76 (hereafter Milbrandt J (2011)).
[59] Vathi Z and Richards E 'Every Child Matters? Ambivalences and Convergences in Migration Management and Child Protection in Albania' (2021) 27 *Child Care in Practice* 21 (hereafter Vathi Z and Richards E).
[60] A non-citizen is any individual who is not a national of a state in which he or she lives. See reference: University of Minnesota 'STUDY GUIDE: The Rights of Non-Citizens.' Available at http://hrlibrary.umn.edu/edumat/studyguides/noncitizens.html (accessed 24 November 2022).
[61] Vathi Z and Richards E (2021) 23.
[62] European Network on Statelessness 'Stateless refugees and migrants' available at https://www.statelessness.eu/issues/stateless-refugees-and-migrants (accessed 5 May 2021).

It has become evident that statelessness is not just a legal term that each state has to recognise on their own standard but universal co-operation is needed when dealing with statelessness. However, a state's sovereignty cannot be overlooked when dealing with statelessness. Even with globalisation, states are still responsible for setting up their own nationality laws. Due to this, stateless children are at the mercy of the state on whose territory they decide to go seek refuge in.

In this section I introduced the intersectionality of statelessness as an issue at the intersection of child law, migration law and nationality law. Each of these bodies of law has its own founding value or principle. The principle of non-refoulment in the case of migration law. The principle or human right to a nationality in citizenship law. In the case of child law that founding principle is the best interest of the child. In the case of childhood statelessness among refugees, this might be the overriding principle. The next section will consider the role of the state in promoting the best interest of the child and draw inference to how this applies to childhood statelessness.

2.3. The state and the best interest of the child

Article 3 of the UN Convention on the Rights of the Child (CRC) provides as follows:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

Article 4(1) of the African Charter on the Rights and Welfare of the Child provides as follows

> 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.

On this face of it, this broad and unqualified obligation applies directly when stateless children are encountered by the state. It is generally accepted that the state plays a crucial and, above all else, advantageous role in the protection of minors.[63] As indicated in the CRC, states have a clear role in 'rendering appropriate assistance to parents, legal guardians and extended

[63] Boyden J & Hart J 'The Statelessness of the World's Children' (2007) 21 *Children & Society* 237 241.

families in the performance of their child-rearing responsibilities'.[64] States hold a number of essential means to take up this role, including legal authority, financial resources, human resources and infrastructure.[65] When a state ratifies the CRC, it takes on obligations under international law to implement it. Implementation is the process whereby States parties act to ensure the realisation of all rights in the Convention for all children in their jurisdiction.

Article 4 of the CRC requires States parties to take

> 'all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.'[66]

While it is the State which takes on obligations under the CRC, when it comes to the implementation of these rights, it is important that the state engages the different sectors of society, especially the children. The state has to ensure that domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced. In addition, the Committee on the Rights of the Child has identified a wide range of measures that are needed for effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels.[67]

The family plays a vital and unique role in the lives of children. However the family can only fulfil their obligation to the child if the state through its government creates the necessary environment for the protection of children's rights. The area of healthcare is one example, parents have the responsibility of making sure their children are healthy but they can only do this if the government fulfils its responsibility to provide access to health care. Such assistance may include, for example, free health care for children under five years of age, or cash transfers

[64] Article 18 (2) and (3) of the CRC.
[65] UNICEF 'Early Childhood Development: The Role of the State.' Available at https://www.unicef-irc.org/article/599-early-childhood-development-the-role-of-the-state.html (accessed 13 July 2021).
[66] Article 4 of the CRC.
[67] UNICEF 'The Convention on the Rights of the Child.' Available at *https://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html* (accessed 16 July 2021).

to vulnerable children,[68] thus the government provides parents with some of the tools they need to raise their children.

The 'Statelessness of the World's Children' by Boyden and Hart illustrates the two-way relationship in which children are critical to states, just as those same states are seen to play a central role in the lives of the young.[69] A particular state is seen as a primary guarantor of the rights and well-being of children. However, when children are displaced across borders due to armed conflict or political oppression, their connection to the sovereign state is far from natural. For displaced children entitlements that are, in principle, assured by membership of a nation-state are subject to being contested by politicians, the media or civil servants. Basic services are liable to be offered as charity, if at all. Although there is a growing body of literature, from both academic and practitioner sources, that discusses such matters in the context of the UK and Europe, it is rare for such work to interact with experience from parts of the world where children are displaced in large numbers,[70] or where there is a large number of undocumented children. I agree with Boyden and Hart when they state that extensive work has to be done to cover such matters in other parts of the world.

Another factor of importance is the voice of the child and the right to have their views heard by those responsible for their protection. In many situations, especially in the forced migration context, children find themselves without parents and without important documents, such as proof of birth registration. This is why it is important that children are involved in the conversations and their voices are heard when states are dealing with questions involving citizenship. Child participation in the context of governance is often considered in relation to Article 12 of the CRC. Article 12 recognises a child's right to be heard or express views freely, to have her/his views considered seriously in decision-making and to have a government ensure the realization of these rights. Child participation can be defined as children being involved in the conversation by engaging with opportunities to form and express their views and to influence matters that concern them directly and indirectly. Meaningful participation for these children involves a transfer of power from the adults to the children, which transforms the status of children from passive recipients to active agents, who are informed and able to

[68] OLCreate 'Children's rights and the law: Role of family and State' available at *https://www.open.edu/openlearncreate/mod/oucontent/view.php?id=53771%C2%A7ion=2.4.2* (accessed on 16 July 2021).
[69] Boyden J & Hart J 'The Statelessness of the World's Children' (2007) 21 *Children & Society* 237
[70] Boyden J & Hart J (2007) 241.

influence decisions affecting their lives.[71] Participation thus requires information sharing and dialogue between children and adults based on mutual respect.

While child participation is a right in itself, it also leads to the realization of other rights. General comment 20 of 2016 on the implementation of the rights of the child during adolescence, for instance, calls:

> 'On States parties to ensure that adolescents are involved in the development, implementation and monitoring of all relevant legislation, policies, services and programmes affecting their lives, at school and at the community, local, national and international levels.' [72]

General comment 20 also explicitly mentions:

> 'The importance of participation as a means of political and civil engagement through which adolescents can negotiate and advocate for the realization of their rights, and hold States accountable.'[73]

When these children participate in the conversations about the plans, local policies and laws that affect them, a more effective solution will come about in situations that deal with children it is important that we give them a voice.[74]

In South African 'the principle which runs like a golden thread through the fabric of our whole law relating to children [is] that the interests of the children are paramount'.[75] South Africa is not only a signatory of the CRC but the Constitution of South Africa, in its Bill of Rights provides for the best interest of the child:[76]

> 'A child's best interest is of paramount importance in every matter concerning the child'.

Sloth-Nielsen and Mezmur underscore the commitment of the legal system to promote and develop this principle.[77] They are satisfied that the legislator and the courts have achieved

[71] UNICEF '*CHILD PARTICIPATION IN LOCAL GOVERNANCE'* 2017
[72] Committee on the Rights of the Child 'General comment No. 20 on the implementation of the rights of the child during adolescence.' (2016) 7.
[73] Committee on the Rights of the Child 'General comment No. 20 on the implementation of the rights of the child during adolescence.' (2016) 8.
[74] UNICEF 'Child participation in local governance' (2017) *Public Finance and Local Governance* 3.
[75] Swedish (Finland) *GJU v BU* (183/2013) [2013] ZAECGHC para.17.
[76] S 28(2) of the Constitution.
[77] Sloth-Nielsen J and Mezmur 'BD '2 + 2 = 5 Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) *International Journal of Children's Rights* 10.

this because of the maturing of the constitutional project overall as well as the role played by the Committee on the Rights of the Child in monitoring implementation in the various participating countries.[78] According to Sloth-Nielsen and Mezmur, South Africa has upheld the principle of the best interest of the child. This study somewhat agrees with the authors in the sense that the state plays a key role in the protection of minors. However, the protection that the state awards tends to not always extend to children who are not citizens, but are within the territory. Stateless children should not have to rely on charities and certain organisations to provide for their wellbeing, especially when the best interest of the child steers how laws and policies should be applied in regard to *all* children.

Statelessness in refugee children is an intersectional phenomenon in which the best interest of the child is one, if not the paramount, principle to consider, together with the principle of *non refoulment*, the principle of belonging to a political community, and the principle of self-government or state sovereignty. In order to better understand the tensions or intersections of these principles it is necessary to develop a more refined understanding of statelessness than the working definition that we started with. The next section will delve deeper into the meaning of statelessness by considering the different categories of statelessness.

2.4. De Jure and De facto statelessness

The establishment of nation-states meant that people needed to be recognised as belonging in a community. Entrance into another community warranted the need for identity and residency documents, passports and citizenship. Statelessness thus poses a major problem for some people. The problem of statelessness takes two conceptually distinct forms, the lack of legal identity and the inability to prove the legal identity that one does have. The lack of legal identity, characterises both de jure and de facto stateless people. The de jure stateless are people without the official or formal nationality of any state,[79] they are literally stateless *by law*. The de facto stateless are 'persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.[80] In a world of nation states, the de jure stateless lack 'the right to have rights'[81] the definition of de jure

[78] Sloth-Nielsen J and Mezmur (2008) 15.
[79] Article 1 of the 1954 Convention Relating to the Status of Stateless persons.
[80] UNHCR 'Expert Meeting: The Concept of Stateless Persons under International Law Summary Conclusions' (2010) 6.
[81] Fullerton M 'The Intersection of Statelessness and Refugee Protection in US Asylum Policy' (2014) 2 *Journal on Migration and Human Security* 142.

stateless is defined in article 1 of the 1954 Convention relating to the Status of Stateless Persons.[82] Even though this definition is not stated in the 1961 Convention on the Reduction of Statelessness, it is presumed. Further, the term was later used in the UN Guidelines on Statelessness.[83] We can thus conclude that all de jure stateless people share the same legal identity.

A problem arises, however, with the definition found in the Convention. The definition is a technical and legal definition. The definition being one of fact (one is stateless simply because one lacks a state's nationality). This could pose problems as one is a citizen by operation of that state's laws. If someone's application for citizenship is declined this means that person is not considered a citizen by mere fact of that state's law. If the administrative procedure allows for discretion when granting citizenship, then applicants cannot be considered citizens until the application has been approved and completed and the citizenship of that State has been bestowed to them. But, most people are not considered nationals by operation of one State's law only. Everyone is born in a geographical location, they have parents who originated from that state and most people have ties with the country they reside in, nonetheless, not everyone receives a nationality 'by operation of law'. Those who have not received nationality automatically under the operation of any State's law are stateless persons or, more specifically, de jure stateless persons.[84]

The de facto stateless, are persons who technically possess a nationality but they do not enjoy the protection and benefits that come with this nationality *as they are unable to prove it*. There are many reasons as to why they are unable to prove their nationality; these could include fear, civil disorder or their country refuses to award them that protection. For example, women and children who have been subjected to human trafficking are often held in a foreign country in conditions that are so horrible and controlled that they are not even allowed access to their passports and no practical possibility of seeking the protection of their national state. In de facto stateless situations, the person is a national of some state but lacks the protection of the

[82] Article 1(1) of the 1954 Convention: 'For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law'.
[83] UNHCR 'Guidelines on statelessness no. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (2012) 4.
[84] Batchelor C 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization.' (2005) 22 *Refuge: Canada's Journal on Refugees* 34 (hereafter Batchelor C (2005))171.

laws of that state.[85] De facto statelessness can be a very problematic concept because there is no legal definition for it, unlike de jure statelessness. When the status of stateless persons was discussed in the 1954 UN Statelessness Convention, instead of expanding the definition of statelessness to include those who are de facto stateless, law-makers limited the definition to de jure stateless persons and left the decision to nation states as to whether to extend its benefits to de facto stateless persons in the final Act. This stated that:

> 'The Final Act of the Convention recommends that each Contracting State, when it recognises as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to the person the treatment which the convention accords to stateless persons'.[86]

In practice, it may be difficult to include de facto stateless persons under the 1954 UN Convention. For that reason, 'de facto stateless persons may fail to receive any protection guaranteed under the 1954 Convention'.[87] The de facto stateless exist somewhere on the membership spectrum between full and non-citizenship. They are denied the benefits of full and functioning citizenship, facing a plethora of human rights challenges similar to the situation of de jure stateless. Yet they hold legal nationality to a state; technically, they are members of a political community somewhere.[88] Some activists have termed these people as effectively or functionally stateless. Effective statelessness means that sometimes people who belong to that state are not able to prove their nationality, as they are sometimes undocumented. Further there is no benefits to being a national of that state. For example someone who is a legally non-resident citizen may enjoy more protection in a particular state than a citizen of a state which is under a violent regime, while those who technically retain their legal connection to a state may substantively lack all connection to it. In order for the nationality to be effective one must have a healthy relationship with the state. While the national supports that government, there must be benefits that flow from being a national under that government. This lack of an effective nationality is a reality which affects a lot of children of undocumented immigrants

[85] Atuguba RA, Tuokuu FXD and Gbang V 'Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy, and Administrative Frameworks in Ghana.' (2020) 8 *Journal on Migration and Human Security* 16 (hereafter Atuguba RA, Tuokuu FXD and Gbang V (2020)) 16.
[86] UNHCR 'Objectives and key provisions of the 1954 Convention relating to the Status of Stateless Persons' available at *https://www.unhcr.org/protection/statelessness/3bd7d3394/objectives-key-provisions-1954-convention-relating-status-stateless-persons.html* (accessed 21 October 2022).
[87] Tas L 'How international law impacts on statelessness and citizenship: The case of kurdish nationalism, conflict and peace' (2016) 12 *International Journal of Law in Context* 48.
[88] Kingston LN (2014) 132.

and those who belong to marginalised communities such as the Roma or the Rohingya who often lack the documents required to prove legal identity.[89] There are different situations in which de facto statelessness can arise, these will be discussed further down in the chapter.

What is the relationship between de jure and de facto statelessness from a rights-based perspective? Arguable those who are de jure stateless are awarded more protection even though they are in the most extreme position. There is a higher number of protection to the de jure stateless, there are legal safeguards set for them in internationally recognised legal instruments.[90] This is due to the fact that de jure statelessness has a legal definition while de facto does not. That is why persons who are stateless de facto should as far as possible be treated as stateless de jure to enable them to acquire an effective nationality.[91]

We also have statelessness in situ and statelessness in a migratory context. Those who are stateless in situ have never crossed borders and are stateless in their own country. Those who are stateless in a migratory context are expatriates who either lose their nationality, never acquired one, or are denied the nationality of the country they are habitual residence in.[92] These two contexts of statelessness reflect a difference in attachment to a country. The reason for making a difference between these two concepts also highlight the difference in situation that stateless persons can find themselves in. However the main reason for making this distinction is the difference in response that the distinct situations represented by the two concepts require.[93] Stateless in situ are persons who are usually in a non-migratory situation, these people remain in their own country and are usually stateless since birth. These people could have been victims of state succession who have links to their place of residents, their parents have lived there their whole lives and they know no other place and have intentions to remain there. Those people should therefore be granted nationality because of the effective link they have to that state. In their article 'The Human Rights of Stateless Persons' David Weissbrodt and Clay Collin state that one way to ensure that stateless persons realize their right to a nationality, is through the doctrine of the genuine and effective link.[94] According to this

[89] Siegelberg ML *Statelessness: a modern history* (2020) 231.
[90] Kubal A 'Can statelessness be legally productive? The struggle for the rights of noncitizens in Russia' (2020) 24 *Citizenship Studies* 198.
[91] Massey H 'Legal and Protection Policy Research Series UNHCR and De Facto Statelessness' (2010) *UNHCR* i.
[92] UNHCR *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014) 3.
[93] Bloom T, Cole P and Tonkiss K *Understanding statelessness* (2018) 36.
[94] Weissbrodt D and Collins C 'The Human Rights of Stateless Persons' (2006) 28 *University of Minnesota Law School* 276.

doctrine, a person should be eligible to receive citizenship from states with which they have a substantial connection or a genuine and effective link.[95] People who are stateless in the migratory context are persons who are migrants or have a migratory background. Persons who have no (or no significant) ties to the country they live in (yet), and should, as a consequence, be able to obtain the protection of the state they live in (as well as to facilitate naturalisation) through determination of statelessness.[96] In this situation, a statelessness determination procedure would be an effective tool in providing these people with the protection they need. In order to identify these persons, we will need to make sure that the criteria is clear, the different definitions are unified and the different reasons for them ending up stateless are recognised.

In the next section I take a closer look at the main contributing causes to statelessness.

2.5. The causes of statelessness

There are various paths that lead to statelessness. Some of the causes of statelessness include discrimination, state succession, arbitrary deprivation of nationality, administrative barriers and lack of documentation, conflict of laws, and the inheritance of statelessness.[97] The study discusses the various pathways, but calls particular focus on forced migration because most people who are forced to leave their homes or country are labelled as refugees and not as stateless refugees, especially in situations where they are both stateless and refugees. A broader understanding of the ways people can end up stateless will assist authorities to better identify stateless persons among refugee populations so that they can enjoy the rights to which they are entitled.

2.5.1. Discriminatory registration and nationality laws

Status discrimination based on gender and birth are some of the leading causes of statelessness caused by discrimination. What happens is that in some countries the domestic laws prevent women from passing on their nationality to their children. The UNHCR listed ten specific actions that will reduce or prevent statelessness. Action 3 of the plan aims to ‘remove gender discrimination from nationality laws’,[98] International law provides protection from arbitrary

[95] Weissbrodt D and Collins C (2006) 276.
[96] Bloom T, Cole P and Tonkiss K (2018) 38.
[97] Atuguba RA, Tuokuu FXD and Gbang V (2020) 22.
[98] UNHCR ‘Global Action Plan to End Statelessness 2014–2024’ (2014) 14.

distinction by governments, it states that women should receive equal treatment to men, and non-marital children to marital children.[99] Article two of the Universal Declaration of Human Rights states that:

> '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, 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'.

We have an example of gender discrimination in Gulf Cooperation Council States, a regional, intergovernmental political and economic union which consists of six countries middle eastern countries: Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. They have all ratified the CRC.[100] If a country' domestic laws state that nationality is conveyed through birth, then birth registration will verify that a child is entitled to nationality. If nationality is conveyed through the child's parents, then parentage will verify that a child is entitled to nationality. When a child's birth is then not documented, the child's nationality may not be recognized by the state of nationality due to lack of proof. If that child does not have another nationality, he/she is at a severe risk of statelessness. While International law prohibits gender discrimination,[101] and a lot of literature that frequently discusses statelessness highlights the importance of civil registration, and how nationality laws should not discriminate based on gender in order to prevent statelessness, gender discrimination in civil registration law is not discussed enough. Many legal and societal factors may deter a mother from registering her child's birth. For instance, if the mother is a single mother, the stigma might dissuade her from registering her child's birth. Even where nationality law technically allows a woman to transfer nationality to her children, this right may be rendered completely theoretical if the mother cannot register the births of her children and thereby give the child proof of her nationality. Every GCC country's civil status provides a list of individuals responsible for documenting the child's birth, with legal responsibility falling to each individual in the order they are listed. What this means is that the second person will only assist if the first one is unavailable. Each of these country's law's prioritizes male relatives over female relatives, meaning women will

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[99] Fisher BL 'Gender discrimination and statelessness in the gulf cooperation council states.' (2016) 23 *Michigan Journal of Gender & Law 271-273.*

[100] United Nations Human Rights 'Status of Ratification Interactive Dashboard' available at *https://indicators.ohchr.org/* (accessed 5 November 2020). The next paragraph is based on Fisher BL 'Statelessness in the GCC: gender discrimination beyond nationality law' (2015) 1 *Institute on Statelessness and Inclusion* 2.

[101] Article 2 of Convention on the Elimination of All Forms of Discrimination against Women states: 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women'.

have a difficult time registering the birth of their child. Only Saudi law explicitly allows a mother to register the birth of her child; the other states do not clearly state that a mother could register the birth of her child. Under Kuwaiti civil registration law, there is no way for a woman to register the birth of her child. In Bahrain, Oman, Qatar, and the Emirates, preference is given to registration by the father, but it is unclear whether mothers can register or not.[102]

These gross human rights abuses against women persist even though there exists a strong legal regime to protect women with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Gender discrimination in nationality laws highlights the legal gap when it comes to the protection and promotion of gender rights and statelessness around the world.[103] The link between gender discrimination and statelessness has not been explored enough, literature and policy makers are generally silent on this matter due to political and religious sensitivities.

Nationality laws will generally not explicitly be racist or discriminatory. More often people become stateless through indirect discrimination, when nationality laws appear neutral, but in reality, they disproportionately affect minorities. In other cases, it is the people that implement the nationality laws. They may do so in discriminatory ways, especially if these administrators of the laws have discretionary power in naturalisation or registration procedures. Moreover, members of minority groups are often not in a position to challenge these decisions either because they are poor, less educated, do not speak the official language, live in remote areas or have a limited understanding of their rights.[104] Some policies are set up to push a racial agenda. Policies that acknowledge nationality on the grounds of blood ties alone (*jus sanguinis*), with no provision for nationality to be conferred on the basis of place of birth *(jus soli)* or on other grounds, can serve to deny whole populations of rights in what is often the only country they have ever known.[105] In the Americas, particularly the Dominican Republic, there is a crisis of 'race-based statelessness', which denies citizenship to hundreds of thousands of people, based on racial and ethnic prejudice.[106] The Constitution of the Dominican Republic used to follow

[102] Fisher BL (2015)2-3.
[103] Reddy S and Ramaprasad A (2019) 384.
[104] Spitálszky A 'Denial and denigration: How discrimination feeds statelessness.' available at *https://www.statelessness.eu/updates/blog/denial-and-denigration-how-discrimination-feeds-statelessness* (accessed 22 June 2021).
[105] Human Rights Watch 'Racism, Racial Discrimination, Xenophobia and Related Intolerance Four Areas for International Action' available at *https://www.hrw.org/legacy/campaigns/race/hrw-statement1.htm* (accessed on 23/08/2021).
[106] Blake J 'Haiti, the dominican republic, and race-based statelessness in the Americas.' (2014) 6 *Georgetown Journal of Law & Modern Critical Race Perspectives* 139.

the jus soli criteria, meaning all children born in the Dominican Republic are considered nationals of the republic, However that has been amended to exclude children of foreign parents.[107] Haitians who are darker skinned are usually considered to be foreigners. In September 2013, the Dominican Constitutional Court upheld a constitutional amendment to revoke the citizenship rights of persons born in Dominican territory to undocumented immigrants, who are primarily black and of Haitian origin.[108] Therefore tackling discrimination is crucial to ending the statelessness of minority communities' around the world, this is as much an issue when dealing with refugees, as they are almost always considered as non-white and of African descent.

2.5.2. State succession

A wave of disappearances and dissolutions of states took place in the 1990s, especially in Europe, creating a vast problem for many of the nationals of these former states, specifically in relation to citizenship status as it left many persons stateless. The Vienna Convention defines succession of state as 'the replacement of one State by another in the responsibility for the international relations of territory'.[109] Initially, nationality has always been viewed as the state's prerogative. As such, early instruments on these matters did not set out whose nationality would or should be affected by state succession, or how. The 1961 Convention on the Reduction of Statelessness is however one of the first instruments of international law to regulate nationality in relation to state succession. Article 10 provides as follows:

> 'Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions'.
>
> 'In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality

[107] Article 18(3) of the Constitution of the Dominican Republic states: 'People born in the national territory, with the exception of the sons and daughters of foreign members of diplomatic and consular legations, of foreigners that find themselves in transit or reside illegally in Dominican territory. All foreigners are considered people in transit as defined in Dominican laws'.
[108] Blake J (2014) 139.
[109] Article 2 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983.

on such persons as would otherwise become stateless as a result of the transfer or acquisition'.

O'Connell stated the principle as follows:

> 'It is the municipal law of the Predecessor State which is to determine which persons have lost their nationality as a result of the change in sovereignty; it is that of the Successor State which is to determine which persons have acquired its nationality'[110]

Another boundary to persons under state succession takes the form of a lack of recognition by other states. This was elaborated on in the *Nottebohm* decision.[111] The case involved proceedings by Liechtenstein on behalf of Nottebohm, a naturalized citizen of Liechtenstein, for damages arising from the acts of Guatemala. The Court ruled the claim inadmissible, holding that Nottebohm lacked the real and effective links with Liechtenstein on which Liechtenstein could exercise diplomatic protection on his behalf.[112] O'Connell makes a paramount observation on this decision, how the effective nationality principle applies in the specific context of state succession. He says:

> 'There must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor state attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned'.[113]

This observation takes us back to a nation and who is seen as being part of that nation. With state succession, new laws can come to play at any moment and one who once was under the protection of a particular state is now left without an identity and without the protection of any state. In the case of refugees, if a civil war breaks out and the old state breaks up and is replaced by two or more new states, and none wants to recognise the refugees of the former state as citizens of the successor state. In these circumstances state sovereignty should not be seen as being absolute and should adhere to the human rights standards set by international law.

[110] Quoted in Mann FA 'The effect of changes of sovereignty upon nationality' (1942) *Modern Law Review* 221.
[111] *LIECHTENSTEIN v GUATEMALA* [1955] ICJ 1.
[112] *LIECHTENSTEIN v GUATEMALA* [1955] ICJ 26.
[113] O'Connell DP *State succession in municipal law and international law* (1967) 499.

2.5.3. Forced migration

Forced migration has become a phenomenon in the twentieth and early twenty-first centuries. Around the world, people are being forced daily to flee their homes. There are many reasons as to why people leave their communities. The reasons can be conflicts where they stay, political persecutions and even the effects of global warming. Refugees are globally recognised as a form of forced migration and refugee law provides protection to persons who have been displaced across international borders, fleeing political persecution by travelling into neighbouring states or moving long distance to states in other continents in search for international protection.[114] The conditions in which people who are fleeing for their lives find themselves in, can increase their risk of becoming stateless, even for those who had possessed a nationality. That is why in the past the problem of statelessness was covered under agreements that dealt with refugees, because the problem of statelessness was closely linked to forced migration, the notion was that people only become stateless when they were displaced because of conflict. Three treaties have been adopted to address problems of displacement and statelessness: the 1951 Convention relating to the Status of Refugees, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. A stateless person who is not a refugee enjoys protection under the 1954 Statelessness Convention, while a stateless refugee qualifies for protection under both the 1954 Statelessness Convention and the 1951 Refugee Conventions. This point is crucial and provides one of the strongest reasons for parallel status determination procedures. The Refugee Convention provides more comprehensive protection for stateless refugees, including the non-penalisation of unlawful entry and the principle of non-refoulment, which prevents states who receive refugees from sending them back to the countries they are fleeing from if their lives are at risk. To avoid 'double counting', stateless refugees are reported within the refugee statistics of the United Nations High Commissioner for Refugees (UNHCR), while only non-refugee stateless persons are accounted for in the statelessness statistics.[115] A stateless refugee may, nevertheless, continue to face problems once the fear of persecution no longer exists and he or she is expected to return to the country of origin. A refugee might find that at this point he or she is no longer recognised as nationals by his or her home country. Then, international protection as a stateless person may be necessary. Ideally, stateless persons should be removed

[114] Betts A *Forced migration and global politics* (2009) 1.
[115] UNHCR 'Global trends: Forced displacement in 2017' 53.

from the refugee protection regime at a much earlier point and provided with a more permanent public status. A separate statelessness status determination process would make this possible.

The 1961 Convention on the Reduction of Statelessness aims to help states to avoid statelessness and provides for acquisition or retention of nationality in various circumstances. It is equally applicable to stateless persons who are not stateless refugees.[116]

It is very difficult to predict global forced displacement, or the impact it can have on global sustainable goals. These types of predictions usually rely on observing historical population trends and then anticipating future events, which is sometimes impossible. If we had looked at the displacement trajectory of the 1990s and 2000s, we would have expected a far lesser number of displaced persons. The rapid growth of displaced people that we have seen in the past decade, could have not been predicted. At the same time many displaced people eventually resettle, they do this by either building permanent homes in their host communities or in a third country that is willing to take them in.[117] Between 2000 and 2009, the numbers of displaced generally ranged between 37 and 42 million. The last decade, however, brought a major shift. More people sought refuge, but those who had been displaced had fewer options for rebuilding their lives. As wars and conflicts dragged on, fewer refugees and internally displaced people were able to return home, countries accepted a limited number of refugees for resettlement and host countries struggled to integrate displaced populations.[118] Looking at the current trend of displaced people, it does not look good for future populations. Whatever the trajectory is at the moment, it is not set in stone and if we take steps to assist those who have to deal with forced displacement we can change the trajectory for the best.

Forced displacement is not the only motive for leaving one's own country, there are other factors which can motivate people to leave their homes. Some people have to leave their countries to find work elsewhere so that they can provide for the physical needs of their families. These migrants are called economic migrants. [119] This is probably one of the leading reasons why states are reluctant to create a pathway to naturalisation for illegal foreigners via statelessness regimes. Be it so, this will put the children born to these illegal migrants at risk of statelessness, and the goal is to always do what is best for the child, which would be to

[116] Bhatnagar K (2019) 7.
[117] UNHCR 'Resettlement' available at *https://www.unhcr.org/resettlement.html* (accessed on 6 November 2022).
[118] UNHCR '*Global Trends: Forced Displacement in 2019'* (2022) 11.
[119] Ball J, Butt L, Beazley H, and Fox N. 'Advancing Research on "Stateless Children" Family Decision Making and Birth Registration among Transnational Migrants in the Asia-Pacific' (2014) *University of Victoria, Centre for Asia-Pacific Initiatives* 2.

ensure that no child is left stateless. This population of children will not only be stateless but they will contribute to the cycle by passing on statelessness to their children.

2.5.4. Documentation

Documents play a vital role in proving someone's identity, which can be linked to nationality. Those who are forced to leave their homes, communities and countries due to conflict, famine extra tend to forget to carry their identity documents, especially in situations whereby you are fleeing for your life. Without any documentation, proving their nationality may be a real challenge, and such persons may be considered at risk of statelessness. Especially if they stay outside their home countries or regions for a long period.[120]

When illegal migrants give birth in a new country, they must register their new born baby. Registering a child's birth and acquiring a birth registration are extremely important as they often provide the first legal recognition of a child and are frequently a prerequisite to obtaining any further civil or identity documents. The CRC states:

> 'he child shall be registered immediately after birth and shall have the right from birth to a name [and] the right to acquire a nationality'.[121]

However, many parents are not able to register the births of their children, especially in cases of forced displacement. Whether forced migrants remain within their country of residence or they cross the borders, they frequently do not have access to registration offices. Sometimes those living in camps or temporary shelters deal with registration officials who are reluctant to issue documents to non-permanent residents. In other cases individuals are faced with timeline issues, they may delay to register their children because of the situation they find themselves in. Then when they finally reach a registration office, registering their child's birth is no longer open to them. Those whose births have not been registered or who cannot produce evidence of registration then cannot prove where they were born or who their parents are. Children without birth certificates grow up to be adults whom no country will acknowledge as nationals.[122] This then perpetuates the cycle of statelessness.

[120] Atuguba RA, Tuokuu FXD and Gbang V (2020) 22.
[121] Article 7 of the CRC.
[122] Fullerton M 'The Intersection of Statelessness and Refugee Protection in US Asylum Policy.' (2014) 2 *Journal on Migration and Human Security* 148.

Besides the issues of birth registration, there are other barriers in accessing civil registration and identification documents which may increase the risk of statelessness. Marriage certificates, death certificates and other civil registration documents are often essential pieces of evidence that help to establish residency, parentage, identity and nationality. Challenges in accessing civil documentation that may put individuals at risk of statelessness include: Lack of civil documentation prior to displacement. There are cases, whereby some communities or groups of people never possessed identity documentation, they lived autonomously from the state and it was not a norm to be linked to a particular territory or group of people by some form of document.[123] This usually happens amongst minority groups, indigenous or nomadic populations. Although this may not have caused difficulties for them in their place of origin, in the context of forced displacement, being undocumented poses challenges. For example, many Tuareg, who traditionally have not possessed any form of civil documentation, were forced to flee both Mali and Libya due to internal conflict. Upon return to their respective countries, many Tuareg refugees faced various obstacles in proving their identity and that they were, in fact, citizens of their country of origin.[124] Another problem is that of fraudulent documents. Some people who do not have their documents and cannot make new ones or get copies, will resort to illegal means to try and procure these documents. When authorities then find out that these documents are forged they may contest the individuals status. Under new guidelines in Ecuador, individuals found to have acquired fake Ecuadorian identity documents are completely removed from the Ecuadorian registry.[125] For displaced Colombians living there – some of whom had acquired fake Ecuadorian documentation, this may be particularly problematic in cases where the parents hold a Colombian identity document but their children are not Colombian. [126]

If you are unable to receive proof of identity in the country you reside in, you are in a senses rejected from being a national of that country. Recognition by ones country is usually through identity documents, without this a person is very much sustainable to statelessness.

[123] Kohl I and Fischer A (eds) 'Tuareg Moving Global: An Introduction' in Tauris IB *Tuareg Society within a Globalized World: Saharan Life in Transition* (2010) 1–8.
[124] Jalali M 'Tuareg Migration: A Critical Component of Crisis in the Sahel' available at *https://www.migrationpolicy.org/article/tuareg-migration-critical-component-crisis-sahel* (accessed on 6 November 2022).
[125] Albarazi Z and van Waas L 'STATELESSNESS AND DISPLACEMENT Scoping Paper' *Norwegian Refugee Council* 21 (Hereafter Albarazi Z and van Waas).
[126] Albarazi Z and van Waas 22.

2.5.5. Conflict of laws

Conflict of laws may contribute to statelessness in situations where the nationality legislations of different states are inconsistent. Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws permits 'each state to determine under its own law who are its nationals'. It is because of this unilateral state action that statelessness under certain conditions does occur. States make the decision of who gains and who loses their nationality.[127] Conflict of laws may contribute to statelessness in situations where the nationality legislations of different states are inconsistent. Since States are generally free to determine their own nationality laws, provided these abide by international law. Regulations defining the acquisition and loss of nationality differ substantially across jurisdictions. For example, in some countries, nationality may only be acquired through familial ties, or jus sanguinis, and other countries confer nationality through birth on the territory, or jus soli, and there are various combinations of these two practices. Such differences between the laws of different jurisdictions mean that displaced populations may fall through gaps and be rendered stateless. The risk of this happening is especially present in the context of people who are displaced across international borders, since it implicates the nationality laws of at least two countries. Displaced populations may also be affected by major political upheavals that occurs during their absence from their country – such as state secession. New rules and ways of conferring nationality might then be established in these situations.[128] In situations of such political upheaval proving one's link to a particular state can be met with extreme challenges.

The fact that each state can decide whether nationality is conferred to someone through birth, marriage or parentage can give rise to a conflict of laws, especially in the migratory context, these conflicts may likewise give rise to statelessness. Further, even though one may have links to more than one state, he or she may still fail to qualify under the law or operation of the law as a national of any of those countries. The likelihood of a conflict of laws leaving a person stateless is increased where discriminatory nationality rules are enforced, particularly with gender discrimination in the conferral of nationality as discussed above. Where a mother cannot pass her nationality to her children, there is already one less avenue available through which to secure a nationality at birth.[129] The child of parents who are nationals of states following the jus soli principle, born in the territory of a state wherein nationality at birth is determined by

[127] Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law, 1930.
[128] Sköld N 'Mapping a Sociology of Statelessness' (2019) 24 *Tilburg Law Review* 16-18.
[129] Albarazi Z and van Waas L 8.

jus sanguinis, is without a nationality. The parents' state does not confer nationality because the child was not born on its territory, while the state wherein the child was born also refuses because the parents are foreigners. In this situation, the child will obviously be stateless. If a child is born of stateless parents in the territory of a state adhering strictly to jus sanguinis, the parents have no nationality with which to endow the child who, consequently, becomes stateless. Some states, for example, China, Italy, Japan, Poland, and Turkey, make modifications and in these circumstances grant nationality unconditionally.[130] Because each state can determine their own nationality laws, on an international level, in situations like these, a Statelessness Determination Procedure could be the only solution.

2.5.6. Arbitrary deprivation

The arbitrary deprivation of nationality can be and has been institutionalised in some states. This is a situation that affects countless children, especially in areas like the Caribbean and in countries like the Dominican Republic.[131] There are two key factors leading to children to be stateless throughout the Caribbean: (1) ineffective civil registration and documentation systems, which was discussed in the previous paragraph, and (2) lack of adequate safeguards for children who would otherwise be stateless. Even though the situation in the Dominican Republic deals with children of migrants, refugees who migrate to a new state could experience the same discrimination when trying to register the birth of their children who are born in that state. This being due to the fact that they are foreigners and viewed as outcastes. In the Dominican Republic it is the duty of civil registry officials to determine whether the child who has been brought before them to have his/her birth registered is eligible for Dominican nationality. If the official decides that the child does not qualify for Dominican nationality, which is usually the case with children of unauthorised Haitian migrants, the child will then not be registered and there is no clear appeal system against such a decision. The right to birth registration is thus equated to the right to Dominican nationality and denial of birth registration has become the mechanism for denial of nationality to children of irregular Haitian migrants.[132] This then calls into question as to what degree can a government call on sovereignty as a justification to exclude its own citizens. The unwillingness of some officials to grant children

[130] Samore W 'Statelessness as a Consequence of the Conflict of Nationality Laws' (1951) 45 *The American Journal of International Law* 476-477.
[131] Inter-American Commission on Human Rights *Report on the Situation of Human Rights in the Dominican Republic* (2015) 235.
[132] Wooding B 'Contesting discrimination and statelessness in the Dominican Republic' (2009) 32 *Forced Migration Review* 23.

the right to the countries nationality due to discrimination is a human rights violation and one that perpetuates statelessness.

Another contributing cause of statelessness for children in the Caribbean is inadequate safeguards for children who would otherwise be stateless. In the context of migration, it is not only the country of birth but also the country of descent that should ensure that these children are able to be registered and have a nationality. Under Article 1 of the 1961 Convention on the Reduction of Statelessness, we find that the State 'shall grant its nationality to a person born in the territory who would otherwise be stateless'. Article 1 does not oblige States to grant nationality to all the children born on their territory, but simply requires States to do so if the child would otherwise be stateless. It is important to note that it is rarely the failed policies of one State that creates a situation of statelessness for children of migrants; rather, it is the dangerous combination of poor policies in the countries of descent and countries of birth that interact to the detriment of the child.[133] The arbitrary deprivation of the nationality of children born of Haitian migrant workers in the Caribbean demonstrates that a government's aim is not always to protect the people within its territories, even if they are born in that territory. Statelessness can be caused by those who are supposed to prevent it.

2.5.7. Religion

Discrimination is defined as having a prejudice toward certain individuals based on certain proscribed grounds. Some of those grounds are race, colour, sex, language, religion, political or other opinion, descent, national or social origin, marital status, property, and birth. These grounds are well established and their bases of distinction are defined by an international legal regime under various legal instruments. Some of these legal instruments include the International Covenant on Civil and Political Rights, International Convention on Economic and Social Rights, Convention against Elimination of Discrimination against Women, and the Convention against Racial Discrimination. Discrimination can definitely be premised on one's religion. If we look at the world's stateless groups, it is evident that most of them are relatively small minorities that have been scattered. More than 75% of the world's known stateless populations belong to minority groups.[134] In most of their countries, they experience stark realities of discrimination based on religion under law and practice. A classic example of

[133] Tobin CA 'No Child Is an Island: The Predicament of Statelessness for Children in the Caribbean' (2015) 1 *DePaul International Human Rights Law Journal* 12 (hereafter Tobin CA (2015)).
[134] UNHCR 'This is our home: Stateless minorities and their Search for citizenship' 1.

statelessness due to discrimination based on religion is the plight of Rohingya Muslim refugees. That group constituted the largest minority among the stateless who have suffered entrenched discrimination and protracted exclusion from established social and political regimes.[135] Religious discrimination is codified into Myanmar law. The 1982 Citizenship Law grants citizenship based on the concept of 'national races', creating a hierarchy of citizenship. Those not considered 'indigenous' national groups only have access to a lower, less secure form of 'naturalised' citizenship. This discriminatory law is further implemented in a discriminatory manner, and has been central to a long-term strategy to make life within Myanmar untenable for the Rohingya, rendering them stateless. The 2008 Myanmar Constitution recognises Buddhism as the 'special religion'.[136] For this religious minorities the relationship between statelessness and religious discrimination is very clear.

2.6. Conclusion

This chapter has extensively detailed what it means to be a stateless person. From examining the role of the state when it comes to stateless children, it was showed that even though the family plays an integral role in the child's life, the family can only fulfil this role if the state creates the necessary environment for them. The different categories of statelessness, and the different factors that cause statelessness were also considered. This chapter also addressed the role of children and their voices, as the laws enacted will define their future, not that of the lawmakers. It is noted that key information and being able to identify the factors is needed in order to establish plans and solutions to combat statelessness. The benefits of knowing the danger zones and areas when it comes to what causes statelessness means the risk may not only be reduced but it may be removed. In order to register stateless populations, it is important that we find them and the link to them could be the causes of statelessness. The chapter also highlighted the relationship between statelessness and displacement.

The picture that emerges is of refugee childhood statelessness as an intersectional phenomenon with multiple causes at the intersection of child law, refugee law, nationality law, and state sovereignty law (international law).

In the next chapter the plight and precarious social position of stateless refugee children will be considered. It will become clear that refugee childhood statelessness as an intersectional

[135] Reddy S and Ramaprasad A (2019) 380.
[136] Institute on statelessness and Inclusion *Joint Submission to the UN Special Rapporteur on Freedom of Religion or Belief* (2020) 3.

phenomenon with multiple causes and varied legal and social consequences. As such it requires an urgent and well-constructed legal response.

CHAPTER 3:

THE PLIGHT AND PRECARIOUS SOCIAL POSITION OF STATELESS REFUGEE CHILDREN

3.1. Introduction

The various causes of statelessness were discussed in the previous chapter. The different categories of statelessness and the role the state plays in protecting these children were also discussed. It was noted that a study of these patterns can lead to a solution for ending statelessness. It was also disclosed in the previous chapter that statelessness is not a phenomenon that only happens in exceptional situations but it is an intersectional phenomenon that can be found at the heart of liberal democracies.

This chapter will examine the direst circumstances in which stateless children may find themselves. This could happen in their countries of origin or where they habitually reside. In order to point to why the issue of statelessness should be decisively dealt with by states, the section examines the discrimination faced by some stateless persons. The chapter reflects how sometimes these challenges can be so severe that it could amount to persecution. The chapter will show how the absence of a legally recognised nationality is a serious impediment. According to the UNHCR and their consultations with stateless children, there are four areas of concern: education, health care, future employment, and childhood. Stateless persons may also encounter travel restrictions, social exclusion, and heightened vulnerability to sexual and physical violence, forcible displacement, and other abuses.[137] In this case, it is evident that the right to a nationality, which as we saw in the Introduction, Arendt called 'the right to have rights', appears to be a crucial one. This chapter's primary objective is to illustrate the severity of the issue of childhood statelessness and the life-long effects it poses to a child's wellbeing.

The reader should note that the consequences of refugee childhood statelessness varies from state to state and largely depends on the protection generally provided to stateless children under the state's child law and refugee law. The chapter aims to provide an overview of typical consequences and therefore inevitably suffers from the weakness of generalisation. Worst case scenarios are often identified in order to gain a full picture of the potential scope of the

[137] Atuguba RA, Tuokuu FXD and Gbang V (2020) 17.

problems faced by stateless refugee children. Furthermore, much of the chapter is based on field research undertaken by the UNHCR among stateless children worldwide.

3.2. Education

Education is a tool that can help young people improve their lives,[138] which is why it is a primary concern for stateless children. Articles 28 and 29 of the CRC provides for the child's right to education.[139] These articles not only recognizes the child's right to education but they also urges state parties to make primary education obligatory and freely accessible. In addition, the International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR) devotes two articles to the right to education, that being article 13 and 14. Article 13 stating in particular that:

> 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.'

This embraces the state responsibility to ensure educational institutions and programmes are accessible to all within the state's jurisdiction. Formal education is closely associated with the modern state and it is seen as one of its primary responsibilities.[140] This is because education is regarded as an essential component of modern civilization. While it is arguably true that some other states have failed in providing acceptable formal education, they nonetheless still want to claim this credit for themselves. However, with the failure of many states, this link between states and education is no longer inevitable. Market forces, private individuals and groups are permitted to and do establish schools, sometimes even more efficiently than the

[138] Ladawan K *A life in waiting: Thai citizenship and stateless youth along the Thailand–Myanmar border* (PhD thesis, Australian National University, 2017) 133.
[139] Article 28 of the Convention on the Rights of the Child (CRC) provides as follows: 'States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: Make primary education compulsory and available free to all'. Article 29 of the Concention proceeds as follows: 'States Parties agree that the education of the child shall be directed to: The development of the child's personality, talents and mental and physical abilities to their fullest potential'.
[140] If we consider South Africa, section 29 of the South African Constitution provides for the right to education. Section 7 (2) of the South African Constitution gives the mandate to fulfil this right to the state.

state, but the state's role is mostly felt when it comes to the provision of education to the economically marginalized section of the society, such as girls, minorities, the poor, and people with disability, etc.[141]

Access to formal education is a difficult process for undocumented and stateless children.[142] When it comes to education, stateless children face numerous obstacles. These could include not being allowed into the classroom, or because the child is stateless, higher fees are required from them. In cases where they are allowed to attend the classes, they might not be allowed to write their final exams or if they are their diplomas and graduation certificates are withheld from them. Meaning they will not be able progress to a higher education, which usually results in better job prospects. Such children also frequently found themselves ineligible for scholarships or student loans.[143]

It can be argued that for stateless children there is no better long-term solution to armed conflicts than providing quality education to the community involved, especially since this could cause them to carry the hatred they face to the next generation, the effects of statelessness can and usually is passed on from parent to child. For these children, education will hopefully provide a safety net right now and will be a real investment for the future. For stateless children who face trauma, school can become an essential form of psychological intervention, a critically important step on the road to recovery and a defensive wall against destructive behaviour. Due to the benefits that education provides for those who find themselves in conflict areas, it has been recognised as a fundamental element of wider social and economic reconstruction. Increasingly education is recognized as one of four pillars of humanitarian aid, along with food and water, shelter and health care.[144] The UNHCR reckons about 48% of refugee children do not attend primary school. These children need to attend school as education plays a very important role in shaping their lives. It prevents them from being recruited into army groups, child labour, and sexual exploitation extra. Education also empowers and enlightens them, they learn about their position in this world and they are up skilled so that they are still able to live productive and fulfilling lives.[145] Even though the state

[141] Abdinoor A 'Community Assumes the Role of State in Education in Stateless Somalia' (2008) 37 *International Education* 43.
[142] Pang V, Teng Ling M and Tibok RP 'Achievement of children in an alternative education programme for refugee, stateless and undocumented children in Sabah, Malaysia' (2019) 4 *Journal of Nusantara Studies* 335.
[143] UNHCR *'I Am Here, I Belong. The Urgent Need to end Childhood Statelessness'* (2015) 2.
[144] Abdinoor A (2007). *Constructing Education in a Stateless Society: The Case of Somalia* (PhD theses, Ohio University, 2007) 42-43.
[145] UNHCR 'Education' available at *https://www.unhcr.org/education.html* (accessed on 7 November 2022).

plays an important role in providing education for marginalised communities, some countries, such as Thailand and Somalia, have resulted in other alternatives to state education so that migrant children can still receive an education. In Thailand the absence of many migrant and stateless children from Thai state schools has partly been compensated for by the attendance of some at uncertified schools sometimes known as 'learning centres' these centres are normally run by members of the children's ethnic community who tend to be intellectuals.[146] Similarly in Somalia, the community has assumed the role of the state in education when it comes to stateless Somalis.[147] Yes, other means have been discovered to educate stateless children; however, this is not a solution because it marginalises these children.

The Rohingya refugee's plight and struggles when it comes to education can paint a picture as to the many struggles stateless refugee children can face and as to which extent the marginalisation can extend. The human right to education for refugees is strategically denied in Bangladesh.[148] Datta, Mahajan and Bose reports that those refugees who are in the camps cannot access the formal education provided by the state, and the Bangladeshi curriculum cannot be taught to these refugee children.[149] The right to education for the stateless Rohingya refugees is not only conditional but also systematically ignored. The government of Bangladesh has publicly asserted that Rohingyas should not receive a better life than what they are used to, or receive access to rights they were never allowed, or else they will never want to return to Myanmar. The government of Bangladesh has restricted formal education for the Rohingya children who are in the refugee camps. In response to this, a few privately-run refugee centres and NGO-run learning centres operate in the camps. These informal education centres are not officially recognized by the government and thus are not able to utilize the Bangladeshi national curriculum. There is also no standardized curriculum for this children, the right to education in Bangladesh is thus reserved for its citizens and stateless Rohingya refugees are prevented from receiving an education. Due to illiteracy, awareness campaigns on such issues as health, hygiene, family planning and gender-based violence have been difficult to do in the camps. Since refugees have no educational qualifications, required skills or legal employment in Bangladesh, they are often physically and commercially abused by their local employers. Refugee adolescents and youth who have completed camp school have become lazy, they do

[146] Nawarat N 'Thailand Education Policy for Migrant Children from Burma' (2012) 47 *Procedia - Social and Behavioral Sciences* 957.
[147] Abdinoor A 'Community Assumes the Role of State in Education in Stateless Somalia' (2008) 37 *International Education* 43.
[148] Article 22 of the 1951 Convention Relating to the Status of Refugees.
[149] Datta M, Mahajan R and Bose M *Business, economics and sustainable development* (2020) 211.

not qualify for many rewarding jobs and are limited in what they can do with the education they received at the camp. According to Karim, they are now at risk of falling prey to human trafficking, drug addiction, drug trafficking and forced labour, irregular movement, or other harmful activities.[150]

The position in South Africa is fortunately different from that of countries like Bangladesh. Since South Africa allows foreigners and refugees to integrate into the society, they are not limited to receiving education in the camps. The South African Constitution provides that everyone has the right to a basic education.[151] Even though the right to education extends to all, there are some policy requirements that come with it. When admitting a child the school will require the following documents; an official birth certificate, if they are South African citizens.[152] If they are not citizens they also need to submit certain documents, such as a birth certificate issued by his/ her country of origin.[153] Schools are, however, able to conditionally accept children who do not possess a birth certificate, however parents will be mandated to go to the Department of Home Affairs (DHA) and get a birth certificate, or the necessary identity documents for their child.[154] Despite all of these provisions section 39(1) of the South African Immigration Act provides:

> No learning institution shall knowingly provide training or instruction to-
> (a) an illegal foreigner; (b) a foreigner whose status does not authorise him or her to receive such training or instruction by such person.[155]

The existing uncertainties between the laws and admission policies means that in South Africa, undocumented children will face challenges when trying to access their right to a basic and higher education.[156] The litigation in *Centre for Child Law v Minister of Basic Education* proves the point.[157] The applicants challenged the policy of the Department of Education to unconditionally admit learners to public schools only if 'they or their parents/guardians identify themselves by means of, inter alia, passports, identity documents, birth certificates or

[150] Karim M 'No education - lost generation: The right to education of stateless Rohingyas in Bangladesh' (2020) 4 *Minority Network* 3-5.
[151] S 29 (1)(a) of the South African Constitution.
[152] S 15 National Education Policy Act, 1996.
[153] S 20 National Education Policy Act, 1996.
[154] S 15 National Education Policy Act, 1996.
[155] S 39 of the Immigration Act, 2002.
[156] The story of Karolyn Mujinga is instructive and a case in point. See further Damons, M 'Matriculant petitions for stateless youths to get into universities'. Groundup, 7 October 2012. Available online at https://www.groundup.org.za/article/stateless-matriculant-battles-to-apply-online-to-universities-without-id/ (accessed 24 November 2022).
[157] *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG).

permits'.[158] The Court rejected the policy as unconstitutional and dismissed the justification of the requirement as a means 'to improve the administration within the Department and, at another level, to manage and ameliorate challenges associated with the control of immigration'.[159] The Court ordered the Department to 'admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province (the schools), and where a learner cannot provide a birth certificate, the Principal of the relevant school is directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified'.[160]

Without a basic primary education, it becomes much harder for stateless people to advocate for themselves. Hence, depriving stateless children of an education can further perpetuate statelessness and the human rights violations that accompany it.[161]All children have the right to an education, even if that education is basic, as without an education breaking the cycle of statelessness in many families can be extremely hard.

3.3. Health

The right to health, which includes access to basic healthcare, has been acknowledged as an essential component of universal human rights protection in a variety of international treaties. The 1946 World Health Organisation (WHO) Constitution was the first instrument to unify health with the idea of rights. It envisages the 'enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being'.[162] Article 25 of the UNDHR contends that:

> 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care'.[163]

However, in order to safeguard this right, individuals rely on states to provide it. Nevertheless, stateless people or those without formal nationality in any nation-state are typically disregarded and denied this privilege. While a legal nationality alone is not sufficient to guarantee that a right to healthcare is accessible, an absence of any legal nationality is almost certainly an

[158] *Centre for Child Law v Minister of Basic Education* para 1.
[159] *Centre for Child Law v Minister of Basic Education* para 1.
[160] *Centre for Child Law v Minister of Basic Education* para 135.
[161] Center on Human Rights Education 'Growing up Stateless: How Statelessness Impacts Children's Rights.' Available at https://www.centeronhumanrightseducation.org/growing-up-stateless-how-statelessness-impacts-childrens-rights/ (accessed 3 June 2021).
[162] World Health Organisation (WHO), World Health Organisation Constitution (1946).
[163] Article 25 of the United Nations Declaration of Human Rights.

obstacle in most cases. Various authors concur that there are millions of so-called stateless people around the world who are effectively denied medical citizenship in their home nations.[164] It has been observed that many stateless individuals are compelled to forego medical care, even in cases of serious illness or injury.[165] The discrimination inflicted by medical personal and administration staff when dealing with stateless persons means someone who is already in a vulnerable position and needs medical attention may go unassisted. All of this, because they do not have a nationality.

Lack of nationality often creates obstacles related to documentation, especially when accessing national healthcare, which is usually the most affordable. This also equates to a stateless person's life span being shorter-than-average, one stateless man recently described his plight as like being "buried alive".[166] Those without a nationality encounter barriers when attempting to gain access to institutional health services that are typically granted to those who are recognised as belonging to a nation-state.

Migration can also be considered a social phenomenon with repercussions on health. It becomes a particular challenge for public health, since migrants, especially those who had to flee for their lives may have special needs. Another danger as brought out by the medical community is that migrants can be carriers of infectious agents. Local populations might be vulnerable because they have not been previously exposed to a given disease, or their immunity may be diluted with the entry of migrants. Likewise, customs, practices, and responses to the migrants' stressful situations can influence social cohesion and affect the health of local populations. Migrant's entry into a new area can also reveal problems in the host areas' supply of government services such as access to healthcare. Migrants' can leave their homes in great health, hence their health might not necessarily be poor, but the migration process and various social factors can negatively affect their health. This includes barriers to healthcare. In forced migration, these determinants are influenced by the migration pattern, the type of armed conflict the migrants had to flee from, the existing health system, the social and demographic profile, and the health needs of forced migrants.[167] The large number of displaced people

[164] See Kingston LN, Cohen EF and Morley CP 'Debate: Limitations on universality: the "right to health" and the necessity of legal nationality' (2010) *BMC Int Health Hum Rights* 1 (hereafter Kingston LN, Cohen EF and Morley CP) and Lougarre C 'Using the right to health to promote universal health coverage: A better tool for protecting non-nationals, access to affordable health care?' (2016) 18 *Health and human rights* 35.
[165] UNHCR *'I AM HERE, I BELONG. THE URGENT NEED TO END CHILDHOOD STATELESSNESS'* (2015) 2.
[166] Kingston LN, Cohen EF and Morley CP (2010).
[167] Pacheco-Coral ADP 'Statelessness, exodus, and health: forced internal displacement and health services' available at *https://www.scielo.br/j/csp/a/sJnqsjwjK3Cd5snf3chvQpz/?lang=en* (accessed 28 September 2022).

should persuade governments and health professionals to develop long-term solutions to address the health needs of these populations.

The expectation that the state should provide the citizens social right is codified by Article 12 of the ICESR.[168] Through state action or through the promotion of the private sector, as a guarantor of social rights, the state has a mandate to uphold the social rights of their citizens. The state in providing health care to those who are citizens or immigrants who are legally recognised by the state, may fail to reach a high standard in their health care services. Nevertheless, both recognized citizens and legal immigrants often do have access to these admittedly imperfect healthcare services because they receive political recognition from the public, private, or non-profit bureaucracies that govern and administer such services. In effect, both groups often have some access to a right to health within their nation of residence. This is different for individuals with no legal nationality, their lack of documentation leave them with no avenue to make a claim to the right to health.[169] The consequences of statelessness can be devastating as with no claim to the right to health, stateless people who are faced with emergency health problems end up dying.

If we again examine the stateless Rohingya we will see how they cannot access their right to health due to their stateless refugee status.[170] Myanmar's 1982 Citizenship Law introduced multiple categories of citizenship and in doing so failed to accept the Rohingya as a valid ethnic group and bared them from citizenship. As non-citizens of Myanmar, and without legal protection under domestic law, the government has imposed restrictions on the Rohingya that would not be legally justifiable towards citizens who are protected under the Myanmar Constitution. The discriminatory policies imposed on them impedes on their ability to access their right to effective health care.

In South Africa, the situation is different. Here the right to health care is extended to both refugees and migrants.[171] Refugees have just as much a right as citizens do when it comes to

[168] Article 12 (1) (2) (d) International Covenant on Economic, Social and Cultural Rights states:
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
[169] Kingston L N, Cohen E F and Morley C P (2010) 2.
[170] Riley A, Akther Y, Noor M, Ali R and Walton-Mitchel C 'Systematic human rights violations, traumatic events, daily stressors and mental health of Rohingya refugees in Bangladesh' available at *https://conflictandhealth.biomedcentral.com/articles/10.1186/s13031-020-00306-9* (accessed on 7 November 2022).
[171] S27 (1) (a) of the Constitution: 'Everyone has the right to have access to health care services'.

accessing health care in the country.[172] The Scalabrini Centre also refers to a department of health 2007 circular which confirmed 'Refugees and asylum seekers, with or without permits, can access the same basic health care services as South African citizens'.[173] The law in South Africa really provides for refugees rights to health, even if they have no documents with them. The Scalabrini Centre reports that Some of these undocumented refugees do however face discrimination on the ground when trying to access their right to health care in the country.

The problem stateless people face is also the uncertainty that comes with their status. When stateless individuals have no legal status it allows states to use domestic laws, which render no state responsibilities towards the stateless, to circumvent their role in protecting the right to health. Regardless of whether the country is a signatory or not to the international conventions enshrining the right to health. Health care accessibility can be affected by violating a justiciable right to health if a country doesn't uphold equal health rights for citizens and noncitizens. For example, if you do not have a birth certificate you will not be able to take advantage of the subsidised vaccine programmes, or you may have to pay more fees because you do not have citizenship. Statelessness allows states to render these individuals invisible, and uses this as a means to deny the right to access health care on equal terms between those who are full or naturalised citizens and those who lack any kind of citizenship.[174] It has been proven time and again that the lack of access to health care among children can have a debilitating effect on their health status and as a result could ultimately hinder their grown as individuals.[175] A more extensive study should be conducted to further elaborate upon the connection between statelessness and healthcare access, especially since there is a universal right to health care.

3.4. Employment

Statelessness creates insurmountable barriers for many young people when it comes to future employment opportunities. The barriers to education and freedom of movement play a major role in limiting future job opportunities for stateless youths. As adults they are often denied the ability to work due to lack of identification. As a result, they must seek employment through

[172] S27 (g) of the South African Refugee Act: 'A refugee is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time'.
[173] Scalabrini 'Migrant and Refugee Access to Public Healthcare in South Africa' available at *https://www.scalabrini.org.za/migrant-and-refugee-access-to-public-healthcare-in-south-africa/* (accessed on 8 November 2022.
[174] Waite M 'How does statelessness affect the 'right to health'? An examination of the stateless Rohingya in Rakhine State, Myanmar' (2016) *Institute on Statelessness and Inclusion* 4.
[175] Barua P and Narattharaksa KC 'The Health Status and Insurance Affiliation of Stateless Children in Tak Province, Thailand' (2020) 13 *International journal of human rights in healthcare* 220.

whatever means possible, often in illegal or unethical trades. In the most extreme cases, stateless persons find themselves as victims of human trafficking or they work in circumstances that can be compared to slavery. Stateless children, are forced to become victims of child labour in an effort to survive. According to Milbrant, stateless women are also particularly susceptible to prostitution and sexual trafficking.[176] The right to work, is found both in Article 23(1) of the UDHR,[177] and Article 15 of the EU Charter of Fundamental Rights.[178] More importantly, the right to choose and engage in decent work is also widely seen as an important factor of human dignity and self-esteem. We can look at stateless people living in the EU as an example.[179] Article 17 of the 1954 Convention relating to the Status of Stateless Persons (ratified by 24 EU Member States) acknowledges stateless individual's right to wage-earning employment. In the absence of statelessness determination procedure, stateless persons are seldom identified and recognized as such. This leads to them not getting a decent, legal, wage-earning job. Their statelessness can prevent them from accessing this basic right on top of their other rights. Stateless individuals are often subjected to marginalization and discrimination, facing almost insurmountable difficulties when seeking legal employment. This blocks them from being able to receive a residence permit which is generally a key document to engage in legal employment in EU Member States.[180] This results in "chronic economic instability" [181] as it is frequently accompanied by unemployment and poverty. With that being said very little research exists on the effects statelessness has on economies.

Furthermore, according to findings by the UNHCR, laws that prohibit child labour afford stateless children very little protection.[182] Their parents are usually poor, from marginalised communities and they themselves cannot obtain legal employment. Their stateless children who are unable to attend school then end up working in hazardous and exploitative conditions.

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[176] Milbrandt J 'Stateless' (2011) 20 *Cardozo Journal of International and Comparative Law* 76 92-93.
[177] 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.'
[178] 'Freedom to choose an occupation and right to engage in work – for non EU citizens who have the right to work in the EU, they should have the same working conditions as EU citizens.'
[179] I rely in this paragraph on the research done by Berényi K 'Work to Belong: A new approach is needed to resolve the employment challenges faced by stateless persons in the EU.' Available at https://www.statelessness.eu/updates/blog/work-belong-new-approach-needed-resolve-employment-challenges-faced-stateless-persons (accessed 6 June 2021).
[180] Berényi K 'Work to Belong: A new approach is needed to resolve the employment challenges faced by stateless persons in the EU.' Available at *https://www.statelessness.eu/updates/blog/work-belong-new-approach-needed-resolve-employment-challenges-faced-stateless-persons* (accessed 6 June 2021).
[181] Pazzynski A 'How Statelessness Affects Global Poverty.' *The Borgen Project* available at *https://borgenproject.org/statelessness-global-poverty/* (accessed 6 June 2021).
[182] UNHCR 'Under the radar and under protected: the urgent need to address stateless children's rights' (2012) 10.

Since these children have no legal documents to prove they are underage, it is difficult to prosecute unscrupulous employers. UNICEF found that in their places of employment, stateless people are often underpaid, discriminated against and left with no option but to do the dangerous jobs.[183]

The economic disempowerment of stateless populations comes at a cost to national economies. As mentioned there is currently virtually no serious scholarly scrutiny of the toll statelessness takes on a country's economy. Without the right to legally work, the stateless do little to contribute to formal economies via employment, taxes, and discretionary spending. The drain of these destitute populations may manifest in little more than a dent in the economies of large countries.[184] However, the lack of research on this topic may permit this to continue, especially given the advantages of the cheap labour market.

3.5. Childhood

Statelessness also threatens the freedom of many children to feel secure, to play, to explore – to simply be children. The UNHCR noted that stateless children are labelled as outsiders, discriminated against, and treated differently from a young age. [185] Statelessness also means a lack of belonging to a nation, which is often crucial for children's sense of belonging to a community and a place. This has detrimental consequences on children's mental and social well-being.[186] The mental and social wellbeing of a child is crucial to who they will become as adults.

In most cases these children are not seen as children when in contact with the law. When stateless children come into contact with the law and cannot prove their age, they may be prosecuted as adults and locked up in adult prisons and detention centres. According to the UNHCR, although many international or national actors are undertaking programmes to address child protection, they seldom include stateless children in their programming.[187] Some

[183] UNICEF 'Ending Statelessness for a Bright Future for Every Child.' Available at *https://www.unicef.org/thailand/livesuntold* (accessed 3 June 2021).
[184] Guay J 'How Being Stateless Makes You Poor' available at *https://foreignpolicy.com/2016/06/30/how-being-stateless-makes-you-poor/* (accessed 28 September 2022).
[185] UNHCR *'I AM HERE, I BELONG. THE URGENT NEED TO END CHILDHOOD STATELESSNESS'* (2015) 2.
[186] Scalabrini institute for human mobility in African 'Statelessness of Migrant Children in South Africa and the Impact and Opportunity for Social Workers.' Available at https://sihma.org.za/Blog-on-the-move/stateless-of-migrant-children-in-south-africa-and-the-impact-and-opportunity-for-social-workers (accessed 3 June 2021).
[187] UNHCR 'Under the radar and under protected: the urgent need to address stateless children's rights' (2012) 10.

harmful practises that are well established when dealing with children in detention, include not placing the children together with their families. These facilities have in turn been used for asylum-seeking. These children can be held in the facilities for long periods.[188]

In the midst of the debates and conversations about immigration and asylum regimes of modern nation states, the lived realities of forced migrant children themselves are not considered. The voice of these children is not heard and as a consequence there is widespread ignorance. Their true circumstances, aspirations and outlook is not included in these conversations. Displaced boys and girls are often conceptualised and portrayed in a simplistic — even stereotypical — fashion. Adolescent male asylum seekers, for example, are seen as a threat. More commonly, as was highlighted in a previous chapter, service providers, the media and child rights advocates consider displaced children through the prism of victimhood: vulnerable by definition to abuse, trauma and deprivation.[189] Because the laws have such a profound impact on their lives, it is imperative that policymakers and legislators include displaced children in the conversation.

There is not much research on how displacement affects the identity formation of youth. In spite of sustained absence from their traditional homeland, many adults who have been forcibly removed from their homeland experience a yearning to return to a familiar homeland and will seek out others with a similar background for solidarity. The question is thus do children who have been born into displacement or who have lived their early years as forced migrants also experience this yearning? When they grow up around people who are very different from them, this could be culturally, religiously and ethnically, do they develop attitudes and skills that prepare them to live in a more heterogeneous world than that of their forebears? The responses to these questions could highlight the extreme mental anguish these children experience. Moreover, that there are no advantages to being a stateless child. This condition of growing up without official recognition of one's identity and citizenship has been described as 'developing in a state of 'liminality'.[190] Liminality in this context refers to being suspended in a transitional space for an indeterminate amount of time. Greg Constantine in his article entitled "We see you", spotlights children who are victims of statelessness. He states that children are the most silent and invisible victims of statelessness. In his very short piece Constantine points to the

[188] Boyden J & Hart J 'The Statelessness of the World's Children' (2007) 21 *Children & Society* 242.
[189] Boyden J & Hart J (2007) 243.
[190] Ball J and Moselle S 'Forced Migrant Youth's Identity Development and Agency in Resettlement Decision-Making: Liminal Life on the Myanmar-Thailand Border' (2016) 2 *Migration, Mobility, & Displacement* 113.

fact that these children's futures are denied.[191] Their lack of identity as children could mean they will have no sense of who they will become in the future, these children could very well be prevented from even have goals and dreams.

3.6. Conclusion

This chapter has highlighted the plight of stateless children. The exact consequences of statelessness vary from state to state but there is sound research to indicate that, universally, the label of statelessness not only causes psychological, emotional and physical harm to children, but it also means that no one will be held accountable for the harm caused. The research shows how stateless children are invisible and unwanted in most cases. Being a stateless child means that one is just stateless and cannot be a child as nature and society intends for one to be. Statelessness impacts especially adversely on the rights to education, access to health case, labour opportunities, and the right to play.

The discussion of statelessness in chapter two and three has established that statelessness among refugee children is an intersectional phenomenon with varied causes and consequences. Since the consequences of childhood statelessness are potentially disastrous, it is important that plans and preventative methods be put into place to try and eradicate it. The discussion in the next chapter will focus on the legal response to statelessness among displaced persons.

[191] Constantine G '*We see you'* The World's Stateless children (2017) 120.

CHAPTER 4

LEGAL RESPONSES TO STATELESSNESS

4.1. Introduction

The adverse impact of statelessness on children was discussed in the preceding chapter. In this chapter, the analysis investigates how the existence of stateless populations poses a threat to a number of fundamental international law principles. Most importantly, the analyses explore the extent to which the concept of statelessness is at odds with the right to a nationality in international treaty law.[192]

This substantial body of international law also records that nationality laws must be consistent with general principles of international law. This was further noted in Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which is a League of Nations convention adopted during the League of Nations Codification Conference. This is important as the lack of a nationality or being identified under a different form of recognition could in itself lead to discrimination, hence why nationality laws must be consistent with the general principles of international law. That is why this chapter will discuss the different international treaties, the laws of different regions and South Africa's nationality laws that contribute to the protection of displaced children who find themselves at risk of being stateless. The intersectionality of childhood refugee statelessness will again be foregrounded.

4.2. International treaties

Refugee childhood statelessness implicates traditional international law and the idea of state sovereignty as recently qualified by international child law, refugee law and nationality law.

4.2.1. The United Nations Convention on the Rights of the Child (CRC)

CRC was celebrated as one of the most significant steps taken towards improving the lives of children throughout the world.[193] Since it was adopted, 196 countries have signed up to the

[192] Including the Universal Declaration of Human Rights (Article 15), the International Covenant on Civil and Political Rights (Article 24), the Convention on the Elimination of All Forms of Discrimination against Women (Article 9), the Convention on the Nationality of Married Women (Article 1), the Convention on the Rights of Persons with Disabilities (Article 18), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 29), and more.

[193] Todres J 'Emerging limitations on the rights of the child: the UN Convention on the Rights of the Child and its early case law' (1998) 30 *Columbia Human Rights Law Review* 159-200.

CRC, with only the United States of America still to ratify.[194] It is the most extensively rectified human rights treaty in the world.[195] This means that the provisions of the CRC have an almost universal applicability, since governments who have ratified it are bound to it by international law and have to follow the rules found in it.[196] The CRC has been hailed as unique because it protects the broadest scope of fundamental human rights ever brought together within one treaty: economic, social and cultural, and civil and political. [197] It is intended to ensure the basic dignity, survival, and growth of more than half of the world's population, children. The particular rights set forth in major general human rights conventions apply to individual adults and children alike, thus the CRC would not diminish the rights which the child would enjoy by virtue of other international conventions.[198] The CRC ensures that even though children are entitled to special care and attention, they should be recognised as individuals who are entitled to the same human rights and fundamental freedoms as any other human being. This is important because children today are often on the frontline, sometimes literally. They are abused and victimized in warfare and political repression, in massive crisis situations, 'children tend to suffer first and most'.[199] The CRC thus extends care to children because of their vulnerable status in relation to adults.

The CRC is significant in the fact that the special protection it offers is specifically for the child as such, not just for the child as the member of the family or any other social group. In other words the rights possessed by the child are not held by implication or any assumption that such rights are held by parent or any other pertinent adults or groups.[200] The child is seen as an individual instead of an extension of someone else.

In this case, what is most important is that it provides the most global recognition of the right to acquire a nationality. As in Article 7 and 8 of the CRC, the right to nationality is explicitly mentioned. Article 7 provides as follows:

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[194] Malik WA 'Non-ratification of UNCRC by most powerful country' *Online Daily Times* 10 March 2021.
[195] Liefaard T (ed) and Sloth-Nielsen J (ed) *The United Nations Convention on the Rights of the Child: taking stock after 25 years and looking ahead* (2016).
[196] Doek JE 'The CRC and the Right to Acquire and to Preserve a Nationality.' (2006) 25 *Refugee Survey Quarterly* 26 (hereafter Doek JE (2006)).
[197] Castle C, Burningham J, Unicef and Al E *For every child*: *the UN Convention on the Rights of the Child in words and pictures* (2002).
[198] Detrick SA *Commentary on the United Nations Convention on the Rights of the Child* (1999) 1 (hereafter *Commentary on the United Nations Convention)*.
[199] Hammarberg T 'The UN Convention on the Rights of the Child and How to Make It Work' (1990) 12 *The Johns Hopkins University Press* 97.
[200] UNICEF *Protecting the world's children : impact of the Convention on the Rights of the Child in diverse legal systems* (2007).

> (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* and, as far as possible, the right to know and be cared for by his or her parents.
>
> (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*.

Under Article 7(1) the CRC states that a child should be registered immediately after birth, and shall have the right to a nationality at the same time. Article 7(2) emphasizes the need for nations to make sure their domestic laws are in line with these rights, so as to prevent the statelessness of children. The CRC introduces a clause regarding unlawful interference in nationality matters, firming up the principle of arbitrariness. Article 8 reads as follows:

> (1) States Parties undertake to respect the right of the child to preserve his or her identity, *including nationality*, name and family relations as recognized by law without unlawful interference.
>
> (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

The above clause adds further weight to the prevention of arbitrary denial and deprivation of citizenship for children. Even though this provisions do not provide a child with the right to a nationality, but the right to acquire one. States are still required to adopt every appropriate measure to make sure they child has a nationality as it's in the best interest of the child.[201]

Articles 7 and 8 has received authoritative interpretations by the Committee in its General Comment 23. Section D para 20 reads as follows:

> The lack of birth registration may have many negative impacts on the enjoyment of children's rights, such as child marriage, trafficking, forced recruitment and child labour. Birth registrations may also help to achieve convictions against those who have abused a child. *Unregistered children are at particular risk of becoming stateless when born to parents who are in an irregular migration situation*, due to barriers to acquiring

[201] Doek JE (2006) 28.

nationality in the country of origin of the parents as well as to accessing birth registration and nationality at the place of their birth.

Para 21 of the same General Comment states as follows:

> The Committees urge States parties to take all necessary measures to ensure that all children are immediately registered at birth and issued birth certificates, irrespective of their migration status or that of their parents. Legal and practical obstacles to birth registration should be removed, including by prohibiting data sharing between health providers or civil servants responsible for registration with immigration enforcement authorities; and not requiring parents to produce documentation regarding their migration status.

The General Comment adds the following in paras 23 to 26:

> 23. Article 7 of the Convention on the Rights of the Child places emphasis on the prevention of statelessness by specifying that States parties shall ensure the implementation of the rights of a child to be registered, to a name, to acquire a nationality and to know and be cared for by his or her parents. The same right is enshrined for all children of migrant workers in article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
>
> 24. While States are not obliged to grant their nationality to every child born in their territory, they 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. A key measure is the conferral of nationality to a child born on the territory of the State, at birth or as early as possible after birth, if the child would otherwise be stateless.
>
> 25. Nationality laws that discriminate with regard to the transmission or acquisition of nationality on the basis of prohibited grounds, including in relation to the child and/or his or her parents' race, ethnicity, religion, gender, disability and migration status, should be repealed. Furthermore, all nationality laws should be implemented in a non-discriminatory manner, including with regard to residence status in relation to the length of residency requirements, to ensure that every child's right to a nationality is respected, protected and fulfilled.

> 26. States should strengthen measures to grant nationality to children born in their territory in situations where they would otherwise be stateless. When the law of a mother's country of nationality does not recognize a woman's right to confer nationality on her children and/or spouse, children may face the risk of statelessness. Likewise, where nationality laws do not guarantee women's autonomous right to acquire, change or retain their nationality in marriage, girls in the situation of international migration who married under the age of 18 years may face the risk of being stateless, or be confined in abusive marriages out of fear of being stateless. States should take immediate steps to reform nationality laws that discriminate against women by granting equal rights to men and women to confer nationality on their children and spouses and regarding the acquisition, change or retention of their nationality.

Scholars such as Ganczer agree with the position adopted here by the Committee and point to the fact that the CRC is a notable exception to many international instruments that provide for the right to a nationality as it includes not only the right to acquire, but also the right to retain a nationality; thus it even provides protection to children against becoming stateless at a later stage. Further, due to the high number of states who have rectified the CRC, this rule is applicable to a much wider sphere.[202] However as discussed, the determination of nationality is still an inherent element of a sovereign state's power to decide who its citizens are.[203] The regulation of nationality still remains a prerogative of States, this is despite the limitations created by international law as to the attribution and deprivation of nationality.[204] In principal, the rules of nationality fall within the scope of domestic jurisdiction and are therefore within the domain of national law.[205] Sovereign states have however complicated the field of the law of nationality. It has become very competitive with regard to who fits in the mould of a national. Since each state sets its own legislative regulations as regard to citizenship on the international level, there is now a lack of uniformity and this has given rise to problems such as statelessness.[206]

The inability to enforce the fundamental rights that relate to nationality effects a mixed group of children. This group includes undocumented immigrants, 'irregular' migrants, and

[202]Ganczer M 'The Right to Nationality as a Human Right' (2014) *Hungarian Yearbook of International Law and European Law* 30.
[203] Aleinikoff TA (ed) and Klusmeyer D (ed) *Citizenship Today* (2001) 18.
[204] Bianchini K 'Legal Aid for Asylum Seekers: Progress and Challenges in Italy' (2011) 24 *Journal of Refugee Studies* 390.
[205] Detrick S *Commentary on the United Nations* (1999) 147.
[206] Detrick S *Commentary on the United Nations* (1999) 148.

trafficking victims. In these situations, the children tend to be functionally stateless even though they may have a nationality. The human rights that these children have under international law are in theory unenforceable.[207] Since statelessness knows no borders it is important that states come to some form of census as to how to unify their nationality laws with international standards, such as those set by the CRC.

One provision that does make the CRC distinct for the protection of otherwise stateless children is that the Convention requires all states to adopt the child's best interests as the guiding principle for all decisions concerning children, including prescribing and applying nationality laws.[208] Rendering a child stateless, or having legislation that opens a window for a child to be stateless is never in the child's best interests, so states should never prescribe or apply legislation concerning children within their territory that would result in making a child stateless.[209] The CRC adds the requirement that the acquisition of nationality must be in the child's best interests and in accordance with the child's identity.[210] Article 3(1) reads as follows:

> 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

Article 3(1) has received its most authoritative interpretation by the Committee on the Rights of Children in General Comment 14. Section A para 1 reads as follows:

> Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 3, paragraph 1, as one of the four general principles of the Convention for interpreting and

[207] Bhabha J 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights.' (2009) 31 *Human Rights Quarterly* 410.
[208] CRC, art 3; UNGA, 'Status of the Convention of the Rights of the Child: Report of Secretary-General' (2 August 2013) UN Doc. A/68/257, para 57 et seq.
[209] Worster WT 'The Obligation to Grant Nationality to Stateless Children under Treaty Law' (2019) 24 *Tilburg Law Review* 211 (hereafter Worster WT 'Treaty Law' (2019)).
[210] Article 3 of the CRC.

implementing all the rights of the child, and applies it is a dynamic concept that requires an assessment appropriate to the specific context.[211]

When considering the best interest of the child the general comment further stipulates on what effect this should have on the laws of the state. Section IV (2) reads:

(d) "Legislative bodies"

31. The extension of States parties' obligation to their "legislative bodies" shows clearly that article 3, paragraph 1, relates to children in general, not only to children as individuals. The adoption of any law or regulation as well as collective agreements – such as bilateral or multilateral trade or peace treaties which affect children – should be governed by the best interests of the child. The right of the child to have his or her best interests assessed and taken as a primary consideration should be explicitly included in all relevant legislation, not only in laws that specifically concern children. This obligation extends also to the approval of budgets, the preparation and development of which require the adoption of a best-interests-of-the-child perspective for it to be child-rights sensitive.

Based on the above discussion, the conclusion seems to be that the CRC in its own right imposes an obligation on states parties, such as South Africa, to implement a separate statelessness determination procedure to identify and remedy statelessness or the risk of statelessness among children who are born within refugee and asylum seeker communities. As will be seen below, this obligation cannot be discharged under the cover of ongoing protection for the children of asylum seekers and refugees under migration law.

The CRC has thus had a profound effect on the rights of the child. There has been a stronger focus on the rights of a child in national and international targets, policies, programs and advocacy for human rights and social progress.[212] However the fate of children's rights as a subset of human rights depends not only on the international communities monitoring, but also on the actions of the national governments who have rectified them.[213] This is most important since it is the child's best interest to possess a nationality. Forced migration is one of those situations whereby a child who has a nationality can end up losing that nationality. It is thus

[211] UNCRC *On the right of the child to have his or her best interests taken as a primary consideration* General comment No. 14 (2013).
[212] Otto C and Yuan H *Celebrate Chinese New Year* (2015).
[213] Lundy L, Kilkelly U and Byrne B 'Incorporations of the United Nations Convention on the Rights of the Child in Law: A Comparative Review' in Freeman M *The Future of Children's rights* (2014) 134.

important that we look at other legal instruments which protect the retention (and remedial acquisition) of a nationality. These instruments might well reinforce the conclusion reached above that the CRC compels states to identify children among refugee populations who are stateless or at risk of statelessness and to grant remedial nationality to these stateless children.

4.2.2. The 1954 Convention Relating to the Status of Stateless (1954 Convention)

This convention was initially conceived as a protocol on stateless persons that was to be included as an addendum to the 1951 Convention. The General Assembly had aimed to draft a treaty that protected both refugees and stateless persons. But the 1954 Convention Relating to the Status of Stateless (hereafter the 1954 Convention) was later made into a convention of its own right and is now the primary international instrument that aims to regulate and improve the status of stateless persons.[214] The 1954 Convention attempts to help stateless people overcome the incredible vulnerability they find themselves in. It does this by identifying the problem of statelessness, promoting the acquisition of a legal identity, and providing, in appropriate cases, for residence which will serve as a basis for access to basic social and economic rights.[215] The 1954 Convention essentially advocates equal rights for nationals and stateless individuals. The 1954 Convention has made significant contribution to not only the definition of stateless persons but to the treatment they receive.

The 1954 Convention defines who a stateless person is and the set of minimum rights that they are granted. As we saw above in chapter two, article 1 defines a stateless person as:

> 'A person not considered a national by any state under the operation of its law'.[216]

This definition is the most recognisable globally. It identifies a specific category of individuals, the de jure stateless, because it depicts a definite, quantifiable fact: that a person is either a national by operation of a state's law or is not.[217] The 1954 Convention ensures the enjoyment of human rights by stateless persons by establishing an internationally recognized status for them. Even though there are two very important instruments of international law regarding statelessness (the other being the 1961 UN Convention on the Reduction of Statelessness), the

[214] 1954 Convention on the Protection of Stateless Persons.
[215] Batchelor C 'The 1954 Convention Relating to the Status of Stateless Persons: Implementation Within the European Union Member States and Recommendations for Harmonization.' (2005) 22 *Refuge: Canada's Journal on Refugees* 34 (hereafter Batchelor C (2005)).
[216] Article 1 of the Convention Relating to the Status of Stateless, 1954.
[217] Bachelor CA 'Stateless persons: Some gaps in international protection.' (1995) 7 *International journal of Refugee law* 232.

1954 UN Convention remains the only international treaty aimed specifically at regulating standards of treatment for stateless persons, as it sets the legal framework for the standard treatment of stateless persons.[218] The 1954 Convention places emphasis on securing a nationality for persons who might need international protection. By doing so it ensures that these persons are protected on a national level.[219] The 1954 Convention employs states to take administrative measures to ensure that stateless persons are recognised as belonging somewhere and are able to exercise some of the freedoms found in the treaty.[220] Article 27 obligating state parties to:

> 'Issue identity papers to any stateless person in their territory who does not possess a valid travel document'.[221]

In order to exercise their freedom of movement, article 28 employs contracting states to:

> 'Issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory.'[222]

Further the 1954 Convention provides other protections to stateless persons, such as the right of association and encourages states to allow stateless people to obtain employment and to ensure their general welfare (housing, schooling and health) is considered.[223]

These provisions do alleviate some of the difficulties associated with being statelessness, they however do not change the status of a stateless person. It is important to note that the enjoyment of the rights guaranteed under the 1954 Convention does not equate to possession of a nationality. This is why the 1954 Convention calls upon States to facilitate the naturalization of stateless persons.[224] The 1954 Convention does not set out a right for stateless persons to acquire the nationality of a specific State. It could thus be argued that the Convention does not add to the protection which stateless refugee would in any case receive under progressive refugee regimes, such as that applicable in South Africa. However, because stateless persons have no State to protect them, the Convention requires States Parties to facilitate the integration and naturalization of stateless persons as far as possible, once they acquire a nationality,

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[218] Atuguba RA, Tuokuu FXD and Gbang V 'Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy, and Administrative Frameworks in Ghana.' (2020) 8 *Journal on Migration and Human Security* 16 (hereafter Atuguba RA, Tuokuu FXD and Gbang V (2020)).
[219] Batchelor C (2005) 35.
[220] Article 25 of the 1954 Convention Relating to the Status of Stateless Persons.
[221] Article 27 of the 1954 Convention.
[222] Article 28 of the 1954 Convention.
[223] Introductory note to 1954 Convention.
[224] Article 32 of the 1954 Convention.

stateless persons are no longer stateless: their plight has come to an end.[225] While they are stateless, the 1954 Convention's core principle is that: no stateless person should be treated worse than any foreigner who possesses a nationality.

In addition, the Convention acknowledges that stateless persons are more vulnerable than other migrants. It therefore provides for a series of special measures for stateless persons.[226] Gaining a nationality is however the main goal. That is why the information and accession package for the 1954 and 1961 Conventions states: 'there is no replacement for nationality itself'.[227] The Convention highlights that it is not enough for stateless people's rights to be protected. They should be afforded a nationality as all the other rights will then flow from gaining that nationality.

This point is crucial for the protection of stateless refugees. Those who argue in favour of protection under the cover of refugee status, and thus deny the need for or legal duty to establish an additional statelessness status determination, misunderstands the unique nature of statelessness. A stateless person is not strictly speaking a foreigner who can be treated as if his or her presence is per definition temporary outside his or her country of nationality. In as far as refugee protection is premised on that construction of the asylum seeker and refugee, culminating in the possible cessation of refugee status at some point, any protection of stateless persons under the cover of refugee law misunderstand their unique position. Stateless refugees, especially stateless refugee children do not seek, even if they are granted, temporary refuge. Stateless refugees have a right under the Convention to be naturalised. This right vests at the moment that their status is determined. At that point they should be removed from the refugee protection regime and immediately be granted a different residence status if not nationality itself. Thus understood, the Convention reinforces the earlier conclusion that stateless refugee children has a right to a statelessness determination process under international child law.

4.2.3. 1961 UN Convention on the Reduction of Statelessness (1961 Convention).

The international community recognized the need for a universal instrument that not only defines statelessness but one that prevents and reduces statelessness well before general human rights treaties began to include measures directed to that end. The 1961 Convention seeks to achieve this goal by requiring that state parties take measures to reduce statelessness by

[225] UNHCR 'Protecting the Rights of Stateless Persons.' Available at *https://www.refworld.org/pdfid/4cad88292.pdf* (accessed 3 May 2021).
[226] Guterres A 'Protecting the Rights of Stateless Persons' (2014) *UNHCR* 4.
[227] UNHCR 'Information and accession package' supra note 47.

establishing safeguards against statelessness in several different contexts.[228] The 1961 Convention establishes an international framework to ensure the right of every person to a nationality from birth,[229] and thus establishing safeguards to prevent statelessness from the time a person is born, so that he or she will not have to deal with it when they are adults.

Articles 1-4 of the 1961 Convention's principal concern is the acquisition of nationality by children who have not reached the age of majority. The cornerstone of efforts to prevent statelessness among children is found in Article 1 of the 1961 Convention. Article 1 provides:

> 'A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless'.

A child who would otherwise be stateless is granted the right to acquire the nationality of his or her State of birth, this is the jus soli criterion, and this can be done in one of two ways.

(a) at birth, by operation of law, or
(b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law.[230]

Hence a state may grant its nationality automatically, by operation of law (ex lege) to children born in its territory who would otherwise be stateless or this can be done later through an application with the correct authorities.

The 'best interests of the child' principle has an impact on the 1961 Convention. All Contracting States to the 1961 Convention are also party to the CRC, meaning Articles 1-4 of the 1961 Convention must therefore be interpreted in light of the provisions of the CRC. However, where the child of a refugee has acquired the nationality of the State of origin of the parents at birth, it is not desirable for host countries to provide for an automatic grant of nationality under article 1(1) of the 1961 Convention at birth, especially in cases where dual nationality is not allowed in one or both States. Rather, States are advised that refugee children and their parents be given the possibility to decide for themselves, whether or not these children

[228] Introductory note to the 1961 Convention.
[229] Article 1 of the 1961 Convention.
[230] Article 1(a) (b) of the 1961 Convention.

acquire the nationality of the State of birth, taking into account any plans they may have for future durable solutions.[231]

Sometimes states may have to deal with a child who is of 'undetermined nationality'[232]. When this occurs, the state should seek to determine whether a child is otherwise stateless as soon as possible so as to not prolong this status as it may lead to the child being stateless. In order for Articles 1 and 4 to apply, the time passed must not exceed five years, as this is the maximum period of residence which may be required under article 1(2)(b) of the 1961 Convention where a State has an application procedure in place.[233] While designated as being of undetermined nationality, these children should have access to all social services on equal terms as citizen children. This includes access to education, health care and all rights awarded to citizen children. If a contracting State of birth has opted to grant its nationality to otherwise stateless children automatically, children of undetermined nationality should be treated as possessing the nationality of the State of birth, unless and until the possession of another nationality is proven.[234] These measures ensure that every child is born with a nationality and is never at risk of statelessness.

Article 15 of the UDHR provides for the right to be free from arbitrary deprivation of nationality.[235] Article 8(1) of the 1961 Convention builds on and echo's the same sentiments. It employs all contracting states to not arbitrarily deprive a person of their nationality if it would render them stateless. It provides an important safeguard by specifying that a state can only deprive a persons of their citizenship after providing them with due process protections.[236] The 1961 Convention specifies the circumstances in which contracting states should award legal status to stateless persons, including granting citizenship to persons born within their borders who would otherwise be stateless.[237]

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[231] UNHCR Guidelines on Statelessness No. 4 'Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness' (2012). Also available at *https://www.refworld.org/docid/50d460c72.html* (accessed 12 May 2021).
[232] The Expert Council on Integration and Migration defines 'People who cannot prove their nationality or whose statelessness has not (yet) been recognised are often classed as people "with undetermined nationality". Available at *https://www.svr-migration.de/en/press/staatelessness-in-germany/* (accessed 27 July 2023).
[233] Article 1(2)(b): 'that the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all'.
[234] UNHRC 'Commemorating the Refugee and Statelessness Conventions' (2012) 82.
[235] Article 15(2) of the UDHR: 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.
[236] Article 8 of the 1961 Convention.
[237] Convention on the Reduction of Statelessness, 1961. Supra note 8 (agreeing that citizenship shall be given at birth or through an application submitted to appropriate authorities).

However, article 8(2) (b) allows the state to deprive someone of their nationality if they obtained it by misrepresentation or fraud.[238] Under these circumstances, the state is not deemed to be acting arbitrarily. This deprivation is only permissible on limited grounds. Such as under articles 7(4) and 7(5) which talks about a person being resident abroad for more than seven consecutive years without making the appropriate authorities aware of his intention to retain his nationality; or misrepresentation or fraud in the process of acquisition of nationality as was discussed. In addition to these two grounds, a contracting State may make a declaration pursuant to Article 8(3) of the 1961 Convention expressly retaining the right to deprive a person of their nationality on one or more of the bases set out in that Article, provided these grounds exist in its national law at the time. The bases for deprivation of nationality in Article 8(3) relate to certain types of behaviour inconsistent with the duty of loyalty to the Contracting State; formal declaration or oath of allegiance to another State; or definite evidence of repudiation of allegiance to the Contracting State. Deprivation of nationality on any of these grounds must meet the specific requirements set out in Article 8(3).These grounds include a fair hearing by a court or other independent body, such as provided by article 8(4) of the Convention. Article 9 of the Convention prohibits deprivation of nationality on racial, ethnic, religious or political grounds, regardless of whether or not it would result in statelessness.[239] Even though states have the right to deprive someone of their nationality, as found in 8(1), it has been echoed that it is important that the state first determines and understands whether each of its potential acts of deprivation of nationality would result in statelessness. If an act of deprivation would result in statelessness, then the Contracting State may only proceed if one of the exceptions to the general rule set out in Articles 8(2) or 8(3) applies.[240]

In conclusion: The main pillars in international law with regard to statelessness are both the 1954 and 1961 Conventions, as they contain the crucial provisions, however their impact is limited because of the low amount of countries that ratified them and because of the lack of monitoring mechanism to support their implementation.[241] The safeguards which are set by

[238] Convention on the Reduction of Statelessness, 1961. Art 8(2)(B) 'Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State: where the nationality has been obtained by misrepresentation or fraud.'
[239] UNHCR Guidelines on statelessness NO.5 'Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness' (2020) par. 6 (hereafter UNHCR guidelines on statelessness No.5).
[240] UNHCR guidelines on statelessness No.5 (2020) para.14.
[241] Zmiyenko O 'Acquis or not acquis: statelessness in the context of forced migration.' (2021) 45 *DPCE* 5262.

both the 1954 and 1961 Convention when applied would help alleviate the problems that stateless children who end up being refugees would face while migrating to a country of safety.

Another important legal document that provides safeguards for children who are forced to migrate is the 1951 Refugee Convention, which will be discussed next. The question to be addressed is whether the granting of refugee status, which could be akin to permanent residence status, is sufficient protection for stateless children. I have argued above that it is not, but that argument must now directly confront the scope of the protection provided under international refugee law.

4.2.4. 1951 Refugee Convention (1951 Convention)

'Refugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming'.[242] Hence it is designed to protect persons fleeing persecution in their own countries. Deprivation of nationality has historically played a critical role in the creation of refugees and in the development of international law measures seeking to alleviate their situation. Deprivation of nationality was a key reason for the development of international law regimes seeking to address the position of refugees.[243] The 1951 Refugee Convention (hereafter 1951 Convention) defines persons needing protection as well as the responsibilities of the states to which they have fled. A refugee is defined in Article 1 (A)(2) as a person who:

> 'owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.[244]

According to this definition, it is evident that not all refugees are stateless. However, the drafters of the 1951 Convention presumed an overlap between refugeehood and de facto statelessness in light of refugees' inability to access effective national protection. The

[242] Hathaway J *The Law of Refugee Status* (1991) 124.
[243] Fripp E 'Deprivation of Nationality, the Country of His Nationality in Article 1A(2) of the Refugee Convention, and Non-Recognition in International Law' (2016) 28 *International Journal of Refugee Law* 453.
[244] Article 1(A)(2) of the 1951 Refugee Convention.

fundamental assumption underpinning the 1951 Convention is that 'refugees already possess birth right citizenship - that is they are not stateless'. Even when refugees come from countries such as Somalia that have at previous times lacked the institutions to produce legitimate passports, those responsible for refugee status determination dutifully copy and file the passports refugees purchased from market vendors, reflecting the regime's ideological commitment to the notion that refugees remain linked to a state to which they will one day, ideally, return.[245] Refugees have a genuine link to their countries, even if the proof they provide is not substantial, they can still be identified as being part of a nation.

Nevertheless, some refugees may also be stateless. This can occur when someone is born and their birth is never registered in their country of birth, thus having no legal tie to that country. In the process, the territory that person lives in faces civil unrest and that stateless person is now forced to flee for their life, perhaps across borders. This person is now a stateless refugee. Another reason as to why there is an overlap between statelessness and refugeehood is discrimination and arbitrary deprivation of nationality. There is insufficient state protection in regard to the deprivation of nationality. States are not emphasising the link between the possession of an effective nationality and the ability to exercise the rights inherent to nationality.

Examining whether arbitrary deprivation of nationality constitutes persecution under Article 1A(2) of the 1951 Convention and, if so, on what grounds, will illuminate the intersection between statelessness and refugee status in international refugee law.[246] It is abundantly clear from the definition that a refugee can be a national (or not) of a country; in the legal sense, nationality is irrelevant to refugee status. In the case of stateless refugees, "the country of nationality" in Article 1A(2) is replaced with "the country of his former habitual residence," and "unwilling to avail himself of the protection of that country" is replaced with "unwilling to return to it." This demonstrates that a stateless person's claim to refugee status is identical to those applicable to claimants with nationality, namely, a well-founded fear of persecution attributable to the person's country of former habitual residence for a reason listed in article lA(2), and whether they are able or willing to return there, that is, whether it is safe there.[247] When this happens, international law provides that they 'should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to

[245] Bradley M 'Rethinking refugeehood: statelessness, repatriation, and refugee agency.' (2014) 40 *Review of International Studies* 111.
[246] Lambert H (2015) 6.
[247] Lambert H (2015) 22-23.

the protection from refoulement in Article 33 of the Refugee Convention'.[248] This provision prohibits contracting states from expelling or returning someone who is seeking refuge to where his/her life is in danger.[249]

Does arbitrary deprivation of nationality amount to persecution within the meaning of Article 1A(2) of the 1951 Convention? Courts have debated this on several occasions. One example is a case in the federal court of Australia.[250] The question raised was whether a stateless person presently unable to return to that person's country of former habitual residence is entitled to the status of refugee, or whether there is an additional requirement that the person have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a political social group or political opinion. The answer to that question depends on the proper construction of Article 1A(2). If a stateless person is outside his/her country of habitual residence and is unwilling, due to fear of persecution, to return to that country, then there is good reason for according him/her a refugee status. The court went on further to say Article 1A(2) of the 1951 Convention accepts that good reason to claim refugee status exists in the case of a national if he is outside his national state owing to well-founded fear of persecution and is either unable to avail himself of the protection of his nation state or unwilling, owing to such fear, to do that. A stateless person, however, has no state to which he can look for protection. If a stateless person is outside his country of habitual residence and is unwilling, due to fear of persecution, to return to that country, then there is good reason for according him refugee status. And, if a stateless person is outside his country of habitual residence and is unable, i.e., unable for reasons extraneous to himself, to return to that country, he, too, might be thought by reason of his unprotected status to have a good claim to be a refugee though he has not faced and will not face persecution there.[251]

This case emphasises that nationality is not a prerequisite for someone to gain protection under the 1951 Convention, if they meet the definition of a refugee, hence are in fear of their lives. Stateless refugees can be awarded some form of protection under the 1951 Convention and state parties should have measures in place to award this protection.

Article 34 of the 1951 Convention stipulates that:

[248] Lambert H (2015) 3.
[249] Article 33 of the 1951 Convention.
[250] *Minister for Immigration & Multicultural Affairs v Savvin* (2000) FCA 478.
[251] *Minister for Immigration & Multicultural Affairs v Savvin* (2000) FCA 478.

> 'The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'

States here are requested to facilitate to the fullest possible extent, the naturalization of refugees.[252] This forms the legal basis for one of the elements of the three-fold concept of international protection which is: local integration, voluntary repatriation or resettlement. Local integration means that a refugee is granted some form of durable legal status.[253] The goal for stateless persons who are refugees is still a nationality, as even though the refugee convention provides a 'safety' blanket on that category of stateless persons, it is still important that one possesses a nationality, as this will assist states in their plights to reduce the number of stateless persons in their territories. A progressive interpretation and application of article 34 of the Convention could thus, in principle, play a key role in alleviating the problem of statelessness among refugees. Ensuring the nationalisation of all refugees would kill two proverbial birds with one stone by providing a durable solution to both a protracted refugee situation and statelessness. However, most state, South Africa, subject the application of article 34 to a finding or certification that the refugee situation is indeed protracted and will last indefinitely. States are often reluctant to provide this certification, which, in any case, if of little consequence to the stateless refugee who already have no ability to return with the rest of the refugee population to their country of nationality. The idea that section 34 can thus stand in for the need to undertake a separate statelessness determination procedure among refugees cannot be supported.

4.2.5. International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (hereafter the ICCPR) was adopted by the United Nations in 1966, and came into force upon receiving the requisite number of ratifications in 1976. The ICCPR is a treaty that focuses on civil and political rights.[254] The ICCPR addresses statelessness through a number of provisions, including the provision on non-discrimination clauses which includes non-discrimination based on someone's status.[255]

[252] Article 34 of the Refugee Convention.
[253] Zimmermann A, Dörschner J, Machts F 'The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary, Oxford Commentaries on International Law' (2011) 1441.
[254] International Covenant on Civil and Political Rights, 1966.
[255] Article 2 of the ICCPR.

Another being that of equality between men and women, even when they are married, [256] and most importantly the right of every child to acquire a nationality entrenched in article 24 of the Convention.[257]

Article 12(4) ICCPR states that:

> 'No one shall be arbitrarily deprived of the right to enter his own country.'

The UN Human Rights Committee (HRC) has defined the word 'own country' to include those with 'special ties', such as long-time residents who are stateless and have been unjustly denied the ability to obtain that state's nationality. In addition, the HRC has stated that article 12(4) includes the right to remain in one's 'own country'. The wording of article 12, paragraph 4, does not distinguish between nationals and foreign nationals as it uses the words 'no one'. Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase 'his own country'. The concept of 'his own country' has a greater scope than the concept of 'country of his nationality'. It is not confined to legal nationality, that is, nationality gained at birth or by conferral; it extends to those who, due to specific ties to a particular country, cannot be deemed foreign nationals. This would be the case in situations of state succession or if someone has been arbitrarily stripped of their nationality. The language of article 12 (4) moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons.[258]

According UN data, in more than sixty States, women do not have the same rights as men with regard to acquisition, change or retention of nationality upon change in civil status.[259] This can lead to statelessness where a foreign woman is required to renounce her nationality upon marrying yet does not automatically acquire the nationality of her husband. Ensuring gender equality in the transmission of nationality is necessary to prevent statelessness, especially amongst children. TheUN also states that in twenty seven States, women are unable to confer nationality to their children on an equal basis as men. Gender inequality in nationality laws can create statelessness where children cannot acquire nationality from their fathers, where, for

[256] Article 3 & 23 of the ICCPR.
[257] Article 24 of the ICCPR.
[258] UNHRC General Comment No. 27 'Freedom of Movement' (1999) CCPR/C/21.
[259] UNHCR 'ICCPR International Covenant on Civil and Political Rights: Quick reference guide- Statelessness and Human Rights Treaties' (2016) available at https://www.refworld.org/docid/58c25e3a4.html (accessed 27 September 2022).

example, the father is stateless or the mother is not married.[260] States parties should ensure that no gender based discrimination occurs in respect of the acquisition or loss of nationality by reason of marriage, of residence rights, and of the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name.[261] We saw earlier in chapter two that gender discrimination has a huge impact on the reduction of statelessness. As statelessness could pass through generations if a parent cannot pass their nationality onto their child due to their gender. That is why Article three of the ICCPR confers equal civil and political rights to both man and women.[262]

Further, as has been repeatedly mentioned above, the lack of birth registration can make it difficult for individuals to prove that they have the relevant links to a State that entitle them to a nationality, and can therefore create a risk of statelessness. Article 24 of the ICCPR provides the most important safeguard against statelessness in the Convention. It states:

(2) 'Every child shall be registered immediately after birth and shall have a name.'

(3) 'Every child has the right to acquire a nationality.'

This provision does not, however, indicate to which state a child may claim his or her right to nationality.[263] It puts emphasis on the time a child should be registered, which is immediately. This will ensure that children are registered while they are children and before they reach the age of majority.

Even thou the ICCPR articulates the right of every child in the state's territory to a nationality, it does not make it an obligation for them to award every child born on their territory a nationality. However, 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.[264]

The following sections will be discussing the steps taken by Europe, the America's, Africa and Asia towards protecting stateless refugee children. The discussion might seem to be taking a

[260] UNHCR 'ICCPR International Covenant on Civil and Political Rights: Quick reference guide- Statelessness and Human Rights Treaties' (2016) available at https://www.refworld.org/docid/58c25e3a4.html (accessed 27 September 2022).
[261] CCPR General Comment No. 28 'The Equality of Rights between Men and Women' (2000) CCPR/C/21 also available at *https://www.refworld.org/docid/45139c9b4.html* (accessed 21 August 2021).
[262] Article 3 of the ICCPR.
[263] De Groot GR *Children, their right to a nationality and child statelessness: Nationality and statelessness under international law* (2014) 145.
[264] CCPR General Comment No. 17 'Rights of the Child' (1989).

long detour but the aim remains to establish whether South Africa has an international obligation to establish a statelessness determination process.

4.3. Regional treaties

4.3.1. Europe

The issue of statelessness has been of great concern to European states. A large number of people became stateless after the dissolution of the Soviet Union. Many people lost their identities during these times and state succession was a major problem that had impacted people's lives. During those times there were gaps in the nationality laws and even today gaps in nationality legislation continue to create statelessness at birth and later in life. Although the majority of stateless persons in Europe were born in the region and are stateless in the only country they have ever known, there has been a wave of stateless migrants and refugees who have come from outside of Europe. They were either stateless before leaving their country of origin or have become stateless since being in Europe.[265] At the core of the regional human rights system in Europe is the Council of Europe.[266] The Council initiated the European Convention on Nationality (ECN) on the 6th of November 1977. This instrument is crucial in ascertaining nationality. Inspiration for the ECN was drawn from the 1961 Convention, the drafters had incorporating some elements almost verbatim and elaborating upon others.[267] The main principles of the Convention aim to regulate issues of nationality. By doing so it aims to prevent statelessness and non-discrimination in questions of nationality. It holds that preventing statelessness is a general legal principle. Other general principles are that states have the competence to determine who its nationals are and it should be consistent with internationally accepted instruments. It protects from the arbitrary deprivation of nationality and sets rules against non-discrimination in nationality laws. It sets out the acquisition of nationality law through the internal laws of the state. It further stipulates that the procedures governing applications for nationality must be just, fair and open to appeal.[268] It thus suggests a similar scope of the right to nationality as the international instruments. Especially in its use

[265] UNHCR'*STATELESS IN EUROPE: Ordinary people in extraordinary circumstances' (2018)* 6.
[266] Institute on Statelessness and Inclusion 'Worlds Stateless Regional standards' available at *http://www.worldsstateless.org/continents/europe/regional-standards3* (accessed 4 May 2021).
[267] Batchelor CA 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *Oxford University Press* 164 (hereafter Batchelor CA (1998)).
[268] Chapter 1-4 of the ECN.

of the system of jus soli, as it requires the state of birth to grant nationality to a child, if the child would be otherwise stateless.[269]

Article 6(3) of the ECN focuses on the states legislation and lays out that state parties should provide in its internal law for the possibility of naturalisation. This time period should not exceed ten years. Which means habitual residence is now formally recognised as a sound basis for the granting of nationality. After the ten years of residence and the fulfilment of certain other criteria's, the person has the right to apply for citizenship.[270] Pertaining to stateless persons the period of time should be less as article 6(4)(g)of the ECN contains a duty to facilitate the acquisition of nationality for stateless persons and recognised refugees lawfully and habitually resident on its territory.[271] The duty to facilitate naturalisation means that the authorities and administrative courts have to take into account the particular situation of refugees when applying domestic law. This includes the difficulties of refugees in procuring documents in cooperation with the authorities of the country of origin.[272] When it comes to stateless persons, they need to take into account the position people without a nationality find themselves in, and a ten year time line would be lengthy for someone who is not be able to access their rights.

Elaborating on another principle used to avoid statelessness is of benefit. That principle is contained in the provisions on loss of nationality. Article 7 paragraph 3 which provides that a state party may not provide in its internal law for the loss of its nationality if the person concerned would thereby become stateless. The same principle is found in article 8(1).[273] Problems do arise in situations where persons are allowed or required to renounce their nationality before they have acquired the nationality of another State. This could be to certain requirements not being met. The person will then be left without a nationality in that case. In that situation the state whose nationality has been renounced must allow them to recover their nationality or must consider that they never lost it, so that statelessness does not occur.[274]

Another important piece of legislation is the 2006 European Convention on the Avoidance of Statelessness which entered into force on 1 May 2009. The focus of this treaty is preventing

[269] Worster WT *Treaty Law* (2019) 213.
[270] Batchelor CA (1998) 163.
[271] Article 6(4)(g): Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons: stateless persons and recognised refugees lawfully and habitually resident on its territory.
[272] Hailbronner K 'Nationality in public international law and European law' (2006) 1 *JSTOR* 7 (hereafter Hailbronner K).
[273] Hailbronner K (2006) 31.
[274] European Treaty '*Explanatory Report to the European Convention on Nationality'* (1997) para79.

statelessness that occurs through state succession. It assists state parties with statelessness that came about due to state succession in the European region. This treaty sets out important protections including the granting of citizenship to all who had it at the time of state succession on condition of residence and historic connection, especially those who had the nationality of the predecessor state.[275] It recognises that state succession is a major source of statelessness especially in Europe and the historical background of Europe.

Not only does Europe deal with statelessness due to their nationality laws and as a result of state succession. Europe has seen a large number of migrants, some being children. These migrant children acquire their nationality from one or both of their parents. However some of these children enter Europe without a nationality. They might have not been able to inherit their nationality from either one or both of their parents for different reasons. Due to this, some of these children who are migrating to Europe might end up being stateless, and growing up with that label, a label which may preclude them from accessing many rights and services.[276] Some of these stateless children do not even become stateless during migration but they come to Europe as migrants or refugees come from countries with known stateless populations.[277] These situations have become more frequent in western countries as many countries closer to conflict zones close their borders in order to avoid a massive flood of migrants. This has led to an imposition of sanctions and visa restrictions on those fleeing conflict. All these measures in turn have resulted in less flexibility among states for international cooperation as well as to worsening conditions for civilians displaced by conflict. That is why the UNCRC imposes mainly moral obligations on rectifying states to implement measures to protect displaced children.[278]

4.3.2. The Americas

The United States of America (USA) as a nation which is part of the Americas is neither a signatory to the 1954, the 1961 Convention on Statelessness nor the UNCRC. One reason given for their refusal to assent to any of the Conventions is that it limits voluntary renunciation of

[275] Institute on Statelessness and Inclusion. "World Stateless Regional Standards." Available at *www.worldsstateless.org/continents/europe/regional-standards3* (accessed 4 May 2021).
[276] European Network on Statelessness 'Ending childhood statelessness' available at *https://www.statelessness.eu/issues/ending-childhood-statelessness* (accessed on 5 May 2021).
[277] UNHCR '*Ending childhood statelessness in Europe*' available at *https://www.unicef.org/eca/media/8086/file* (accessed 5 May 2021).
[278] Liefaard T and Sloth-Nielsen J *The United Nations Convention on the Rights of the Child: taking stock after 25 years and looking ahead* (2017)427.

nationality in ways that would conflict with the right to voluntary expatriation that is recognised under US law. Americans may renounce their nationality, even if that renunciation would lead to statelessness. The 1961 Convention, by contrast, prohibits even the voluntary renunciation of citizenship when it would result in statelessness.[279] The USA's reluctance to be a signatory of any of the Conventions on statelessness and their nationality laws allowing for the renunciation of citizenship without having safeguards to prevent statelessness could render many citizens stateless.

The 1969 American Convention on Human Rights (AmCHR) directly provides for the right to a nationality. It goes as far as requiring states to provide nationality to children born on the territory, who do not possess another nationality and could thus end up stateless.[280] To prevent states from causing statelessness, article 20 (3) states that 'no one shall be arbitrarily deprived of his nationality or of the right to change it'. The Convention has been ratified by 25 states in the America's, the USA not being one of them.[281] This affirms that the USA still has a long road to reduce statelessness.

The statelessness problem in the America's is not limited to the North of America. The tropical islands of the Caribbean harbour some of the worst laws and policies on nationality in the Western Hemisphere, causing a significant statelessness problem in the region.[282] Nearly a quarter million persons are affected by these laws in the region, making it the cradle of statelessness in the Americas. Statelessness in the Caribbean arises in large part from poor policies and practices with regard to birth registration and transmission of nationality which is mostly triggered by migration.[283] Nonetheless progress has been made towards eradicating statelessness in South America and the Caribbean since 2014 but there is still much to be done if it wants to eradicate statelessness. With the adoption of the Brazil Declaration and Plan of Action in 2014, 28 countries and three Latin American and Caribbean territories committed themselves to eradicate statelessness in the region following the guidelines of the UNHCR Global Action Plan to End Statelessness. The countries are determined to prevent any new statelessness cases from the region. They aim to ensure that all stateless persons acquire a nationality or regain their nationality. Those people who are currently stateless or at risk of

[279] Price PJ (2013).
[280] Article 20 AmCHR.
[281] American Convention on Human Rights art. 20.
[282] Tobin CA 'No Child Is an Island: The Predicament of Statelessness for Children in the Caribbean.' (2015) 1 *DePaul International Human Rights Law Journal* 1 (hereafter Tobin CA (2015)).
[283] Tobin CA (2015) 1.

statelessness should be allowed to cross any legal or practical barriers when proving their nationality. During that process of trying to obtain a nationality those people should be protected. Mondelli points out that the Brazil Action Plan also proposes that States adopt measures in all three areas: prevention, protection and resolution.[284] If the states adopt these measures the progress will be significant. However, this progress will be limited by the fact that not enough of the states are signatories to the two statelessness conventions.

Mondelli describes some of the progress made by South American states to eradicate statelessness. He notes that 16 states have assented to the 1961 Convention. Three of these – Argentina, Belize and Peru – became parties to the Convention in 2014, while Haiti has recently decided to accede to the Convention, making it the 17th state. Colombia and Chile have also limited the scope of constitutional exceptions to the principle of jus soli, which will end up reducing the cases of statelessness occurring on their territories, and Panama has changed its registration policy to facilitate registration of births of children born in Costa Rica to Panamanian parents. Mondelli explains that to protect stateless persons, the Brazil Plan of Action asks States to accede to the 1954 Convention, adopt domestic protection frameworks, and establish procedures for determining statelessness.[285] Regarding the procedures for determining statelessness, Mondelli reports that the InterAmerican Court issued an advisory opinion stating that, in a migration context, states should take measures to identify children who are stateless in the territory and they should establish procedures that recognise the varying needs of these children.[286] In 2016, Costa Rica adopted regulations that allow for the comprehensive protection of stateless persons. In addition, Argentina, El Salvador, Panama, Paraguay and Uruguay are currently drawing up regulations to address the issue, while Colombia, Guatemala and Peru have also expressed interest in doing so.[287] Regardless of the progress that these states have made towards eradicating statelessness in the Americas there is still a lot of work that has to be done.

[284] Mondelli I 'Eradicating statelessness in the Americas.' (2017) 56 *Forced Migration Review* 45 (hereafter Mondelli I).
[285] Mondelli I (2017) 46.
[286] Mondelli I (2017) 46.
[287] Mondelli I (2017) 46.

4.3.3. Asia

Some of the largest stateless populations in the world are found in Southeast Asia.[288] Around 40 percent of the stateless population live in the Asia Pacific region, with the majority of them residing in the countries of Southeast Asia. While some of these people are refugees or migrants, most of them belong to minorities living in the country where they were born. The causes of statelessness and problems with legal identity in this region are context-specific and interconnected. The causes of statelessness in this region include inter-alia discrimination, the weaknesses found in civil registration systems and inadequate legal frameworks.[289] Currently, South East Asia is not bound by any treaty obligations that deal with statelessness. The legal safeguards against statelessness are inadequate. Laws in many states do not include safeguards that prevent problems of legal identity and/or statelessness. [290] Weak civil registration systems is a factor that contributes to statelessness. Shortcomings in birth registration expose children to risks of statelessness as they leave them without proof of parentage or birth in a country, all of which constitute vital facts for claiming nationality. The rates of birth registration vary greatly across the region, ranging from 74.4 percent in 2016 in Cambodia, 52.1percent in Indonesia in 2014 and 98 percent in Thailand.[291] Some of the common barriers to registration include lack of awareness, inaccessibility of registration systems, or corruption. In 2014, states in the region proclaimed the Asia Pacific Civil Registration and Vital Statistics Decade with the goal of improving civil registration systems by 2024, including achieving universal birth registration. Which is in line with the UNHRC goals. These initiatives have reinvigorated civil registration and vital statistics efforts. After reforming its civil registration law and providing a more flexible registration system, Thailand now has the highest birth registration rate in the region, with Vietnam and the Philippines following closely. Yet, replicating this success has been challenging, especially in states with high income disparities, such as Indonesia, Cambodia, and Myanmar. Even countries that have high registration rates, pockets of low registration exist, mostly affecting marginalised and hard-to-reach populations. Discrimination, inequalities faced by marginalized communities, logistical barriers as well as difficulties with late birth registration, all pose challenges for achieving universal birth

[288] Ishii SK 'Transnational regimes of labour and statelessness: Intersections of citizenship regimes and local norms in East and Southeast Asia.' (2020) 14 *Sociology Compass* 2 (hereafter Ishii SK).
[289] Sperfeld C 'Legal Identity and Statelessness in Southeast Asia' Available at *https://www.jstor.org/stable/resrep28879* (accessed 6 May 2021) (hereafter Sperfeldt C).
[290] Sperfeld C 'Statelessness in Southeast Asia: Causes and Responses.' available at https://globalcit.eu/statelessness-in-southeast-asia-causes-and-responses/ (accessed 21 August 2021).
[291] Mitchel J & Sejersen T 'DRAFT Assessing Birth Registration Completeness in Asia and the Pacific' 13.

registration.[292] With that being said, there are many initiatives to consult and develop new norms, for example, the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration provides for a right to a nationality.[293] The association was created by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Intraregional migration and the affects it has on the region is central to ASEAN's aims and objectives.[294] Because of the advances of these regions and the initiates it is clear that much progress has been made, however there are some people who still face hurdles when accessing their nationality rights.

The Region of Southeast Asia has for years dealt with problems of displacement, the movement of asylum seekers, refugee and stateless populations and irregular migration flows. The maritime migration crisis of May 2015 found at least 5000 refugees and migrants from Myanmar and Bangladesh stranded at sea. It involving thousands of Rohingya's and Bengalis. The connections between statelessness, an absence of protection, and irregular migration were brought into sharp focus.[295]

There are few parties to the Refugees Convention and the related Protocol in the region. These include Cambodia, Philippines, and Timor-Leste.[296] What's more in the region unlike other parts of the world, such as Europe, formal procedures for people to seek asylum are not widespread or, where they do exist, they are not easy to access. For example, there is a limited ability for people to lodge an application for protection in the region, a limited ability (of UNHCR) to register and process applications, a limited ability of IOM's to operate in the region and assist migrants, and the limited rights flowing from asylum seeker status and refugee status in the region is evidence of the infectivity of the system. In other words, there are limited mechanisms available currently in the region to access and provide protection to migrant and stateless populations.[297] Fortunately there are examples of systems that work in the region. In countries such as Thailand, the Philippines, and Malaysia, both government and NGO-led

[292] Sperfeld C 'Statelessness in Southeast Asia: Causes and Responses.' available at https://globalcit.eu/statelessness-in-southeast-asia-causes-and-responses/ (accessed 21 August 2021).
[293] Worster WT 'Treaty Law' (2019) 215.
[294] McAuliffe M 'Protection Elsewhere, Resilience Here: Introduction to the Special Issue on Statelessness, Irregularity, and Protection in Southeast Asia' (2017) 15 *Journal of Immigrant & Refugee Studies* 224 (hereafter McAuliffer M).
[295] McAuliffe M (2017) 221.
[296] McAuliffe M (2017) 225.
[297] McAuliffe M (2017) 225.

initiatives to identify stateless persons or people who are at risk of statelessness has led to an improvement in the level of data on affected populations.[298]

No region in the world is free from the problems that lead to statelessness, it is a global problem, one which has to be tackled not only on an international level but each individual state has to have laws and policies put in place to deal with statelessness. South Africa is of key note significance in this study, as such, the next chapter will be covering the laws that govern nationality in South Africa.

South Africa is not a party to any of the European, Inter-American or Asian legal instruments discussed above. However, it is bound the African law on nationality and statelessness. It is to that law that my attention turns next.

4.3.4. Africa

Many nationality problems in Africa are a result of colonisation. The continent inherited borders that cut through pre-existing political boundaries and institutions that had been founded on systematic racial and ethnic discrimination. The nationality laws adopted at independence where based on European models which were not suitable in the African context.[299] Citizenship is a tool used to manipulate and deny the rights of those whom a state wishes to marginalize or exclude. The Ethiopian-Eritrea war is an example of this.[300] Between 1998–2000 when Ethiopia and Eritrea arrested and forcibly expelled an estimated 150,000 people. These individuals were stripped of their explicit right to a nationality.[301]

Bronwyn reports that the Constitution of countries such as Angola, Kenya, Malawi and South Africa all provide in general terms for the right to a nationality. Only thirteen African countries specifically provide in their nationality laws in accordance to article 1 of the 1961 Convention on the Reduction of Statelessness, that children born on their territory who would be stateless have the right to a nationality.[302] The African Charter on the Rights and Welfare of the Child (ACRWC), ratified by 47 countries and signed by all, follows the CRC as it expressly protects

[298] Sperfeldt C 'Statelessness in Southeast Asia: Causes and Responses.' Available at https://globalcit.eu/statelessness-in-southeast-asia-causes-and-responses/ (accessed 26 October 2022).
[299] Bronwyn M *Citizenship Law in Africa* (2016) 4.
[300] Bronwyn M *Citizenship Law in Africa* (2016) 4.
[301] Campbell J R 'The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Courts (Re) Define Nationality' (2011) 23 *International Journal of Refugee Law* 656.
[302] Bronwyn M *Citizenship Law in Africa* 4.

the right to nationality for children, and has been interpreted to protect the acquisition of nationality at birth.

In addition, the African Charter also requires states to apply the best interests of the child analysis to any decision, and has been interpreted to say that statelessness is never in the best interest of the child.[303] Even if the nationality laws of around half of Africa's countries are quite liberal,[304] they can fail to reach the international standard that requires statelessness to be avoided at all costs.

The African Charter on Human and Peoples' Rights (ACHPR) does not include a right to a nationality, but it does include a provision to the right to the 'recognition of legal statuses.[305] The ACRWC also adopted these simple provisions. Article 6 provides for the right to a nationality and birth registration immediately after birth.[306]

In particular, article 6 provides as follows:

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.

More specifically, article 6(4) deals specifically with childhood statelessness or the risk of statelessness. It provides as follows:

> 4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize 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 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established with a mandate to promote and protect the rights enshrined in the African Charter on the Rights and Welfare of the Child. In the communication between *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 ACERWC made

[303] Worster WT 'Treaty Law' (2019) 214.
[304] Bronwyn M *Citizenship Law* (2016) 4.
[305]Article 5 African Charter on Human and Peoples' Rights.
[306] Article 6 ACERWC.

important findings about article 6.[307] The case involved the status of Nubian children whose ancestors originally hailed from Sudan but who were born in Kenya and whose children were born in Kenya. The Nubians claimed to be Kenyan citizens but faces several challenges, summarised by the Committee as follows:[308]

> 'A major difficulty in making the right to nationality effective for Nubian children is the fact that many Nubian descents in Kenya who are parents have difficulty in registering the birth of their children. For instance, the fact that many of these parents lack valid identity documents further complicates their efforts to register their children's births. It is further alleged birth registration certificate in Kenya explicitly indicates that it is not proof of citizenship, thereby leaving registered children in an ambiguous situation contrary to Article 6 of the African Children's Charter'.

The Committee held that the refusal of the Kenyan government to confer nationality of the Nubian children from the date of birth registration violates article 6 of the ACRWC as it exposed those children to the risk of statelessness.[309] The Committee confirmed the analysis undertaken above in chapter 3 about the negative consequences of childhood statelessness:

> 'Whatever the root cause(s), the African Committee cannot overemphasise the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherits an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the State. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally antithesis to the best interests of children'.

Given the far-reaching implications of statelessness, the Committee made the following decisive determination about the limitation on the traditional international law principle of state sovereignty that article 6 implies:

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[307] *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 (hereafter *Kenyan Nubian Children Case*).
[308] *Kenyan Nubian Children Case* para 4.
[309] *Kenyan Nubian Children Case* paras 43-44.

> 'Therefore, under general international law, States set the rules for acquisition, change and loss of nationality as part of their sovereign power. However, 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*'.

Given that a state cannot be expected on the same basis to universally grant nationality to every child born within the state, that is, the *jus soli* principle is not mandated under international or African law, the duty to grant nationality to children who are stateless or at risk of statelessness implies the establishment of a status determination procedure. The obligation under article 6(4) applies in the case of refugee children born in the host state and arises independently of any protection granted refugee children under migration law. This raises the interesting question whether a purposive interpretation of article 6(3) read together with the duty to prevent statelessness in article 6(4) means that article 9 of the ACRWC imposes a similar obligation on states, not in the case of refugee children who are born in the state, but refugee children who are granted refugee status by the state. In my submission it would.

Before I proceed to explore this submission in more detail, it is necessary to point out that the ACERWC have given more detail about the obligation to combat statelessness in its General Comment 2.[310] The Committee deals extensively in General Comment 2 with the issue of statelessness on the African continent and the legal obligations on members of the African human rights system to prevent the phenomenon. The Committee finds that 'there are hundreds of thousands of people living in Africa who are stateless, and many more whose nationality is in doubt or dispute'.[311] The Committee claims that there is a direct link between these high levels of statelessness, or the risk of statelessness, and the low levels of birth registration on the continent.[312] When it comes to statelessness, the Committee focuses for this reason mainly on the problem of low birth registration. The Committee accepts that African states provide for

[310] ACERWC 'General Comment 2: General comment on article 6 of the African Charter on the Rights and Welfare of the Child: Right to birth registration, name and nationality' (2014) ACERWC/GC/02 (2014), adopted by the Committee at its twenty-third Ordinary Session (07 - 16 April, 2014) (hereafter General Comment 2).
[311] ACERWC 'General Comment 2' para 4.
[312] ACRWC 'General Comment 2' para 3.

the conferral of nationality in their constitutions and/or other legislations. However, these laws often do not reflect the States' commitments to avoid statelessness, established by Articles 6(3) and 6(4) of the Charter.[313] In addition, many African nationality laws are in conflict with basic principles enshrined in the African Children's Charter and other human rights treaties.[314] Thus a child's right to nationality is dependent on a State's compliance with the obligation to prevent and reduce statelessness. The Committee points out that 12 states discriminate on the basis of gender with regard to the right to confer nationality (through the masculine blood line only) and, in addition, many states follow purely descent-based systems of nationality with no provision for the recognition of nationality on the basis of place of birth. Both these factors contribute to statelessness and the risk of statelessness.[315] These risks are compounded in the case of refugee children who are per definition born outside the country of their refugee parents and where the father is often dead or disappeared.

As far as the interpretation of article 6 of the ACRWC is concerned, the Committee proceeds from the starting point, shared by the African Commission and adopted in the *Kenyan Nubian case*, that the four rights listed in the article are indivisible and closely related:[316]

> 'The Committee holds the view that the rights to a name, to birth registration and to acquire a nationality together constitute the pillars of a person's identity. At birth, acquisition of nationality under the law generally occurs automatically on the basis of either descent or birth in the territory, or a combination of both; parentage and place of birth may also be the basis for later acquisition of nationality as a child or at majority. Birth registration establishes the place of birth and parental affiliation, which in legal terms serve as proof of acquisition of the parents' nationality, or the nationality of the State where the child is born. While birth registration in and of itself does not normally confer nationality upon children, it is a key form of proof of the link between the child and a State. It thereby serves to ensure that every child acquires a nationality and prevents statelessness. The Committee therefore emphasizes […] that there is a strong and direct link between birth registration and nationality; that is, that paragraphs (3) and (4) of Article 6 are closely linked to paragraph (2). A State's compliance with the obligation to

[313] ACRWC 'General Comment 2' para 5.
[314] ACRWC 'General Comment 2' para 4.
[315] ACRWC 'General Comment 2' para 6.
[316] ACRWC 'General Comment 2' para 23

prevent and reduce statelessness starts from taking all necessary measures to ensure that all children born on its territory are registered'.

The CERWC finally confirms the foundational overlap and intersectionality between child law and nationality law. The principle is the following:[317]

> 'The commitment to reduce the possibility of statelessness is an overarching obligation in the best interests of the child'.

The state should start by taking all necessary measures to ensure that all children born on its territory are registered. These include: children born out of wedlock, children born to a parent or parents who are foreigners (including those whose parents are in an irregular immigration status, or who are refugees or asylum seekers), children whose parents are unknown, and all other groups at risk of non-registration. Children born in the territory should be registered even if it is not clear from the outset that the nationality of the state in question will not be conferred.[318] This being done at the time the child is born will contribute to the urgent need to end childhood statelessness.

I fully concur with the African jurisprudence. If a stateless determination process at birth registration identifies the child in question as potentially stateless, there is a human rights obligation on the state, not only to register the birth but to grant nationality to the child. However the same duty to undertake a statelessness determination procedure should apply, on the basis of the same principle, at the moment a refugee child newly arrives in the state and the arrival is registered under refugee law.

In spite of the significant legal developments mentioned above, Citizenship laws in Africa still leave many millions of people at risk of statelessness. It is impossible to put an accurate figure on the numbers affected, but stateless persons are among the continent's most vulnerable populations. African states should address the problems of nationality that the continent's history of colonisation and migration has created and bring their nationality laws into line with international human rights norms. An important new development is the draft *Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa*.[319] I mentioned above that the

[317] ACERWC 'General Comment 2' para 91.
[318] ACRWC 'General comment 2' para 23.
[319] See generally Monono, DE 'Peoples' Right to a Nationality and the Eradication of Statelessness in Africa' (2021) 3 *Statelessness & Citizenship Review* 33.

ACHPR does ot contain any provision expressly dealing with nationality and statelessness. The draft Protocol aims to fill the void by supplementing the Charter. The object of the Protocol, according to article 2, is to eradicate statelessness in Africa. The quest to do so is guided by the following founding values or general principles set out in article 4:

> 1.'It is for each State Party to determine under its own law who are its nationals, subject to the provisions of this Protocol and consistency with international treaties, international custom, and the principles of law generally recognised with regard to nationality.
>
> 2. The States Parties agree and recognize that: a. Every person has the right to a nationality; b. No one shall be arbitrarily deprived or denied recognition of his or her nationality nor denied the right to change his or her nationality; c. States have the obligation to act, both alone and in cooperation with each other, to eradicate statelessness and to ensure that every person has the right to the nationality of at least one state where he or she has an appropriate connection. d. In all actions undertaken by any person or authority concerning the nationality of a child, his or her best interests shall be the primary consideration'.

The Protocol still recognises the traditional international principle of state sovereignty but expressly subjects that sovereignty to the human rights obligation to eradicate statelessness in the best interest of the child. Moving from principle to practice, article 19 of the draft Protocol explicitly imposes an obligation on states to design and implement a statelessness determination procedure as an essential step in the eradication of statelessness:

> 'A State Party shall provide in law for a process to facilitate the recognition or acquisition of its nationality by persons having an appropriate connection to that State whose nationality is in doubt, for the attribution of the status of stateless person if it is determined that the person does not possess the nationality of the State concerned or any other State, and for the facilitation of the acquisition of its nationality by stateless persons as provided in Article 6(3) of this Protocol'.

Article 19 applies to people with an 'appropriate connection to the state'. This crucial phrase is defined in the Protocol as follows:

> 'a connection by personal or family life to a State and shall, among others, include a connection by one or more of the following attributes: birth in the relevant State, descent from or adoption by a national of the State, habitual residence in the State, marriage to a

national of the State, birth of a person's parent, child or spouse in the State's territory, the State's being the location of the person's family life, or, in the context of succession of States, a legal bond to a territorial unit of a predecessor State which has become territory of the successor State'.

Unfortunately, the Protocol does not make explicit mention of asylum seekers and refugees and does not resolve whether these migration populations have 'an appropriate connection to the state' that would trigger the duty to establish a statelessness procedure. In my view, the definition is broad enough in letter and spirit to fully embrace children in refugee populations.

On the basis of the interpretation, under the draft Protocol, African states such as South Africa, might incur the international obligation to institute a status determination process for all childhood refugees. In fact, I argued above that such an obligation already exists under other international and regional human rights instruments.

The draft Protocol has not been adopted yet but it will become the main African treaty that deals with the right to nationality and the eradication of statelessness. Not only does the draft protocol require states to take legislative measures to eradicate statelessness, it takes an African solution to the problem of statelessness. This is significant because, as previously stated, statelessness in Africa is a result of colonialism. With the adoption of this protocol by African states, Africa has a real and fighting chance against statelessness.

Having established that South Africa indeed has an international law obligation to introduce a statelessness status determination procedure in the case of childhood refugees, the next question become ho w far the South African domestic law has thus far given expression to this obligation. What legal responses to the problem of refugee childhood statelessness have South Africa adopted. That question is the topic of the next section.

4.4. Legal framework on nationality and statelessness in South Africa

South Africa does not report any statelessness statistics, the number of stateless people in the region is unknown.[320] Statelessness is however a problem in the country. In 2011, the South African government pledged to sign the 1954 and the 1961 Conventions, but as of the writing of thesis, this is yet to be done.[321] This section will discuss the following laws in South Africa in order to identify the gaps in the current legal regime in addressing the issue of child statelessness: (1) South Africa's Constitution, (2) the Citizenship Act, the Refugees Act and the Births and Deaths Registration Act.

4.4.1. The Constitution of the Republic of South Africa, 1996

The South African Constitution contains a number of provisions dealing with citizenship and nationality. The right to nationality is enshrined in section 28 of the Constitution:

> 'Every child has the right to a name and a nationality from birth'.

Literally speaking, the language of this section applies to every child, citizen and non-citizen alike. The Bill of Rights also protects the fundamental rights that flow from nationality, such as the right to equality (section 9), the right to freedom of movement (section 21), the right to freedom and security of person (section 12), and most importantly, the right to human dignity (section 10). Since the wording of the constitution in relation to these rights is 'everyone', these rights should also apply to citizens and non-citizens. This is in line with the disaggregation of citizenship discussed by Benhabib and introduced above in chapter 2. As such, these rights could be used as a safeguard that prevent serious cases of human rights violations in relation to stateless people in South Africa. Still, it is these sets of rights which are often denied to stateless persons as a result of their lack of nationality and immigration status.[322] The fact that stateless people are sometimes unable to access these fundamental human rights indicates that there are gaps in our nationality rules regarding the protection of stateless people in the region.

The aim of section 28 is clearly to guard against statelessness with regard to children, rather than to operate as a direct means of acquiring South African citizenship. While this section

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[320] Khan F 'Exploring Childhood Statelessness in South Africa.' (2020) 23 *Potchefstroom Electronic Law Journal* 16 (hereafter Khan F).

[321] Chabane M 'Migrant issues, opening of refugee offices, statelessness: stakeholder engagement, with Ministry; Electoral Amendment Bill: summary of public input' available at *https://pmg.org.za/committee-meeting/35586/* (Accessed on 15 November 2022).

[322] Khan F (2020) 19.

does not directly guarantee South African nationality for children within South Africa's borders, it may have the effect of placing obligations on the State to grant South African citizenship to certain children, particularly those who are, or are potentially, stateless.[323] Since South Africa is not a signatory to the 1961 Convention, the UNHCR agreed that South Africa is not obliged to grant nationality to all those that are born on South African soil. However, South Africa still has to publish a common statement on the definition of a stateless person, which is something the government had agreed to do.[324]In its preamble, the Constitution affirms its desire to move forward from the dark past of apartheid and move forward by establishing a society which is founded on the values of human dignity, equality, human rights and freedoms.[325] As such, refugees, stateless persons and asylum seekers should be awarded protection by the legal system. The principle of Ubuntu, which is not expressly referred to in the constitution but is implied, and is one of the fundamental values, and calls form the protection of stateless people. Ubuntu is a Zulu term which means '*Umuntu ngumuntu ngabantu'* and is sometimes translated as 'a person is a person because of other persons'.[326] The broader view of Ubuntu extends to everyone, especially those who are vulnerable and in need of protection.[327] A person who thus lacks Ubuntu towards others, lacks the humanity that makes all of us humans. The country has not ratified the two conventions on statelessness and there is no domestic legal framework dedicated to statelessness. The constitution nevertheless provides in section 39 that when interpreting the Bill of Rights, a court, tribunal or forum must consider international and may also consider foreign law. This to ensure that solutions are identified that may be found useful for the South African context.[328]

The issue that the government tries to curb is that of illegal migrants. Those who are in the country legally should be protected by the laws of this country. The fear the government has is that there are illegal migrants in the country who do not uphold the laws of the country. So the laws that are in place also exist to curb illegal migration, this is true in every other country. South Africa, being such a hot spot for migrants and persons that are fleeing, the government

[323] Heerden VB, Cockrell A, Keightley RJ and Heaton PQR *Boberg's Law of Persons and the Family* (1999) 83.
[324] Chabane M 'Migrant issues, opening of refugee offices, statelessness: stakeholder engagement, with Ministry; Electoral Amendment Bill: summary of public input' available at *https://pmg.org.za/committee-meeting/35586/* (hereafter Chabane M).
(Accessed on 15 November 2022).
[325] Preamble of the Constitution of South Africa.
[326] Murove M F 'Ubuntu' (2013) 59 *Diogenes* 37.
[327] Koenane M 'Ubuntu and philoxenia: Ubuntu and Christian worldviews as responses to xenophobia' *HTS Teologiese Studies* 3.
[328] Neluvhalani VS *An analysis and re-assessment of the immigration legislative and administrative frameworks in combating statelessness: A decolonised view* (LLD thesis, North-West University, 2021).

would rightly be worried about controlling and regulating the borders. They may be reluctant to grant residence and naturalisation to de jure and de facto stateless persons because that might open a backdoor for undocumented or illegal migrants to regularise their otherwise illegal presence in a country. The issue may be understandable in the case of adult foreigners, but it becomes a significant moral dilemma in the case of migrant children involved in an irregular migratory situation. Consider the situation of a child born of undocumented parents from two different countries who are both illegally in a third country. The child might be unable to claim the rights attached to nationality in any of the three countries. Thus, statelessness cannot be neglected under the guise of migration control. The intersectionality of the issue nevertheless makes principled and practical solutions more complex than might appear to human rights activists who operate at a regional level.

4.4.2. South African Citizenship Act 88 of 1995

Citizenship is the gateway through which a number of rights in the Constitution can be accessed. The South African Citizenship Act governs the acquisition of South African citizenship. The Act provides for citizenship by birth or descent. One automatically qualifies for South African citizenship if they are born in South Africa and at least one of their parents is a South African citizen or a SA permanent residency permit holder or if you are adopted by a South African citizen. A person can apply for South African citizenship by descent or naturalisation.[329]

There is one exception to these requirements known as the 'statelessness exception', in terms of the exception, citizenship can be granted to individuals born in South Africa who do not 'have the citizenship or nationality of any other country, or has no right to such citizenship or nationality', so long as the birth is registered according to the Births and Deaths Registration Act 51 of 1992 (BDRA).[330] This is in line with the section 28 guarantee found in the Constitution, that without qualification every child has the right to a 'nationality from birth'. This exception also seems to give effect to the obligations under the African human rights system discussed above. Children who acquire citizenship through this channel are citizens 'by birth'. This is birth right citizenship, meaning Stateless children, are entitled to citizenship by virtue of having been born on South African soil. The current BDRA regulations require parents to register the birth of their children within 30 days, or else it will be considered a late

[329] S2 South African Citizenship Act.
[330] S(2)(2) South African Citizenship Amendment Act, 2010.

registration, which comes with its own requirements. In order to register their children, parents need to possess legal identification documents, meaning those parents who do not have legal documents, such as undocumented migrants who give birth in South Africa, they will fail to register the birth of their children, thus severely curtailing the applicability of the 'statelessness exception'. Another drawback is that Home Affairs has not included any guidance on the statelessness 'exception' in the Regulations or established a statelessness determination mechanism to regulate the application of the exception. It remains unclear how a child may go about acquiring citizenship through the exception. Simply put, if the regulations have not created a form or procedure for the application, it becomes impossible to make the application, without the help of a third-party organisation such as Lawyers for Human Rights, and frequently, court action.[331] In a case heard by the high court of South Africa, the Department of Home Affairs was ordered to make and implement regulations to facilitate applications for nationality under section 2(2).[332] These regulations had to be published by March 2018. As this did not happen, the court again in 2020 ordered the Department of Home Affairs to publish regulations on the implementation of the Citizenship Act.[333] The effect of a lack of regulations and the legislative gaps in the law was evident in an appeal case to the Constitutional Court of South Africa from a decision of the High Court of South Africa dealing with the validity of a regulation amending the South African Citizenship Act of 2010.[334] Reg 3(2)(a) of the Regulations on the South African Citizenship Act sets the required period of permanent residency prior to eligibility for naturalisation to 10 years. This period contradicts S5(1) of the SACA, the primary legislation, where the minimum period is five years. The first two applicants in this case had renounced their Congolese citizenship to comply with S5(1) of the Citizenship Act,[335] however when they had approached the department of Home Affairs, their application had been dismissed as they did not meet the ten-year requirement set out in the regulation, thus leaving them without a nationality and stateless. Their child was born after they had renounced their citizenship. Hence the third applicant, Gaddiel, was born in South Africa without a nationality and was stateless. Gaddiel should have been substantively protected as a stateless person by the 'statelessness exception'. However, this substantive protection is only attainable if Gaddiel undertakes further litigation challenging the failure of

[331] European University Institute '*REPORT ON CITIZENSHIP LAW: SOUTH AFRICA'* (2018) 13.
[332] *DGLR v Minister of Home Affair*s 2014 (GPJHC) 38429/13.
[333] *Minister of Home Affairs v Ali* 2019 (2) SA 396 (SCA).
[334] *Mulowayi v Minister of Home Affairs* 2019 (4) BCLR 496 (CC).
[335] Section 5(1)(h) of the South African Citizenship Act makes renunciation of citizenship a requirement where the applicant's country does not permit for its nationals to hold dual citizenship, as is the case with the Democratic Republic of Congo.

the South African government to enact a process for Gaddiel to make an application under the Citizenship Act. The only other option for him would be to wait until he reaches majority to apply for citizenship,[336] which would render him stateless until then. This illustrates the difficulties that stateless people face when navigating the administrative processes.

In 2020 the government finally published draft regulations on the Citizenship Act for comments.[337] However, as of yet, there has been no clarity on the finalisation of these regulations. Until then, the lives of those without a citizenship will be affected in profound ways. In another case heard by the Constitutional Court of South Africa, Justice Khampempe affirmed that:

> 'While it is true that certain rights in our Constitution adhere to South African citizens alone, the Court has repeatedly affirmed that arbitrary and irrational distinctions between citizens and non-citizens are inconsistent with the Constitution. And that it bears reiterating that the Preamble to the Constitution states that "South Africa belongs to all who live in it" and the rights in the Bill of Rights are afforded to everyone, unless expressly stated otherwise'.[338]

In a country like South Africa 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. Citizenship dictates if they will be able to get employment, their access to education as well as their ability to fully participate in the political sphere and exercise freedom of movement.[339] Since stateless refugee children have no papers and formal recognition by any country, and statelessness can be passed on from parent to child, the lack of regulations as to how to apply the law limits the access to rights for stateless refugees.

[336] S2 (3) of South African Citizenship Amendment Act, No.8.
[337] Publication of the draft regulations on the Citizenship Act, 1995 for comments (2020).
[338] *Chisuse v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) para24 (hereafter Chisuse s).
[339] *Chisuse* para 28.

4.4.3. South African Refugees Act 130 of 1998

In contrast to other countries, South Africa does not establish refugee camps at its borders. This is a reflection of its welcoming nature when it comes to refugees.[340] The South African Refugee Act (Hereafter the Refugee Act) aims:

> 'to give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith'.[341]

With its foundation based on the constitutional principles of equality, freedom and human dignity, the South African Refugees Act affords refugees a wide range of rights in South Africa, including all the rights set out in Chapter 2 of the Constitution, which included the right to equality, freedom to trade and work and health.[342] However, due to the lack of statelessness statistics in South Africa, it is unclear how many stateless refugees are actually awarded the rights found in the Refugees Act. These statistics are important as even though these stateless refugees are better off being protect under the umbrella of the refugee protection system, their lack of documentation can be the reason why they don't receive the protection awarded to refugees. In a briefing on the closure of Refugee Reception Offices (RRO's), it was held that people who were undocumented were turned away at the borders, and this has been normalised as it happens in other countries.[343]

The Scalabrini centre carried out statistical research on a population for which no data exists: Unaccompanied and Separated Foreign Children in South Africa.[344] The research emphasized the important role that statistics play in decision making. They found that the number of children migrating alone or with an unrelated adult to South Africa is unknown. What the research found was that 39% of the surveyed children left their country of origin due to conflict. These children seem, therefore, to have refugee claims and should be documented under the

[340] Chabane M.
[341] South African Refugees Act, 130 of 1998.
[342] Lee MC *Is South African Refugee Law Creating a Stateless Generation?* (LLM thesis, University of Cape Town, 2019) 31 (hereafter Lee M).
[343] Maunye M 'State of Refugee Reception Offices: briefing by Deputy Minister' available at *https://pmg.org.za/committee-meeting/13141/* (accessed on 15 November 2022).
[344] Scalabrini centre 'Are there durable solutions for Unaccompanied and Separated Foreign Children in South Africa?' available at *https://www.scalabrini.org.za/are-there-durable-solutions-for-unaccompanied-and-separated-foreign-children-in-south-africa/* (accessed on 15 November 2022).

Refugees Act.[345] The report further exposes the severe lack of documentation options available to these children, many of the children surveyed did not hold a birth certificate. As much as 21% of these children are at risk of becoming stateless, leaving them without the ability to access any formal rights. The absence of relevant immigration and protection policies can result in these children falling through the cracks of social and legal systems.[346] The countries refugee protection system is extensive, it is however not equipped to deal with those who refugees and at the same time stateless.

Stateless persons and refugees have always shared a close connection throughout history, despite the fact that international attention has been focused on the protection of refugees and statelessness is only now gaining real recognition. Due to the low accession rates of the Statelessness Conventions and the concomitant lack of domestic determination procedures adequately identifying and protecting stateless persons, the only legal recourse stateless persons can utilise is the legal regime that protects refugees, which was not specifically designed for them.[347] This is, however, not a solution for stateless people who also fall within the definition of a refugee, as people who are only refugees have a nationality, they only lack the protection of their country, they have proof that link them to a certain country. When you are stateless and a refugee there is no link to any country and the process of getting protection can be much harder.

A refugee who seeks asylum in South Africa can eventually naturalise and apply for South African citizenship.[348] The Citizenship Act allows foreigners to receive citizenship through naturalisation.[349] In order to apply for naturalisation, the applicant must first have their permanent residency.[350] According to the regulations, the period of ordinary residence should

[345] Section 3 of the Refugees Act provides that a person is a refugee if that person:
(a) Owing to a well-founded fear of being persecuted by reason of his or her gender, race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having the nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, is unwilling to return to it; or
(b) Owing to external aggression, occupation, foreign domination, or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or
(c) Is a spouse or dependant of a person contemplated in paragraph (a) or (b).
[346] Scalabrini centre 'Are there durable solutions for Unaccompanied and Separated Foreign Children in South Africa?' available at *http://citizenshiprightsafrica.org/are-there-durable-solutions-for-unaccompanied-and-separated-foreign-children-in-south-africa/* (accessed 20 June 2022).
[347] Lee M (2019) 31.
[348] S27(c) of the South African Refugee Act, 1998.
[349] S5 (1) of the South African Citizenship Act.
[350] S5(1)(b) of the South African Citizenship Act.

be 10 years immediately preceding the date of application for naturalisation.[351] However, as mentioned above, refugees can only apply for permanent residence if the Department certifies that they are caught in a protracted refugee situation, and that they will remain refugees indefinitely.[352]

The Department of Home affairs (DHA) in South Africa is custodian, protector and verifier of the identity and status of citizens and other persons resident in South Africa. The DHA has in place a status determination procedure for refugees and asylum seekers.[353]

According to the DHA, the eligibility Procedure for an Asylum Seeker is:

- A person enters the Republic of South Africa through a port of entry (a land border post, airport or harbour), claims to be an asylum seeker and is, therefore, issued with a section 23 permits which is a non - renewable "asylum transit permit" of the Immigration Act.
- The permit is valid for a period of 14 days only and authorizes the person to report to the nearest Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugee Act.[354]

An application for asylum, requires the asylum seeker is to furnish:

- A valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act.
- Any proof of identification from the country of origin, if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer.[355]

Even though access to the refugee reception offices or any other place designated for the purpose of determining refugee status is free, an asylum seeker must be physically present at the RRO to apply for refugee status.[356] This means that a person cannot send a representative

[351] S3(2)(a) of the Citizenship Act Regulations, GN 1122 of 28 December 2012.
[352] S29(d) of the Immigration Act, 2002 read with s27(c) of the Refugees Act 13 of 1998.
[353] Department of Home affairs 'Refugee Status & Asylum' available at *http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum* (accessed 19 July 2022).
[354]Department of Home affairs 'Refugee Status & Asylum' available at *http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum* (accessed on 16 November 2022).
[355] S8(1)(b) of the Refugees Act Regulations, 2019.
[356] S 2(1) of the Refugees Act Regulations (Forms and Procedures) 2000.

to the office to apply on his or her behalf. A further challenge faced now when trying to access these offices is not only that South Africa has a few RRO's but the government started closing these offices in metropolitan areas in 2011, with plans to reopen them at border posts.[357] Those who do make it to an RRO are faced with challenges just trying to access the RRO. Because of the limited resources to fully accommodate them, many individuals who require the services of the Status Determination Committee or Refugee Reception Officers have to stand in long queues often having to endure the early morning cold and many hours standing on their feet. It is not unheard of for asylum seekers to wait about a week before entering a refugee reception office and receiving assistance.[358] Due to this many asylum seekers will remain undocumented and be under the status of being illegal in the country.

In a case involving a stateless mother from eSwatini, the Home Affairs Director of Travel Documents and Citizenship, Richard Sikane, disputed statelessness itself, claiming 'I seriously dispute that any person can be born stateless'.[359] These views further emphasise the point that the Refugee Act is not sufficient to provide protection to stateless populations. Since the identification of stateless persons is of utmost importance in guaranteeing the rights of stateless persons and children living in the country. South Africa should have a dedicated mechanism that will deal with statelessness cases, as this will make it possible to respond to the phenomenon at a policy level and in order to protect individual human rights.

4.4.4 Births and Deaths Registration Act, 1992 (BDRA)

The BDRA serves to regulate births and deaths in South Africa.[360] The Act applies to both South Africans and non-South Africans. Chapter two of the Act deals with the registration of births. According to section 9 (1):

> 'In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements…'

[357] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); 2018 (4) SA 125 (SCA).
[358] Ramoroka V *THE DETERMINATION OF REFUGEE STATUS IN SOUTH AFRICA: A HUMAN RIGHTS PERSPECTIVE* (LLM thesis, University of South Africa, 2014) 31.
[359] Broughton T "Mother challenges home affairs" *Mail&Guardian* 16 August 2019.
[360] Births and Deaths Registration Act, 1992.

Therefore, the birth of a child needs to be registered. When registering the birth of a child, particular documents are required. Parents must hold valid identity documents.[361] The same applies to those children born to refugee parents, regulation 7 of the current Regulations affirms:

> 'Regulations 3, 4, 5 and 6 shall apply with the necessary changes to persons who hold permanent residence status in terms of section 26 or 27 of the Immigration Act and to persons who hold refugee status in terms of section 24 of the Refugees Act.'[362]

This means that even refugee parents must present a valid form of identification in order to register the birth of their child. Since they do not possess a valid South African identity document, they are required to present a valid passport, visa, asylum or refugee document.

However, in a 2018 court case,[363] the court ruled that requiring parents to present valid identification in order to register their child's births was unconstitutional. The court ordered that in order to cure the defects that were found, there should be a reading in. The reading in should read as:

> (i) before the word "a" at the commencement of subregulation (3)(f) to Regulations 3, 4 and 5 the words "where it is available,";
>
> (ii) immediately after the word "applicable" in subregulation (3)(i) to Regulations 3, 4 and 5 the words "and available";
>
> (iii) immediately after the word "by" to subregulation (1) of Regulation 12 the words "either" and immediately after the word "mother" in that subregulation the words "or father".

Thus, a child's registration at birth no longer depends on whether or not the parents have the proper documentation.

After the notice of birth has been approved and the child's birth is registered, regulation 7 (2) (b) provides:

> 'Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate with an identity number for holders of a valid refugee permit issued in terms

[361] Regulation 3 of the Regulations on the Registration of Births and Deaths, 2014.
[362] Regulation 7 of the Regulations on the Registration of Births and Deaths, 2014.
[363] *N v Director General: Department of Home Affairs* [2018] 3 All SA 802 (ECG).

of section 24 of the Refugees Act, on Form DHA-19 illustrated in Annexure 24, as contemplated in terms of section 7 (2) (*b*) of the Identification Act.'

However, South Africa now issues a record of birth to children born to refugees. Not the birth certificate South African citizens receive for their children. Due to this, the Consortium for Refugees and Migrants in South Africa marched to the Department of Home Affairs in December 2021 to demand South African birth registration for children of refugees and asylum seekers. The Minister engaged the UNCHR Assistant High Commissioner for Protection. In that meeting the UNHCR agreed that South Africa is not obliged to grant citizenship to every child born in South African territory to non-South African parents, as they are not a signatory to the 1961 Convention. The meeting between the Minister and the Assistant High Commissioner of UNHCR also agreed that the practice of South Africa issuing a Record of Birth to children born on South African soil but of non-South African parents is correct. The record of birth should be presented to the embassy of the parent's country of origin and it is their responsibility to issue a birth certificate.[364] However, Chauke raises some issues that arise, particularly when we consider refugeehood and statelessness in this context. The position of the government also fails to have regard to its obligations under the African Human Rights system.

4.5.4. Conclusion

This chapter has discussed the normative guidance on statelessness in an international, continental and the SA national context. It also noted that nationality is a prerequisite in attaining rights, it is thus evident that this multiple protection requires states to act in the best interests of the child by adopting all possible measures to secure a nationality for the child. Many states are still not signatories to the two most important statelessness conventions. South Africa is an example of a country that has taken great strides with the scope that they cover when it comes to the rights of displaced persons. With that being said there is a lacuna in the law.

Yes it has been argued that South African law is sufficient in protecting these vulnerable children, however the reluctance to accede to the Statelessness Conventions means there will be no procedure set in place to adequately identify and protect stateless persons. South Africa

[364] Parliamentary monitoring group 'Migrant issues, opening of refugee offices, statelessness: stakeholder engagement, with Ministry; Electoral Amendment Bill: summary of public input' available at *https://pmg.org.za/committee-meeting/35586/* (accessed 2 December 2022).

should assent to the 1954 Convention, as well as the 1961 Convention, then they should domesticate those conventions in order to have legislation in place to protect these children who are stateless or at risk of being stateless. In any case, I argued above that South Africa has the obligation under African human rights law to introduce a statelessness status determination process. Despite South Africa's reluctance to ratify the two statelessness conventions, and its general disregard for its African human rights obligations, there is a way that the country can try to meet the 2024 deadline.

The next chapter will introduce prevention methods and the statelessness determination procedure.

CHAPTER 5

PREVENTION METHODS AND THE STATELESSNESS DETERMINATION PROCEDURE.

5.1. Introduction

In the preceding chapter a case was made that there is a legal obligation on South Africa under international and regional migration law to identify and grant nationality to stateless refugee children from birth. This obligation it was argued implies the duty to implement a statelessness status determination process in addition to any other status determination process that might be in force, such as a refugee status determination process. The problem is that South Africa have not implemented such a procedure. Fortunately, a small number of developed democracies have introduced status determination procedures and methods for dealing with stateless populations within their borders in an effort to alleviate the issue of statelessness. This chapter will consider the efforts countries such as Denmark, Georgia, Kenya and Nepal have made in order to eradicate statelessness. The statelessness determination procedures will also be discussed. The aim is to explore these examples in order to establish the best international practice on the issue. Unfortunately, South Africa is not a leader in the field but will have to follow the examples of others.

5.2. The Role of individual National Human Rights Institutions

5.2.1. Denmark

Statelessness in Denmark commonly occurs in a migratory context. Children who migrate will automatically possess the nationality of one or both their parents. However, some children may not be able to inherit their parents' nationality for different reasons and find themselves in a country where nationality is not acquired through the place of birth (jus soli), leaving them stateless or at risk of statelessness. These children usually come from countries with large stateless populations such as Syria, Iran and Myanmar. Children who are born to a parent who is en route to Europe, and undocumented child, children who are unaccompanied or separated from their parents while outside their country are also at risk of statelessness.[365]

[365] Institute on Statelessness and Inclusion 'European Network on Statelessness: Denmark' (2020) 4.

Denmark is a state party to both the 1954 and 1961 Statelessness Conventions, In addition to that, Denmark are also signatories to other international human rights instruments that contain provisions of relevance to statelessness, such as the CRC. Denmark are also signatories to the 1951 Refugee convention which deals with displaced people. Section 44(1) of the Danish Constitution provides for the naturalisation of aliens. The only way an alien resident may naturalize is through statute.[366] Hence, before a foreigner can become a citizen an Act has to be passed to that effect. The government or an independent authority has no say to that effect. Before you can apply for naturalisation in Denmark, a stateless person must have been a resident for one year in the country.[367] Before 2010/2011 statelessness had received little attention in Denmark. This changed and the Danish Immigration Service took responsibility for identification, registration and/or determination of statelessness. The Danish Immigration Service introduced the statelessness registration procedures in the second half of 2011, after the increased attention paid to statelessness. This procedure is not formalised in the law. What the Danish parliament then decided to do was to adopt an Act amending the Aliens Act on registration of foreigners' basic personal data. The Act allowed statelessness to be established during several administrative procedures. There is no centralized procedure with the sole purpose of statelessness determination and the protection of stateless persons. Statelessness is determined under the existing procedures. It may be carried out as part of a decision in regards to an application for a residence permit (e.g. family reunification, asylum, work, education) or as an isolated act, if so requested by resident immigrants who for instance wish to have a wrongful registration corrected. In such cases, the Immigration Service's Citizenship Service handles the request.[368]

The Danish Institute for Human Rights status reports, of 2012 and 2013, dealt with the issue of statelessness in the context of concerns relating to Danish citizenship laws. The report included recommendations to the Danish government that citizenship law be amended to automatically grant citizenship to stateless children born on Danish territory. These recommendations further called for the inclusion of habitual as opposed to legal residence in

[366] S44 (1) of Denmark's Constitution, 1953.
[367] Life in Denmark 'Conditions for foreign citizens' acquisition of Danish citizenship**' available at** *https://lifeindenmark.borger.dk/housing-and-moving/danish-citizenship/conditions-for-foreign-citizens--acquisition-of-danish-citizenship* (accessed on 8 November 2022).
[368] Ersboll E and Savolainen P 'Mapping statelessness in Denmark.' 2019 *UNHCR* 12.

Denmark. Such recommendations were recognised as being in accordance with Denmark's commitments under the 1961 Convention on the Reduction of Statelessness.[369]

Denmark is a state party to international and regional instruments that protect every child's right to acquire a nationality and advocates for the prevention of childhood statelessness. By having a procedure that identifies stateless persons is evidence that Denmark is working towards the goal of making sure that stateless is eliminated from the states territory.

5.2.2. Georgia

Georgia ratified the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol in 1999. Georgia also acceded to the 1954 Convention in December 2011 and to the 1961 Convention in July 2014. Statelessness in Georgia is mostly a consequence of the break-up of the Soviet Union and it arise in the context of broader large-scale migration and displacement.[370] Georgian is one of the success stories when it comes to the efforts they have taken to combat statelessness. With the breakup of the USSR and the large scale migration and displacement the Georgian government and civil society have taken the issue of statelessness very seriously. In 2007 there were an estimated 11,000 stateless individuals or those at risk of statelessness in Georgia. This number fell to 2,000 in 2017.[371]

Georgia has a procedure in place for those who are stateless and want to apply for status. A stateless person who is of full legal age (18 years) can submit an application to any territorial office of the Public Service development agency, a branch of the Public Service Hall, or a Community Centre. If the applicant is a minor (younger than 18) then a legal representative must submit on their behalf. The application must contain two photographs, an identity document, travel document, or any other document issued by a foreign country certifying the fact of statelessness of a status seeker, and a receipt that serves as proof for the payment of the relevant service fee. In the case of stateless persons that are fleeing conflict certain documents might be missing, when that happens the applicant must provide explanation as to why they

[369] Van Waas L and Neal M 'Statelessness and the role of National Human Rights Institutions' (2013) *Tilburg Law School Legal Studies Research Paper Series* 12.
[370] UNHCR '*Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report Universal Periodic Review: 2nd Cycle, 23rd Session GEORGIA*' (2015) 1.
[371] McClellan M 'Statelessness in Georgia – how to make good laws better.' Available at https://www.statelessness.eu/updates/blog/statelessness-georgia-how-make-good-laws-better (accessed 16 August 2021).

are unable to produce those documents. During the administrative proceedings, until the status of a stateless person is determined, a status- seeker's stay in Georgia without the legal grounds is considered admissible. The stateless person is provided with an identity card that lasts for one year. This temporary identity card is a certificate of an identity which is issued to an asylum seeker, a seeker of a status of stateless person in Georgia, and other persons as prescribed by the law. An application for the status of a stateless person is considered and a final decision is taken within 6 months after the application is filed. The agency can extend the term of administrative proceedings for an additional 3 months, if the significant circumstances have to be established or a necessary document/ information has to be obtained. After acquiring a residence permit, a stateless person can obtain a travel passport so that he/she can leave Georgia, travel abroad, and re-enter Georgia.[372]

Georgia has made it possible for those who currently do not have a status to have an identity that will allow then to access their basic human rights. Stateless people in Georgia are identified and even allowed to travel in an out of the territory without fear of detention because of their lack of citizenship. The establishment of an application procedure allows for the law to be applied and for stateless people to be protected in the process.

5.2.3. Kenya

Kenya has different groups of stateless persons. Most of these come from ethnic minorities such as the Pemba, Shona, Rwandan descent and Indian. Other groups that are at risk of statelessness are some Kenyan Somalis and the Nubians who, due to discrimination have limited access to Kenyan identification documents. The members of these communities 'belong' to Kenya because of the existing and longstanding ties with the country, however they do not have Kenyan citizenship.[373] Pertaining to the Nubians, as we saw above in chapter four, these people have been in Kenya for over a hundred years, however due to their ethnicities they have many administrative and procedural blockages put in front of them, they have a hard time accessing Kenyan citizenship.[374] Post-Independence the Kenyan government refuses to recognise the Nubians as citizens and has been treating them as 'aliens', due to this

[372] Migration Commission 'The status of the stateless person and required documents.' Available at https://migration.commission.ge/index.php?article_id=163&clang=1 (accessed 16 August 2021).
[373] UNHCR 'Stateless Persons.' Available at https://www.unhcr.org/ke/stateless-persons (accessed 16 August 2021).
[374] Fokala E 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) *De Jure Law Journal* 477.

discrimination they are unable to obtain ID cards and are thus not granted a nationality, rendering them stateless.[375]

The Kenya National Commission on Human Rights (KNCHR) identified stateless persons as a special group in need of protection and rights promotion, due to their situation as being amongst the most vulnerable members of society. In July 2010 the KNCHR, in partnership with the UNHCR, produced a report titled *Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*.[376] The purpose of the report was to shed light on Kenya's nationality issues, particularly as they relate to groups at risk of statelessness.[377]

On the 26th of May 2021, the Government of Kenya launched a 60-day Rapid Results Initiative (RRI) to expedite the re-acquisition of Kenyan nationality for those individuals who had lost it due to historical legislative changes, such as with the introduction of the 2010 Constitution, as well as the acquisition of nationality for other groups.[378] This rapid results initiative campaign was intended to eliminate the backlog using the same innovation, but to provide the groundwork for rapid processing and issuance of these papers. The Government Taskforce on Statelessness subsequently confirmed that other stateless groups, including stateless persons of Rwandan descent, can benefit from the procedure. Since the announcement, UNHCR and the Kenya Human Rights Commission have been collaborating with community leaders from stateless communities to explore how they can support them with their nationality applications.[379]Applicants can apply through the Department of Immigration services, the website is easily accessible and it tailor made so that even foreign nationals are able to apply.[380]

[375] Fokala E and Chenwi L 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee' (2013) 6 *African Journal of Legal Studies* 361.
[376] Abuya E 'Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya' (2010) *KNCHR & UNHRC*.
[377] Abuya E 'Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya' (2010) *KNCHR & UNHRC* 5.
[378] Embassy of the Republic of Kenya in Japan '*RAPID RESULTS INITIATIVE (RRI) FOR THE ISSUANCE OF CITIZENSHIP AND PERMANENT RESIDENCE'* available at http://www.kenyarep-jp.com/archive/21/210628_e.html (accessed 17 August 2021).
[379] UNHCR '#IBelong Campaign' available at *https://www.refworld.org/docid/60e808fc4.html* (accessed 17 August 2021).
[380] Department of Immigration Services 'Efns' available at https://fns.immigration.go.ke/ (accessed 11 November 2022).

5.2.4. Nepal

From 1951, Nepalese citizenship could be obtain on the basis of a person's birthplace and descent. Naturalisation was possible for those who had been resident in the country for at least five years. A decade later, however, the provisions relating to naturalisation became more restrictive, placing emphasis on 'Nepalese origin' and the ability to speak and write Nepali. A new constitution in 1990 brought in legislation which restricted the granting of citizenship by descent to Nepali men, repealed the granting of citizenship by birth and required foreigners to be resident in the country for 15 years before qualifying for naturalisation. The aftermath of the 2006 democracy movement saw massive changes, including promises of amendments to the citizenship laws.[381]This would hopefully lead to more representation for women and ethnic minorities.

The National Human Rights Commission of Nepal (NHRCN) is a commission that 'is mandated to ensure the respect, promotion and protection of human rights, is competent to launch inquiries and investigations into alleged human rights violations, and can recommend legal or departmental action against human rights violators'.[382] Although statelessness is not of priority for the commission, the issue has featured in some of its work. During some of their monitoring missions the commission has identified people who have difficulties receiving citizenship documentation or being recognised as nationals. In the same human rights monitoring work, the NHRCN has paid attention to child rights, including through sharing information about the importance of birth registration.[383]

Nepal has become the state party of different human rights related Conventions. To fulfil the legal obligations imposed by the Conventions, Nepal has to formulate different national laws to comply with those obligations. The Constitution of Nepal, 2015 guarantees the right to citizenship. Part two of the Convention deals with citizenship. Article 10(1) states 'No Nepali citizen shall be denied the right to acquire citizenship'. Article 11 then goes on and expounds on what deems one a citizen. Article 11(2) deems one a citizen by decent if that person's mother or father was a citizen of Nepal during such person's birth. Article 11(4) protects against

[381] White P 'Reducing de facto statelessness in Nepal' (2009) 32 *Forced Migration Review* 28-29.
[382] National Human Rights Commission- Nepal, available at *https://www.nhrcnepal.org/aboutus* (date accessed 11 November 2022).
[383] Van Waas L and Neal M 'Statelessness and the role of National Human Rights Institutions' (2013) *Tilburg Law School Legal Studies Research Paper Series*

statelessness for children who are found in Nepal without parents are deemed as citizens of Nepal, it states: 'Every child who is found in Nepal and whose parents' identity is not known shall, until the father or mother of the child is traced, be deemed citizen of Nepal by descent'.[384] This provision has guaranteed the citizenship right of such minors accepting the principle of State as a Guardian. Further, this provision has protected the right to nationality that all children have, as provided by international instruments such as the UNDHR and CRC.[385] The Constitution also protects against gender discrimination in nationality laws as article 11(5) states that 'A person, born in Nepal to a Nepali citizen mother, who has domicile in Nepal and whose father is not identified, shall be granted citizenship of Nepal by descent'.[386] Women can pass on their citizenship to their children in the absence of the child's father, which is of paramount importance for single mothers who can now make sure their children do not end up stateless. This reduces the likelihood of a child becoming stateless in Nepal.

5.3. Status determination procedures

When it comes to tracking stateless populations and establishing procedures to ensure their rights are safeguarded, data collection is of highest importance. In spite of this, stateless persons are perhaps the group most likely to go uncounted. Even when they do not move, they are often absent from census data and development measures, and when they move, there may be no record of them. This can make it difficult to know their needs and to hear their views. The 1954 Convention provides a set of basic rights and freedoms that stateless persons should enjoy, however, it does not address how to identify those who should benefit from it.[387] The system of registering stateless people using a statelessness determination procedure (hereafter SDP) should then be considered a realistic and practical solution. To take advantage of the legal framework that protects stateless persons, they must first be identified, and SDP's provide the procedure needed to identify stateless people.

Governments are sometimes reluctant to establish statelessness procedures as part of their immigration laws. This may be partially attributable to the fact that the right to close a border has often been a mark of sovereignty. This fundamental principle is strongly defended by most states and governments. The only universally accepted exception to this rule is the right of

[384] Constitution of Nepal, 2015.
[385] Upadhyay R 'Problem of Statelessness in Nepal' (2019) 6 *NUTA Journal* 64.
[386] Article 11(5) of the Nepal Constitution.
[387] Bianchini K 'A Comparative Analysis of Statelessness Determination Procedures in 10 EU States' (2017) 29 *International Journal of Refugee Law* 44-45.

asylum seekers (from a domestic standpoint) or refugees (from an international standpoint) to enter a state while fleeing war or persecution and their right not to be returned to a situation of war or persecution (non-refoulment).[388] Statelessness has the potential to become a second exception to national sovereignty as I argued above. In fact, the draft Protocol to the African Charter seems to institute this exception.

With this rationale, legislators have constructed distinct legal frameworks to aid in the protection of refugees and stateless individuals. The 1951 Refugee Convention protects refugees and the 1954 Statelessness Convention protects stateless persons. It is true that being a refugee and being stateless are two different things, but an estimated 1.5 million 'stateless refugees' experience both at the same time. As a point, the 1951 Convention does acknowledge that a refugee may simultaneously be a stateless person. However, the structures set in place for the identification and recognition of stateless people are very limited, compared to the status determination procedures set up for refugees. This is so despite the fact that stateless people are at a heightened vulnerability.[389] If legislators deem it necessary to establish separate legal instruments for these distinct groups, it is important that separate determination procedures also be established.

The UNHCR has established a set of guidelines around such procedures.[390] According to the Guidelines, a statelessness determination procedure is set up to identify stateless persons among migrant populations and to ensure that they enjoy the rights to which they are entitled until they acquire a nationality. States are not mandated to follow a certain route when designing and operating a statelessness determination procedures. However, when establishing a statelessness determination procedure, States need to keep in mind that although the 1954 Convention does not prescribe a particular procedure, the formalized procedure must ensure fairness, transparency and efficiency. As mentioned above stateless persons may also be refugees. Therefore, States could end up combining their statelessness and refugee determination procedures. Another element that they must consider is that of confidentiality. An applicant's privacy must be respected regardless of the form or location of the statelessness determination procedure. With regard to form, the Guidelines suggests that a centralized procedure is preferable, as it is more likely to develop the necessary expertise among decision

[388] Lauterpacht E and Bethlehem 'The scope and content of the principle of non-refoulement: Opinion' (2003) *UNHCR* 89.
[389] McGee T 'Recognising stateless refugees' *Forced Migration Review* available at *https://www.fmreview.org/recognising-refugees/mcgee* (accessed 19 July 2021).
[390] UHNCR 'Statelessness determination procedures identifying and protecting stateless persons' (2014) 4-5.

makers. The determining authority has to consider the fact that it is not easy for people to prove that they are stateless. These people tend to not have any documents with them, they usually lack evidence that prove they are not a national of any state. According to the Guidelines, it is important that the authorities then consider all available evidence, might it be written or oral evidence from the applicant. It is important that applicants throughout the country have easy access to a determination procedure and that they are informed of the existence of the procedure, for example through information in institutions which provide services to migrants.

Even though states can set up their own SDP's, in order for the established SDP to provide effective protection and lead to the reduction of statelessness, the Guidelines suggests that five key elements must be in place. First the procedure must accede to and comply with relevant international instruments including the 1954 convention on the protection of stateless persons. Second there must be information available on the issue of statelessness and authorities must be competent to address the issue. Third there must be a procedure to determine statelessness and then that determination must lead to the fourth element which is an adequate protection of status and finally stateless people must have facilitated access to naturalisation, to ultimately be able to resolve their statelessness.[391]

Since statelessness can arise both in a migratory and non-migratory context the way a state identifies these stateless individuals is context specific and different methods have to be used when identifying them. Some stateless populations in a non-migratory context remain in their 'own country', they are in situ populations. This population of people have an effective link to their country of residence and thus there is no need for a determination procedure that establishes status. It would be advisable for states to rather undertake nationality campaigns for their registration. It is still beneficial for states to establish statelessness determination procedures for stateless individuals who do not fall within the in situ population, especially since a countries population may change over time.[392]

Only about twenty States worldwide have established dedicated SDPs.[393] Under its mandate for statelessness, the UNHCR is willing to assist states who lack the capacity and resources to set up their own statelessness determination procedure. They can do this by conducting

[391] Statelessness Index 'Statelessness determination and protection in Europe: good practice, challenges, and risks' (2021) *The European Network on Statelessness* 10.
[392] UNHCR *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014) 25-26.
[393] UNHCR 'Establishing Statelessness Determination Procedures for the Protection of Stateless Persons.' Available at *https://www.refworld.org/pdfid/5f203d0e4.pdf* (accessed 14 April 2022).

determinations themselves, this is a measure of last resort.[394] Even with the aid of the UNHCR, the particular state should be mostly in control of the procedure, since each SDP is mostly country and territory specific.

A fear that a lot of states hold is that an established statelessness determination procedure would create a 'pull factor', meaning people would be drawn to countries with SDPs for the purpose of receiving benefits.[395] Countries that have established an SDP have not seen large numbers of people applying for statelessness status. France has the longest standing statelessness determination procedure,[396] we will thus consider their example. France received an average of 224 applications for statelessness status between 2010 and 2016. In 2018, France received 420 applications for statelessness status and made 71 findings of statelessness status and 122 findings of statelessness refugee status. Although the number of applications increased, France's determining authority, states that the admission rate is stable.[397] Having this data also allows for international cooperation as one states authorities can contact no other states authorities to confirm whether or not an individual is stateless or a national.[398] It is evident that establishing an SDP will not act as a factor that draws stateless individuals to a particular state, even in a migratory context.

To avoid a failed effort in setting up an SDP each government has to consider their resources and have a tight proof plan on how they will draw up and plane their individual SDP. The local population and the migration patterns will determine the approach that should be taken to establish the SDP. Both financial and human resources are significant in the planning of statelessness determination procedures.[399] When adopting an SDP there should be certain procedural guarantees. These include having information on the eligibility criteria for the

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[394] Bhatnagar K (2019) 10.

[395] *A pull factor is a motivating factor that entices people to relocate to another region or country. See reference: safeopedia dictionary 'pull factors' available at https://www.safeopedia.com/definition/3136/pull-factors (accessed 24 November 2022). In the context of statelessness, a pull factor refers to a situation in which guaranteeing the rights of the stateless is thought to encourage more people to genuinely or fraudulently claim to be stateless to enjoy such rights.*

[396] UNHCR 'Good practice papers, action 6- Establishing Statelessness Determination Procedures for the Protection of Stateless Persons' (2020) 5.

[397] UNHCR 'Establishing Statelessness Determination Procedures for the Protection of Stateless Persons' (2020) 7.

[398] UNHCR 'Statelessness Determination Procedures and the Status of Stateless Persons' available at *https://www.refworld.org/docid/4d9022762.html* (accessed 18 August 2022).

[399] UNHCR *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons* (2014) 27-28. The Handbook further recommends Everyone in a State's territory must have access to statelessness determination procedures para69, Statelessness determination procedures should be formalized in law para71, With regard to the status determination, it is undesirable for a first instance decision to be issued more than six months from the submission of an application as this prolongs the period spent by an applicant in an insecure position (para 75).

determination procedure, the applicant should have a right to an interview with the decision making official, when a decision is made it should be made in writing and they should have a right to appeal if their application is rejected.[400] Even though there are no putative measures against a stateless person whose application has been rejected, they would normally risk being excluded from society and encounter difficulties when trying to access several human rights, therefore it is important that the burden of proof should not be too high.[401]

Existing good practices are a great source and point of reference when trying to create a statelessness determination procedure. Complications can arise and encumber the process if inflexible procedures are in place, if there are strict language requirements and limited places where claims can be submitted.[402] The application process has to take into consideration that most of the applicants are in a vulnerable position and may not have the means to meet the requirements if they are not flexible. Regulations that allow for the applicant to submit their statelessness claim in either written or oral form and in any language would allow migrants to apply with ease. There should be interpreters in place to assist applicants who cannot speak the official language as this will further assist in eliminating any language barriers.

Only when states implement a statelessness determination system that incorporates the five key elements outlined and is formed in a way that promotes justice, administrative fairness, and equality will nation states have a serious chance against statelessness.

5.4. Conclusion

This chapter discussed the strides reached by different human rights institutions over the years. The different legislative and policy measures that were put in place to make sure that statelessness is done away with in those countries. The statelessness determination procedure and its significance in the reduction of statelessness was covered.

The next chapter will put together a summary of the research and conclude by making final recommendations.

[400] UNHCR 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (2012) 5.
[401] Bianchini K 'A Comparative Analysis of Statelessness Determination Procedures in 10 EU States' (2017) 29 *International Journal of Refugee Law* 48.
[402] Gyulai G 'Determination and the protection status of stateless persons' (2013) *European Network on Statelessness* 15.

CHAPTER 6

SUMMARY AND RECOMMENDATIONS

6.1. Introduction

This chapter concludes the thesis and make recommendations on how South Africa may enhance the protection of refugee children who may become stateless or are already stateless. The focus falls on lessons South Africa can and should learn from the growing international and comparative law developments around the issue discussed earlier in the thesis. A summary of the findings as well as the primary objectives of each chapter will also be discussed.

6.2. Summary of research

This thesis was concerned with the problems faced by many refugee children who end up finding themselves stateless or at the risk of statelessness. It endeavoured to showcase and highlight the precarious situation these children find themselves in and the lessons South Africa can learn. The central focus of the thesis is how South Africa can address the problem of statelessness among refugee children while adhering to international best practices. In addressing this, the thesis provided answers to several questions.

The first chapter of the thesis provides the definition of statelessness. Being stateless means you are not considered a national by any state under its laws. This universally accepted definition is found in Article one of the 1954 Convention Relating to the status of Stateless persons. Chapter two further elaborated and introduces the different forms of statelessness, which is de jure and de facto statelessness. Chapter two also explained the causes of statelessness. Evidently, there is no single route that leads to statelessness; there are multiple routes. These include, to name only some, discriminatory registration and nationality laws, state succession, forced migration, a lack of documentation, and the conflict of laws. Chapter two further highlighted the intersectionality of childhood refugee statelessness.

Chapter three described what happens to stateless children. These children struggle to access formal education. There are roadblocks that sometimes prevent them from accessing health

care. Their future employment prospects are diminished and most importantly, in my opinion, their childhood is taken away from them. The impact on their mental health will last a lifetime.

The right to nationality is currently protected by international, regional, and national legal systems. Chapter four of this thesis discusses a few of them. On the international level, the Convention on the Rights of the Child, the 1954 Convention Relating to the Status of Stateless persons and the 1961 Convention on the Reduction of Statelessness, to name a few. In addition, the chapter discusses the legal systems of Africa, the Americas, Europe, and Asia. On a national level, the South African Constitution is also covered. The chapter concluded that there is a legal duty on South Africa to establish a statelessness status determination procedure in the case of refugee children born in the country, in addition to any refugee statelessness determination process that might be applicable. I raised the question whether the same procedure should not also be established for the benefit of all refugee children newly arriving in the country. The evaluation of South African law reveals that no such procedure has been established, even though legislation no formally contains a statelessness exception.

Statelessness-related best practises are covered in the fifth chapter. These states and the Guidelines on status determination procedures issued by the UN can serve as examples once South Africa eventually sits down to draft the necessary statelessness status determination procedure. The states that are making head waves when it comes to recognised stateless people and awarding them their rights are firstly signatories to both statelessness conventions and lastly they have set up procedures that not only identify stateless persons but they award them some form of identity documents.

6.3. Recommendations

Given the above summary and research carried out in this thesis, the study makes the following recommendations towards reducing statelessness when it comes to refugee children:

6.3.1 Additional research on statelessness

The issues that have been discussed in this thesis should be the focus of further investigation. There has been a surge in research on the topic of statelessness, but it is still not given the necessary consideration. Reports, papers and articles on statelessness are being published at a pace not seen previously. Despite the slow pace of new publications on statelessness, it can be inferred that statelessness has arrived as a recognised field of academic study. Therefore, it is

essential that we fill up the numerous gaps in our understanding of statelessness, and develop a research agenda and fora to exchange and discuss findings. Statelessness is now a legitimate area of research in its own right. This greater need in South Africa is compounded by the fact that there are no statistics on stateless in the country.

6.3.2 Moving forward, the best interest of the child must be the guiding principle

'No child is an island, entirely by itself'.[403] States play a critical role in ensuring that children have access to their right to nationality. Children need the protection and care of the society they live in. As a result, the principle of the best interest of the child is the cornerstone of children's rights in international law. This principle is applicable to all children no matter whether they live in their country of origin or not.[404] Preventing statelessness among refugee children will be consistent with the principle of the best interests of the child.

6.3.3 Remove arbitrary barriers to birth registration

Since failure to register a child's birth can increase the likelihood of statelessness, some of the strict requirements for registering a child's birth should be eliminated. When registering the birth of a child there shouldn't be a closed list of required documents. The Department of Home Affairs should be able to produce a universal, free and accessible birth registration system. Guidance on how to achieve the goal of universal birth registration can be found in the proposed model regulations in the Appendix.

6.3.4 Implement court judgements

In South Africa, the courts are tasked with resolving disputes and issuing judgments, and the non-implementation of court judgments is a direct assault on the courts' power. Stateless individuals will struggle to be recognized if court decisions are not properly implemented. Their struggle to obtain their rights will be a continuous one that is why all necessary measures to guarantee the effective implementation of court judgements must be taken.

[403] Tobin CA (2015) 12.
[404] Luquerna A 'The children of isis: Statelessness and eligibility for asylum under international law' (2020) 21 *Chicago Journal of International* 167.

6.3.5 Improved data collection

The first stage in resolving the issue is recognition, which entails creating more avenues for stateless individuals to attain formal status. Since South Africa is not a signatory to any of the agreements on statelessness, migrant children may find themselves without protection. Since South Africa does not have any data on the statelessness population in the country, they have been led to making estimates. As a result, tracking progress on reducing statelessness for policy, programming and advocacy purposes is limited. The government and civil society will need good data to assist stateless people and to address the causes of statelessness. Improving statistics is crucial to enhancing the lives of stateless individuals and eradicating statelessness. Since these people who are at risk of statelessness are refugees, South Africa can follow the path of the UNHCR and categorises persons either as refugees or stateless, in order to achieve effective protection but also to avoid double-counting.[405]As stated previously under lessons for South Africa, there needs to be another route and different options for refugee children who end up or are at risk of stateless so that they are not forgotten and are awarded the protection they need.

[405] Albarazi Z and Dr. van Waas L *STATELESSNESS AND DISPLACEMENT Scoping Paper* 10.

APPENDIX

BIRTHS AND DEATHS REGISTRATION ACT, 1992

DRAFT REGULATIONS ON THE REGISTRATION OF BIRTHS AND DEATHS, 2022

The Minister of Home Affairs intends, in terms of section 32 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), to make the Regulations in the Schedule

SCHEDULE

Definitions

1. In these regulations any word or expression to which a meaning has been assigned in the Act shall have that meaning and, unless the context otherwise indicates—

"**Children's Act**" means the Children's Act, 2005 (Act No. 38 of 2005);

"**confirmation of birth certificate**" means a certificate issued to a non-South African citizen confirming that the birth of his or her child occurred within the Republic and enables the holder thereof to approach the relevant authorities of his or her country of citizenship or nationality in order to register the birth of his or her child in his or her country of citizenship or nationality's population register;

"**informant**" means a person who gives notice of death under regulation 14;

"**funeral undertaker**" means a person who is designated as such in terms of section 22A of the Act;

"**identity document**" means an identity document or card issued in terms of the Identification Act;

"**Identification Act**" means the Identification Act, 1997 (Act No. 68 of 1997);

"**Immigration Act**" means the Immigration Act, 2002 (Act No. 13 of 2002);

"**Inquests Act**" means the Inquests Act, 1959 (Act No. 58 of 1959);

"**inspectorate**" means the inspectorate established in terms of section 33(1) of the Immigration Act;

"**late registration of birth**" means a notice of birth given after the expiry of the period of 30 days contemplated in section 9(3A) of the Act;

"**medical practitioner**" means a person registered as a medical practitioner under the Health Professions Act, 1974 (Act No. 56 of 1974) and who has a valid practice number issued by the relevant health professions council;

"**national population register**" means the population register contemplated in section 5 of the Identification Act;

"**non-South African citizen**" means a person who holds a valid temporary residence visa contemplated in sections 11 to 23 of the Immigration Act, and includes an asylum seeker or refugee issued with a permit in terms of section 22 or 24 of the Refugees Act;

"**Refugees Act**" means the Refugees Act, 1998 (Act No. 130 of 1998);

"**South African Citizenship Act**" means the South African Citizenship Act, 1995 (Act No. 88 of 1995);

"**the Act**" means the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992); and

"**valid passport**" means a valid passport as contemplated in regulation 2 of the Regulations made under the Immigration Act.

REGISTRATION OF BIRTHS

Substitution of regulation 8 of the draft regulations

Notice of birth of children born of parents who are non-South African citizens.

8.(1) A notice of birth of a child born of parents who are non-South African citizens and who are not permanent residents or refugees must be given as contemplated in subregulation (3) by either parent of the child within 30 days of the birth of the child in the Republic.

(2) Where the parents of the child whose birth is sought to be registered as contemplated in subregulation (1) are deceased, the notice of birth may be given by the next-of-kin or legal guardian of the child.

(3) A notice of birth referred to in subregulation (1) must be given to the Director-General on Form DHA–24 illustrated in Annexure 1 and be accompanied by—

a) proof of birth on Form DHA–24/PB illustrated in Annexure 1A attested to by a medical practitioner who—
    i. attended to the birth; or
    ii. examined the mother or the child after the birth of the child;
b) an affidavit attested to by a person who witnessed the birth of the child where the birth occurred at a place other than a health institution on Part A5 of Form DHA–24 illustrated in Annexure 1;
c) a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be;

d) where applicable, a certified copy of the valid identity document or passport and visa or permit of the next-of-kin or legal guardian;
e) where applicable, a certified copy of an asylum seeker permit issued in terms of section 22 of the Refugees Act of the mother or father or both biological parents of the child;
f) where applicable, a certified copy of the death certificate of any deceased parent of the child;
g) where applicable a letter of guardianship;
h) where applicable a proof of guardianship affidavit;
i) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered; and
j) proof of payment of the applicable fee.

(4) Where a woman gives birth to more than one child during a single confinement, the notice of birth contemplated in subregulation (1) must be given for each child separately on Form DHA–24 illustrated in Annexure 1 with all the supporting documents contemplated in subregulation (3) and the exact time of each birth must be recorded in that Form.
(5) Upon approval of a notice of birth, the Director-General must issue to the parents a confirmation of birth with an identity number on Form DHA–19 illustrated in Annexure 4, in terms of section 5(3) of the Act.

Insertion of regulation 9.

Late registration of birth of children born to non-South African citizens.

9.(1) A notice of birth given later than 30 days after the birth but before the child is older than one year, shall be given in accordance with subregulation (3).

(2) Where both parents of a child whose birth is sought to be registered in terms of subregulation (1) are deceased, the notice of birth must be given by the next-of-kin or legal guardian of the child.

(3) A notice of birth referred to in subregulation (1) must be given by, where possible, both parents to the Director-General on Form DHA–24/LRB illustrated in Annexure 2 and be accompanied by—

(a) proof of birth on Form DHA–24/PB illustrated in Annexure 1A attested to by a medical practitioner who —

i. attended to the birth; or

ii. examined the mother or the child after the birth of the child;

(b) an affidavit attested to by a person who witnessed the birth of the child where the birth occurred at a place other than a health institution on Part A7 on Form of DHA–24/LRB illustrated in Annexure 2;

(c) biometrics, in the form of a palm, foot or fingerprint, of the child whose birth is sought to be registered in the appropriate space on Part A8 on Form 24/LRB illustrated in Annexure 2;

(d) The full set of fingerprints of the parent(s) shall be taken on form DHA-24/A as illustrated in Annexure 1B;

(e) a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be;

(f) where applicable, a certified copy of the valid identity document or passport and visa or permit of the next-of-kin or legal guardian;

(g) where applicable, a certified copy of an asylum seeker permit issued in terms of section 22 of the Refugees Act of the mother or father or both biological parents of the child;

(h) where applicable, a certified copy of the death certificate of any deceased parent of the child;

(i) where applicable a letter of guardianship;

(j) where applicable a proof of guardianship affidavit;

(k) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered; and

(l) proof of payment of the applicable fee.

(4) Upon approval of a notice of birth, the Director-General must issue to the parents a confirmation of birth with an identity number on Form DHA–19 illustrated in Annexure 4, in terms of section 5(3) of the Act.

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