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**Playing in the shadows: An analysis of childhood statelessness and the right  
to nationality in South Africa and Zimbabwe.**

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## DEDICATION

*This research is dedicated to all stateless children in South Africa and Zimbabwe: May you no longer have to play in the shadows.*



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Firstly, I would like to thank the Lord Almighty for giving me the strength and courage through 2019 to complete my LLM. **Psalm 46:1-3** 'God is our refuge and strength, an ever-present help in trouble. Therefore we will not fear, though the earth gives way and the mountains fall into the heart of the sea, though its waters roar and foam and the mountains quake with their surging.'

I would also like to thank my parents, Deon and Delia Coetzer for all their support throughout my academic career. Without their love, patience and motivation, I would not have been able to achieve what I have thus far. My entire academic career is dedicated to the two of you. I would also like to thank the rest of my family that has also supported and wished me well throughout the duration of my LLM.

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## KEYWORDS

- Statelessness
- Children
- Nationality
- International human rights law
- *De facto* statelessness
- *De jure* statelessness
- Citizenship
- *Jus soli* and *Jus sanguinis*
- South Africa
- Zimbabwe
- Deprivation
- Naturalization



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## LIST OF ABBREVIATIONS:

- Universal Declaration on Human Rights, 1948 (UDHR).
- The International Convention on Civil and Political Rights, 1966 (ICCPR).
- 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention).
- 1961 Convention on the Reduction of Statelessness (the 1961 Convention).
- The Convention on the Rights of the Child, 1989 (CRC).
- Universal Periodic Review (UPR).
- The African Charter on the Rights and Welfare of the Child, 1990 (ACRWC).
- African Charter on Human and Peoples Rights, 1987 (ACHPR).
- The United Nations Refugee Agency (UNHCR).
- Lawyers for Human Rights (LHR).
- Institute on Statelessness and Inclusion (ISI).
- Southern African Development Community (SADC).
- Constitution of the Republic of South Africa, 1996 (South African Constitution).
- South African Citizenship Act 88 of 1995 (South African Citizenship Act)
- The Births and Deaths Registration Act 51 of 1992 (South African BDRA).
- South African Immigration Act 13 of 2002 (South African Immigration Act).
- The Refugees Act 30 of 1998 (the South African Refugees Act).
- The Constitution of Zimbabwe Amendment of 2013 (Zimbabwean Constitution).
- The Citizenship of Zimbabwe Act No. 23 of 1984 (Zimbabwean Citizenship Act).
- The Births and Deaths Registration Act of 1986 (the Zimbabwean BDRA).
- The Refugees Act No. 13 of 1978 (the Zimbabwean Refugees Act).

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# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

The Universal Declaration on Human Rights (UDHR) provides that 'everyone has the right to nationality.'<sup>1</sup> Nationality<sup>2</sup> refers to the legal relationship between a State and an individual.<sup>3</sup> The consequences are that this legal relationship gives rise to obligations and rights conferred by the State on these individuals. Statelessness occurs when an individual has no nationality of any country; a stateless person is someone who is not considered as a national by any State under the operation of its laws.<sup>4</sup> Consequently, due to the lack of nationality by these individuals, they are not afforded the rights that confer to persons that have a nationality, causing them to be disadvantaged. People that are stateless often do not have the right to necessities like the right to health care and education.

There is an estimated 10 Million stateless people in the world<sup>5</sup>, and one third of these are children.<sup>6</sup> It is important to note that there are two different categories of statelessness, namely *de jure statelessness* and *de facto statelessness*. *De jure statelessness* occurs when a person does not have a nationality.<sup>7</sup> *De facto statelessness* on the other hand occurs when a person does have a nationality according to law, however this nationality is not effective or the person cannot verify his/her nationality.<sup>8</sup> Lack of documentation is not the same as being stateless, lack of birth registration can cause a child to be at risk of statelessness as a birth certificate provides proof of parentage and establishes where the child was born.<sup>9</sup> The risk of statelessness can also be increased by gender discrimination in nationality laws.<sup>10</sup>

It is important that States understand the effect that childhood statelessness has on the development of children as it affects children's ability to access fundamental rights such as the right to healthcare, right to social welfare and right to housing.<sup>11</sup> The deprivation

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<sup>1</sup> Article 15 of Universal Declaration of Human Rights, 1948 (UNHR).

<sup>2</sup> For the purpose of this thesis, the term nationality and citizenship will be used interchangeably.

<sup>3</sup> Manby B (2011) 'Statelessness in Southern Africa' UN High Commissioner for Refugees (UNHCR).

<sup>4</sup> Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons (1954 Convention).

<sup>5</sup> UNHCR '#IBelong Campaign Update December 2016' (2016).

<sup>6</sup> Institute on Statelessness and Inclusion (ISI) 'The World's Stateless' (2014).

<sup>7</sup> Massy H 'UNHCR and De Facto Statelessness' (2011) Division of International Protection LPPR/2010/01.

<sup>8</sup> Weissbrodt D, Collins C (2006) 'The Human Rights of Stateless Persons', in Human Rights Quarterly, Vol. 28,252.

<sup>9</sup> UNHCR 'What is statelessness?' (2016) UNHCR 1.

<sup>10</sup> UNHCR 'What is statelessness?' (2016) UNHCR 1.

<sup>11</sup> Vales H (2017) 'Human rights and stateless children' The World's Stateless Children Institute on Statelessness and Inclusion 165.

of these rights has a cascading effect where stateless children, become unemployed adults who are exploited due to their status of being stateless.<sup>12</sup> Healthcare is subject to the ability to provide documentation proving nationality, this results in children not being able to access basic healthcare or vaccinations.<sup>13</sup>

The two fundamental international conventions regarding statelessness are the 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention) and the 1961 Convention on the Reduction of Statelessness (the 1961 Convention). The main 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.<sup>14</sup> The 1961 Convention primary focus is on providing States with a guideline on how to implement law into their domestic law to safeguard against statelessness.<sup>15</sup> Therefore the 1961 Convention primary focus is the prevention of statelessness.

The main focus of this thesis is childhood statelessness. The Convention on the Rights of the Child, 1989 (CRC) provides that every child should be registered at birth and has the right to a name and nationality.<sup>16</sup> The CRC also places an obligation on States that are party to this convention to enact laws domestically that comply with the rights as mentioned above.<sup>17</sup> At a regional level the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC) also provides for the right to a child to be registered at birth and that a child has the right to a name and nationality.<sup>18</sup> The ACRWC goes beyond the CRC by stating that countries must ensure that their Constitutional legislation provides that a child must acquire nationality of the territory they are born in, if the child has not been granted a nationality by any other State.<sup>19</sup> In Africa, there is a substantial link between a lack of belonging and statelessness.<sup>20</sup> Nationality or either the lack there of, affects whether a person feels as if they belong. Birth registration establishes the place of birth of a person and parentage.<sup>21</sup> This can also be said that birth registration

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<sup>12</sup> Vales H (2017) 'Human rights and stateless children' The World's Stateless children Institute on Statelessness and Inclusion 165.

<sup>13</sup> Vales H (2017) 'Human rights and stateless children' The World's Stateless children Institute on Statelessness and Inclusion 165.

<sup>14</sup> Preamble of 1954 Convention.

<sup>15</sup> Preamble of 1961 Convention.

<sup>16</sup> Article 7(1) of the Convention on the Rights of the Child, 1989 (CRC).

<sup>17</sup> Article 7(2) of the CRC.

<sup>18</sup> Article 6 of the African Charter on the Welfare and Rights of the Child, 1990 (ACRWC).

<sup>19</sup> Article 6 (4) ACRWC.

<sup>20</sup> Elphick R, George JP (2014) Promoting Citizenship and Preventing Statelessness in South Africa: A practitioner's guide (1st ed) Pretoria University Law Press, Pretoria 1.

<sup>21</sup> General Comment on Article 6 on the African Charter on the Rights and Welfare of the Child (2014) (ACRWC/GC/02 (2014)).

effectively influences a person sense of belonging and connection to their place of birth. It establishes an identity. Birth registration does not automatically confer nationality on to a child; it does establish proof of a link between a person and a country.<sup>22</sup> Therefore birth registration does serve as a means to prevent statelessness.<sup>23</sup>

Both South Africa and Zimbabwe have ratified the CRC and ACRWC, which as a result places an obligation on these States to incorporate the provisions of the CRC and ACRWC into their domestic law. Both these countries have incorporated provisions into their Constitution and domestic law to remedy the issue of nationality of the child. These domestic laws however have not been completely effective as the issue of statelessness, specifically childhood statelessness is still of concern in both these countries.<sup>24</sup> The cause of this can either be gender discriminatory domestic laws that prevent women from conferring their nationality on to their children, the high cost of birth registration in these countries for non-citizens and the emergence of child-headed families that are not able to register children that were born to a citizen of the State.<sup>25</sup> In both these States it is not only children born to migrants who become stateless but also children born to citizens that either do not have the means to be registered or their registration was done in violation of the State's domestic law.<sup>26</sup>

The aim of this thesis will be to firstly determine the obligation that is placed on both South Africa and Zimbabwe under the international law instruments they are parties to, namely the International Convention on Civil and Political Rights, 1976 (ICCPR) and the CRC. The regional instruments that they are party to will also be discussed as well and the obligation placed on them under these instruments. Regional Instruments such as the African Charter on Human and Peoples Rights of 1981 (ACHPR) and ACRWC will also be discussed and how they influence the right to nationality in Africa. An analysis will be done of how South Africa and Zimbabwe have incorporated the international and regional law instruments into their domestic law and how effectively they implement their domestic law in order to prevent childhood statelessness. Further remedies will be analysed to determine under international and regional on how South Africa and Zimbabwe can effectively combat childhood stateless and provide for better protection

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<sup>22</sup> ACERWC/GC/02 (2014).

<sup>23</sup> ACERWC/GC/02 (2014).

<sup>24</sup> Section 28 of the Constitution of the Republic of South Africa, 1996. Section 6 of the Constitution of the Republic of Zimbabwe, 2013.

<sup>25</sup> Mbiyoz, A 'Statelessness in Southern Africa - Time to end it, not promote it' (2019) Institute for Security Studies (ISS) 4.

<sup>26</sup> Manby B (2011) 'Statelessness in Southern Africa' UNHCR 12.

for stateless children in their domestic legal instruments. It will also be discussed whether an agreement between these countries would aid them to more effectively remedy the issue of stateless children born to Zimbabwean parent(s) in South Africa.

## 1.2 Significance of the study

Childhood Statelessness is growing phenomenon that results in children becoming vulnerable and not being able to effectively exercise their human rights. Often because of the status of not having a nationality, these children fall out of the protection of a State's law and this can cause them to be vulnerable and be subject to exploitation.<sup>27</sup> Statelessness also affects the right to health care, and social services and later on in life also has an impact on job security. Stateless children are also at risk of deportation and harassment due to their lack of documentation.

Both in South African and Zimbabwe there is no legal framework that exists that specifically provides for statelessness. However South Africa's Constitution does provide for the right to nationality; this is not restricted to only citizens.<sup>28</sup> Birth registration has the effect of establishing the place of birth and who the parents of the child are, which in turn serves as proof of the nationality of the State where the child was born (*jus soli*) or the nationality of the parents of the child (*jus sanguinis*).<sup>29</sup>

As mentioned above birth registration can be closely linked to the right to nationality. Birth registration has been an issue of concern in both South African and Zimbabwe and has been one of the main causes of children being at risk of becoming stateless. In South Africa the domestic law places a restriction on who can register a child and there is a high cost for non-nationals to register the birth of their children. Similarly, in Zimbabwe there is also a high cost for a non-national to receive a birth certificate for their child and there are certain time constraints placed on the ability to register a child born to Zimbabwean nationals in another State.

Therefore, the significance of this research is to establish the administrative and legislative obstacles that prevent South Africa and Zimbabwe from not effectively implementing the provisions under the CRC, relating to the nationality of the child and their regional obligation under the ACRWC. The remedies to change the administrative and legislative obstacles under international and regional law will also be discussed and

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<sup>27</sup> Manby B (2011) 'Statelessness in Southern Africa' UNHCR 1.

<sup>28</sup> Section 28 of the Constitution of the Republic of South Africa, 1996.

<sup>29</sup> Manby B (2015) 'Citizenship and Statelessness in Africa: The Law and politics of belonging' Wolf Legal Publishers.

how the domestic law and procedures should be changed to prevent childhood statelessness in both these States.

### 1.3 Research Question(s)

The main research question is whether South Africa and Zimbabwe are honouring their obligations under international and regional law child rights law to the right to nationality of children and the rights of children that are stateless or are at risk of being stateless.

In order to discuss this question, these further sub-questions have to be discussed:

- How do South Africa and Zimbabwe interpret the right to nationality and protect stateless children as required by international and regional human rights instruments they have ratified?
- What is the duty placed on South Africa and Zimbabwe by international and regional children's rights instruments to remedy any domestic legislation to address childhood statelessness?

### 1.4 Literature Review

October 2019 will mark the mid-way point in the 10-year #IBelong campaign. This campaign was launched by the United Nations High Commissioner for Refugees (UNHCR) in 2014 with the purpose to enable that all stateless persons are identified and supported with by 2024.<sup>30</sup> Though much provision has been made for statelessness in international and regional law, it is still dependant on States to ensure that their domestic law provides for the administrative and legislative measures that are aimed at identifying and reducing statelessness.

The Constitution of the Republic of South Africa, 1994 (the South African Constitution) provides that every child has the right to a name and nationality<sup>31</sup>, the Citizenship Act No. 88 of 1995 (the South African Citizenship Act) and Births and Deaths Registration Act 51 of 1992 (South African BDRA) are the main domestic legislation that provides for acquisition and loss of citizenship by children. Lawyers for Human Rights (LHR) and the Institute on Statelessness and Inclusion (ISI) published a document in 2018 titled *Childhood Statelessness in South Africa*, which analyses the conflict between South African domestic law and the obligations under international law to provide measures to

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<sup>30</sup> UN High Commissioner for Refugees (UNHCR), '#IBelong Campaign Update December 2016' (2016).

<sup>31</sup> Section 28 of the Constitution of the Republic of South Africa, 1994 (the South African Constitution).

guard against childhood statelessness.<sup>32</sup> The LHR has also published an extensive guide on promoting citizenship and preventing statelessness in South Africa.<sup>33</sup> After examining the above literature it is clear that there is currently in South Africa, no clear mechanism that provides for the protection of stateless people. Due to this, the interpretation of domestic laws that provide for the mechanism to protect children from statelessness, are often not interpreted correctly and often do not provide protection from statelessness.

In Zimbabwe, Manby (2019) in a Report on Citizenship Law: Zimbabwe, firstly addresses the issue of dual-citizenship.<sup>34</sup> Another issue addressed is the high cost of birth registration for non-Zimbabwean citizens.<sup>35</sup> This can create a situation where people do not have the means to acquire citizenship due to the high cost thereof. Zimbabwe is a signatory to the 1954 Convention and should ensure that their domestic law may not have the effect of causing a person to become stateless. This is confirmed in an article by Muller (2016) on the right to nationality Southern African Development Community (SADC).

In an article discussing statelessness in Southern Africa, the author Manby (2011) observed that birth registration is compulsory in South Africa and Zimbabwe.<sup>36</sup> However due to the high cost of birth registration for non-nationals in both these countries, this places a restriction on the requirement that births must be registered. Manby also noted that birth registrations in South Africa for non-nationals, has become increasingly difficult due to fraudulent identity documents that have been issued.<sup>37</sup> As a result of the reluctance of registering non-nationals, vulnerable children have fallen through the cracks.<sup>38</sup> The CRC provides that the best interest of the child is the primary focus when implementing legislation that could affect the well-being of the child. That means that when Zimbabwe and South Africa enact or administer legislation that is pertaining to children, specifically the nationality of a child, it is important that they implement it in such a way, that it abides by the principle of the best interest of the child.

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<sup>32</sup> Lawyers for Human Rights (LHR) and the Institute on Statelessness and Inclusion (ISI) 'Childhood Statelessness in South Africa' (2018) 1.

<sup>33</sup> Elphick R, George JP (2014) 'Promoting Citizenship and Preventing Statelessness in South Africa: A practitioners guide' (1st ed) Pretoria University Law Press, Pretoria.

<sup>34</sup> Manby B 'Report on citizenship law: Zimbabwe' (2019) European University Institute 9 &10.

<sup>35</sup> Manby B 'Report on citizenship law: Zimbabwe' (2019) European University Institute 9.

<sup>36</sup> Manby B 'Statelessness in Southern Africa' (2011) UNHCR 12.

<sup>37</sup> Manby B 'Citizenship and Statelessness in Africa: The Law and politics of belonging' (2015) Wolf Legal Publishers 397.

<sup>38</sup> Manby B 'Citizenship and Statelessness in Africa: The Law and politics of belonging' (2015) Wolf Legal Publishers 397.

In the paper '*Statelessness: The impact of international law and current challenges*' Manly discusses the impact international law has on statelessness and the challenges' faced to eradicate statelessness.<sup>39</sup> In this paper the author explores the ways in which international law address statelessness and the obligation it places on countries to address statelessness within their country.<sup>40</sup> This paper will be used to address the challenges that South Africa and Zimbabwe face and how they can use international law to remedy any domestic law pertaining to statelessness and nationality.

There is a lack of literature that highlights the effects that political will has on the issue of childhood statelessness. Xenophobia and lack of political will to provide nationality to children that are stateless, heavily contribute to the issue of childhood statelessness in South Africa and Zimbabwe. Various case law and relevant internet sources will be used throughout this thesis to show the attitude of the State towards children that are stateless and at risk of statelessness.

### **1.5 Methodology**

A desktop study will strictly be used for the research done in this thesis. An enquiry of the relevant primary sources such as international and regional instruments will be used. Further analysis will be done on national legislation and case law, and this will serve as a foundation in order to establish the complexity of the problem at hand. To further place the issue at hand in depth to the thesis, the various secondary sources such as assessments of international academic writers on this topic, articulated in various textbooks and journal articles will be analysed.

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<sup>39</sup> Manly M '*Statelessness: The Impact of International Law and Current Challenges*' (2014) Chatham House 1-6.

<sup>40</sup> Manly M '*Statelessness: The Impact of International Law and Current Challenges*' (2014) Chatham House 1-6.

## CHAPTER 2: INTERNATIONAL AND REGIONAL INSTRUMENTS RELATING TO THE RIGHT TO NATIONALITY AND STATELESSNESS:

### 2.1 Introduction

The United Nations High Commissioner for Refugees (UNHCR) estimates that worldwide, a baby is born stateless every 10 minutes.<sup>41</sup> The right to acquire a nationality is a 'fundamental right'<sup>42</sup> and has also been described as an enabling right, that acts as a stepping stone to the enjoyment of other fundamental rights.<sup>43</sup> This opens a floodgate to the exploitation of such an individual, as no State has taken responsibility for him or her. The recognition of nationality aids as a doorway to the enjoyment of other rights such as the right to health care, education, equality before the law and the right to employment and other social rights.<sup>44</sup> Therefore if the right to nationality is not realised, the above-mentioned rights will be violated as well. If a child does not acquire the right to nationality, they will not be able to have access to health care or education and will become vulnerable and will be developmentally challenged compared to children that do have access to these rights.

A stateless person is an individual who is not considered as a national by any State under the operation of its laws.<sup>45</sup> There are two ways in which nationality is conferred by States, namely, *jus sanguinis* and *jus soli*.<sup>46</sup> In terms of *jus sanguinis* (acquisition by descent), nationality is acquired by birth and provides that a person's nationality is determined on the basis of the nationality of his or her parents or one particular parent, at the time of his or birth.<sup>47</sup> The second manner in which is the concept of *jus soli* (acquisition by birth on the territory) and is where a person's nationality is determined by his or her country of birth.<sup>48</sup> Nationality can also be acquired through naturalisation.<sup>49</sup>

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<sup>41</sup> United Nations High Commissioner for Refugees (UNHCR) 'Ending statelessness within 10 years: A special report' (2014).

<sup>42</sup> Article 15 of the UDHR.

<sup>43</sup> The Institute on Statelessness and Inclusion (ISI) 'Addressing the right to a nationality through the Convention on the Rights of the Child - A Toolkit for Civil Society' (2016) 2.

<sup>44</sup> De Groot, R 'Children, their right to a nationality and child statelessness.' in Edwards, A & van Waas, L 'Nationality and Statelessness under International Law' (2014) Cambridge University Press 144.

<sup>45</sup> Article 1(1) of the Convention Relating to the Status of Stateless Persons, 1954 (1954 Convention).

<sup>46</sup> De Groot, R and Vonk, O (2018) 'Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *Ius Sanguinis* and *Ius Soli*' Netherlands International Law Review Volume 65, Issue 3, 319.

<sup>47</sup> De Groot, R and Vonk, O (2018) 'Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *Ius Sanguinis* and *Ius Soli*' Netherlands International Law Review Volume 65, Issue 3, 319.

<sup>48</sup> De Groot, R and Vonk, O (2018) 'Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *Ius Sanguinis* and *Ius Soli*' Netherlands International Law Review Volume 65, Issue 3, 319.

This an administrative process by which a person can apply for registration of nationality for the country they are currently habitually resident in, this often subject to long-term residence and other conditions can also be added by the State party, for an individual to qualify for naturalisation.<sup>50</sup>

In this chapter the various international and regional law instruments regarding the right to acquire nationality will be examined. Emphasis will be on the obligation placed by these instruments on States to provide for the right to nationality and to aid in the reduction or elimination of childhood statelessness. Firstly, International Instruments such as the Universal Declaration of Human Rights and treaties such as the CRC, Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness will be discussed and how it relates to the right to nationality, specifically in relation to the rights of the child. Specific reference will be made to the Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (CMW) and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (Joint General Comment CMW and CRC). The Standard Development Goals (SDGs) will also be discussed. Though not a legally binding instrument such as the treaties and general comments mentioned above, SDGs play a major role in addressing human rights violations and is a call to action for all countries that are parties to the United Nations.

Regional African instruments such as the African Charter on Human and Peoples' Rights and the ACRWC will also be discussed. Case law and other instruments will be looked at and how they aid the primary international and regional law instruments in guiding State parties to effectively implement their duty under international and regional law. The ACERWC, General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality" will also be discussed.

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<sup>49</sup> Manby, B (2016) 'Citizenship Law in Africa: A Comparative Study' Open Society Foundations 1.

<sup>50</sup> Manby, B (2016) 'Citizenship Law in Africa: A Comparative Study' Open Society Foundations 7, 16.

## 2.2 International Instruments:

### 2.2.1 Universal Declaration of Human Rights, 1948 (UDHR)

Article 15 of the UDHR provides that “Everyone has the right to a nationality” and that “No one shall be arbitrarily deprived of his or her nationality, nor denied the right to change his or her nationality”.<sup>51</sup> Article 15 (2) of the UDHR does not expand on what is meant by the arbitrary deprivation of nationality. There is a distinction between the arbitrary deprivation of nationality and the denial of nationality.<sup>52</sup> There are various human rights principles that have been developed to give content to the right to be free from arbitrary deprivation of nationality<sup>53</sup>; however, there is international law that provides permissible grounds for the deprivation of nationality.<sup>54</sup>

Procedural fairness and due process is used to aid against the arbitrary deprivation of the right to nationality.<sup>55</sup> The procedural due process requirement in the context of nationality and statelessness is clear and provided for in the 1961 Convention on the Reduction of Statelessness.<sup>56</sup> International jurisprudence on what constitutes arbitrary action provides that the standard for an inquiry, which should be taken into consideration, is necessity, proportionality, and reasonableness.<sup>57</sup> In terms of nationality, the scope of arbitrariness that is prohibited and includes at least two elements: the prohibition against racial and ethnic discrimination<sup>58</sup> and the prohibition against statelessness.<sup>59</sup> The prohibition of racial and ethnic discrimination is found in Article 2 of the UDHR and also represents a rule of customary international law.<sup>60</sup> Therefore any deprivation of nationality based on racial or ethnic discrimination will be classified as being arbitrary.<sup>61</sup> Discrimination on the basis of national origin is prohibited

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<sup>51</sup> Article 15 UDHR.

<sup>52</sup> Adjami, M, Harrington, J ‘The Scope and Content of Article 15 of the Universal Declaration of Human Rights’ (2008) *Refugee Survey Quarterly*, Volume 27, Issue 3 101.

<sup>53</sup> Office of the High Commissioner on Human Rights (OHCHR) ‘Right to a Nationality and Statelessness’ available at <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx> [accessed on 30 May 2019].

<sup>54</sup> United Nations General Assembly- Human Rights Council ‘Human rights and arbitrary deprivation of nationality - Report of the Secretary-General’ (2013) 6-9.

<sup>55</sup> Adjami, M, Harrington, J ‘The Scope and Content of Article 15 of the Universal Declaration of Human Rights’ (2008) *Refugee Survey Quarterly*, Volume 27, Issue 3 101.

<sup>56</sup> Article 8(4) of the 1961 Convention on the Reduction of Statelessness (1961 Convention).

<sup>57</sup> *A. v. Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1997), para 9.2, 9.4.

<sup>58</sup> Article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965. (CERD).

<sup>59</sup> United Nations General Assembly- Human Rights Council ‘Human rights and arbitrary deprivation of nationality - Report of the Secretary-General’ (2013) 3.

<sup>60</sup> *R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport*, (UNHCR Intervening) [2005] 2 AC 1, [2004] UKHL 55, para. 46.

<sup>61</sup> Adjami, M, Harrington, J ‘The Scope and Content of Article 15 of the Universal Declaration of Human Rights’ (2008) *Refugee Survey Quarterly*, Volume 27, Issue 3 11.

by international law.<sup>62</sup> The substantive element of arbitrariness in regards to the right to be free from arbitrary deprivation of citizenship is emanating from the norm that there is a duty on a State to reduce and avoid statelessness.<sup>63</sup> The avoidance of statelessness as a constraint on States causes that any deprivation of nationality that would result in statelessness would have the effect of being considered arbitrary and therefore a human rights violation.<sup>64</sup>

### 2.2.2 The Convention of the Rights of the Child, 1989 (CRC)

The CRC was adopted in 1989 and is an international law instrument that focuses primarily on the rights of the child. The guiding principles of the CRC include non-discrimination<sup>65</sup>, the best interest of the child and the right to life, survival and development and respect for the views of the child.<sup>66</sup> Article 8 of the CRC is also applicable as it places an obligation on States to preserve the identity of a child and accordingly a child should for no reason be deprived of his or her nationality. The CRC provides for the right of the child to acquire a nationality.<sup>67</sup> Article 7 of the CRC is the core provision for preventing statelessness at birth and comprises of four elements, namely the right to birth registration, right to acquire a nationality and that states shall adhere to their obligation in terms of international instruments and the element of 'where the child would otherwise be stateless'.<sup>68</sup> A distinct feature of the CRC is that the guiding principle for all decisions involving a child should be based on non-discrimination; dedication to the best interests of the child, the right to life, survival and

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<sup>62</sup> UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: Sweden 24/4/2002", UN Doc. CCPR/CP/74/SWE, para. 12; UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: Ireland 03/08/93", UN Doc. CCPR/C/79/Add.21, para. 17; UN Committee on the Elimination of Racial Discrimination, "Concluding Observations on the Elimination of Racial Discrimination: Dominican Republic 26/08/99", UN Doc. CERD/304Add.74, para. 11; UN Committee on the Rights of the Child, "Concluding Observations of the Committee on the Rights of the Child: Iceland 31/01/2003", UN Doc. CRC/C/15/Add.203, para. 22.

<sup>63</sup> Van Waas, L & Jaghai, S 'All citizens are created equal, but some are more equal than others' (2018) Netherlands International Law Review, Volume 65, Issue 3, 417.

<sup>64</sup> Van Waas, L & Jaghai, S 'All citizens are created equal, but some are more equal than others' (2018) Netherlands International Law Review, Volume 65, Issue 3, 417.

<sup>65</sup> Article 2 of the CRC.

<sup>66</sup> Article 3 of the CRC. Skivenes M & Sørdsdal L.M 'The Child's Best Interest Principle across Child Protection Jurisdictions' In Falch-Eriksen A & Backe-Hansen E. (eds) 'Human Rights in Child Protection' (2018) Palgrave Macmillan, Cham 59.

<sup>67</sup> Article 7 of the CRC. Ziemele, I 'Article 7. The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents, in Alen, Lanotte, V, Verhellen, E, Berghmans et al 'A Commentary on the United Nations Convention on the Rights of the Child' (2007) Martinus Nijhoff Publishers 25.

<sup>68</sup> Article 7 of the CRC. Ziemele, I 'Article 7. The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents, in Alen, Lanotte, V, Verhellen, E, Berghmans et al 'A Commentary on the United Nations Convention on the Rights of the Child' (2007) Martinus Nijhoff Publishers 25.

development and respect for the views of the child.<sup>69</sup> Due to the vulnerability that is associated with a child being stateless, it would be a violation of the best interest of a child to be put into a position where they are stateless. The practical terms of the right to nationality has not been clarified by the Committee on the Rights of the Child, emphasis has been placed that there is an obligation that States shall take all appropriate measures to ensure that no child is stateless.<sup>70</sup>

The first paragraph of Article 7 provides for the right of registration at birth and is based on Article 24(2) of the ICCPR, which also provides for this right.<sup>71</sup> The term 'immediately' was inserted into Article 7 and as a result placed an obligation on State parties to create a framework that provides for the immediate birth registration of a child.<sup>72</sup> In order for the right to birth registration to be fulfilled, the process of registration ought to be free of charge and universally accessible; this is according to the CRC General Comment No 7 on Implementing Child Rights in early childhood.<sup>73</sup> States Parties should reduce or eliminate registration fees, set up temporary registration offices in remote areas and provide for registration at schools for children who are not registered.<sup>74</sup> It is of utmost importance that the right to nationality is realised for all children without any discrimination.<sup>75</sup> Children with disabilities<sup>76</sup>, children affected by HIV/AIDS<sup>77</sup> or based on their race or ethnicity<sup>78</sup> may therefore not be excluded from birth registration. Provision shall be made to ensure that indigenous children are

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<sup>69</sup> Article 3 of the CRC. UNGA, 'Status of the Convention of the Rights of the Child: Report of Secretary-General' (2013) UN Doc. A/68/257, para 57. Skivenes M., Sørdsal L.M 'The Child's Best Interest Principle across Child Protection Jurisdictions' In Falch-Eriksen A., Backe-Hansen E. (eds) 'Human Rights in Child Protection' (2018) Palgrave Macmillan, Cham 59.

<sup>70</sup> Open Society Justice Initiative 'Children's right to a nationality' (2011) available at <https://www.justiceinitiative.org/publications/fact-sheet-childrens-right-nationality> [accessed on 24 August 2019].

<sup>71</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989 (HRC General Comment 17).

<sup>72</sup> Stein, J 'The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: The Committee's Role and Potential' (2014) The International Journal of Children's Rights Volume 24: Issue 3 610.

<sup>73</sup> UN Committee on the Rights of the Child (CRC) 'General comment No. 7: Implementing Child Rights in Early Childhood' (2005) CRC/C/GC/7 (CRC General Comment No. 7).

<sup>74</sup> CRC General comment No. 9 'The rights of children with disabilities' (2007) CRC/C/GC/9 (CRC General Comment No 9).

<sup>75</sup> Article 2 of the CRC.

<sup>76</sup> CRC General Comment No. 9, para 35. Article 18 (2) of the Convention on the Rights of Persons with Disabilities, 2006. (CRPD).

<sup>77</sup> CRC General comment No. 3 'HIV/AIDS and the Rights of the Child' (2003) CRC/GC/2003/3.

<sup>78</sup> Article 2 of the CRC.

registered and that their parents understand the importance of birth registration.<sup>79</sup> States should adopt campaigns to educate children and parents on the importance of birth registration and the manner in which a child can be registered. The CRC read with the General Comments, therefore further advanced on the realisation of the right to nationality of a child, other than the ICCPR, where birth registration is only linked to the protection of a child and the aim is to advance the legal personality of children and not the right to a nationality.<sup>80</sup>

The right to nationality is recognised only after the right to birth registration and a name.<sup>81</sup> The *Travaux Préparatoires* shows that the CRC was initially to provide for the right to nationality from birth however it was established that this may be in violation of State sovereignty.<sup>82</sup> Therefore there is a distinction between the right to acquire a nationality from the right to a nationality. The right to acquire a nationality is not a right to a specific nationality and does not prescribe the manner in which nationality is obtained.<sup>83</sup> This means that a child shall acquire nationality after birth as soon as possible, this responsibility is not only on the State of the birth of the child only but also on the State to which the child's parents have a nationality.<sup>84</sup> This can become problematic when the parents of the child are also stateless or undocumented and therefore the responsibility will be fully on the State in which the child has been born. Due to the obligation of the State to uphold the best interest of the child<sup>85</sup>, the right to life, survival and development and respect for the views of the child<sup>86</sup>, and the principle of non-discrimination<sup>87</sup> the State will be in violation of its obligation under the CRC if the child is not permitted the right to acquire the nationality of the State where he or she was born, if the child is at risk of being stateless. There is no obligation on States to

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<sup>79</sup> Stein, J 'The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: The Committee's Role and Potential' (2014) *The International Journal of Children's Rights* Volume 24: Issue 3 610.

<sup>80</sup> HRC General Comment No 17, par. 7.

<sup>81</sup> Stein, J 'The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: The Committee's Role and Potential' (2014) *The International Journal of Children's Rights* Volume 24: Issue 3 610.

<sup>82</sup> Detrick, S 'The United Nations Convention on the Rights of the Child. A Guide to the *Travaux Préparatoires*' (1992) *American Journal of International Law* 640.

<sup>83</sup> Stein, J 'The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: The Committee's Role and Potential.' (2014) *The International Journal of Children's Rights* volume 24: issue 3 12.

<sup>84</sup> UNHCR 'Nationality and Statelessness: A Handbook for Parliamentarians' (2005) 7.

<sup>85</sup> Article 3 of the CRC.

<sup>86</sup> Article 3 of the CRC. UNGA, 'Status of the Convention of the Rights of the Child: Report of Secretary-General' (2013) UN Doc. A/68/257, para 57. Skivenes M., Sørdsdal L.M 'The Child's Best Interest Principle across Child Protection Jurisdictions' In Falch-Eriksen A., Backe-Hansen E. (eds) 'Human Rights in Child Protection' (2018) Palgrave Macmillan, Cham 59.

<sup>87</sup> Article 2 of the CRC.

grant nationality, but they are required to adopt appropriate measures, either nationally or in cooperation with other States, to ensure that no child is stateless at birth.<sup>88</sup>

The last sentence of Article 7 (2) of the CRC refers directly to childhood statelessness and it is important that this Section is read in conjunction with other articles in the CRC. According to Worster the principle that provides that States should grant nationality to children, who would otherwise be stateless, has become part of customary international law.<sup>89</sup> The CRC has no framework that provides States with guidance in regards to the obligation to provide nationality to children born within their territory that would otherwise be stateless. The CRC also provides that States shall take appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the CRC.<sup>90</sup> Therefore States have an obligation to implement the above measures to provide for the birth registration and the right of a child to acquire a nationality in their domestic legislation.

The Joint General Comment of the CMW and CRC further discusses the right to nationality and safeguards against statelessness.<sup>91</sup> As discussed above, Article 7 of the CRC provides safeguards against childhood statelessness as it requires States to ensure the rights of a child to have his or her birth registered, the right to a name and to acquire a nationality.<sup>92</sup> This right is similarly enshrined in Article 29 of the CMW and provides that each child of a migrant worker should have a right to a name, to registration of birth and the right to a nationality. There is an obligation on States to ensure that measures are strengthened to provide nationality to children that would otherwise be stateless.<sup>93</sup> Any nationality laws that discriminate on the basis of prohibited grounds such as race, ethnicity, religion, gender and migration status, should be revoked.<sup>94</sup> The right to nationality of the child should be respected and should not be violated based on residence status.<sup>95</sup>

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<sup>88</sup> Human Rights Committee (HRC) '*General Comment No. 17: Article 24 Rights of the child*' (1989) para 8.

<sup>89</sup> Worster, WT '*The Obligation to Grant Nationality to Stateless Children under Treaty Law*' (2019) 24 *Tilburg Law Review* 212.

<sup>90</sup> Article 4 of the CRC.

<sup>91</sup> Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (CMW) and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (Joint General Comment CMW and CRC).

<sup>92</sup> Joint General Comment CMW and CRC, para 23.

<sup>93</sup> Joint General Comment CMW and CRC, para 26.

<sup>94</sup> Joint General Comment CMW and CRC, para 25.

<sup>95</sup> Joint General Comment CMW and CRC, para 25.

### 2.2.3 International Convention relating to the Status of Stateless Persons, 1954 (1954 Convention)

The 1954 Convention is the core international instrument relating to the protection of stateless persons and it provides for the universal definition of statelessness and the minimum standard of treatment of a person that is deemed stateless.<sup>96</sup> The 1954 Convention is the only international instrument that focuses on the treatment of stateless persons.<sup>97</sup> The 1954 Convention establishes the universal definition of a “stateless person” in Article 1(1) however it does not establish a mechanism to identify a stateless person.<sup>98</sup> The definition found in Article 1(1) now forms part of customary international law.<sup>99</sup> Article 1(2) of the 1954 Convention sets out circumstances in which a person may be determined to be stateless, but does not fall within the ambit of the protection of the Convention.

If a person is stateless, he or she is often denied the enjoyment of various human rights and therefore cannot effectively participate in society. The 1954 Convention establishes a framework that provides stateless persons with minimum rights and creates an obligation on State parties to the 1954 Convention to provide for these rights. The rights in the 1954 Convention that are applicable when an individual is subject to the jurisdiction of a State party includes the right to personal status<sup>100</sup>, property<sup>101</sup>, access to courts<sup>102</sup>, public education<sup>103</sup>, administrative assistance<sup>104</sup> and facilitated naturalization.<sup>105</sup> Rights that are also afforded to individuals when they are physically present in a State party’s territory are freedom of religion<sup>106</sup> and the right to identity papers<sup>107</sup>. Article 1(1) of the 1954 Convention is applicable in the context of migration

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<sup>96</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 1.

<sup>97</sup> The International Convention on the Reduction of Statelessness, 1961 (1961 Convention) is concerned with avoiding statelessness primarily through safeguards in nationality laws, thereby reducing the phenomenon over time. The 1930 Special Protocol concerning Statelessness, which came into force in 2004, does not address standards of treatment but is concerned with specific obligations of the previous State of nationality. This Protocol has very few States Parties.

<sup>98</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 6.

<sup>99</sup> United Nations (UN) ‘*Draft Articles on Diplomatic Protection with commentaries*’ (2006) 49.

<sup>100</sup> Article 12 of 1954 Convention.

<sup>101</sup> Article 13 of the 1954 Convention.

<sup>102</sup> Article 16 of the 1954 Convention.

<sup>103</sup> Article 22 of the 1954 Convention.

<sup>104</sup> Article 25 of the 1954 Convention.

<sup>105</sup> Article 32 of the 1954 Convention.

<sup>106</sup> Article 4 of the 1954 Convention.

<sup>107</sup> Article 27 of the 1954 Convention.

and non-migration.<sup>108</sup> Some stateless persons can never have even crossed a border or was born in the country they are currently stateless in.<sup>109</sup> Stateless persons may also be classified as refugees and therefore qualify for additional protection.<sup>110</sup>

The rights provided for in the 1954 Convention are given to stateless persons based on the extent of their connection to the State. The rights in the 1954 Convention are applicable based on whether the individual fulfils the definition of a stateless person or whether the individual is lawfully in, lawfully staying in or habitually resident in the territory of the State.<sup>111</sup> Individuals that have been determined to be stateless are therefore afforded more comprehensive rights than individuals that are still waiting to be determined as being stateless.<sup>112</sup>

The 1954 Convention provides that stateless persons who are lawfully in a State party are given an additional set of rights.<sup>113</sup> These rights include the right to engage in self-employment<sup>114</sup>, freedom of movement within a State territory<sup>115</sup> and protection from expulsion<sup>116</sup>. For stateless persons to be regarded as “lawfully in” a State parties territory his or her presence in the country had to be authorized by the State.<sup>117</sup> The duration of presence of the individual can be temporary and he or she right to nationality will still be applicable to the individual.<sup>118</sup> The interpretation of the rights of the 1954 Convention upholds the object and purpose which is to provide the widest possible exercise by stateless persons of the rights contained therein.<sup>119</sup> Applicants for statelessness status, who enter into the procedure for determination are deemed to be

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<sup>108</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 10.

<sup>109</sup> UNHCR, ‘*Expert Meeting – Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)*’ (2010) 2.

<sup>110</sup> Executive Committee of the High Commissioner’s Programme ‘*Conclusion on the Provision of International Protection Including through Complementary Forms of Protection No. 103 (LVI) – 2005*’ 7 (2005) No. 103 (LVI). Stateless refugees are explicitly protected under Article 1A (2) of the Convention Relating to the Status of Refugees, 1951.

<sup>111</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 47.

<sup>112</sup> Van Waas, L ‘*The UN statelessness conventions*’ in Edwards, A & van Waas, L *Nationality and Statelessness under International Law* (2014) Cambridge University Press 71-72.

<sup>113</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 47.

<sup>114</sup> Article 18 of the 1954 Convention.

<sup>115</sup> Article 26 of the 1954 Convention.

<sup>116</sup> Article 31 of the 1954 Convention.

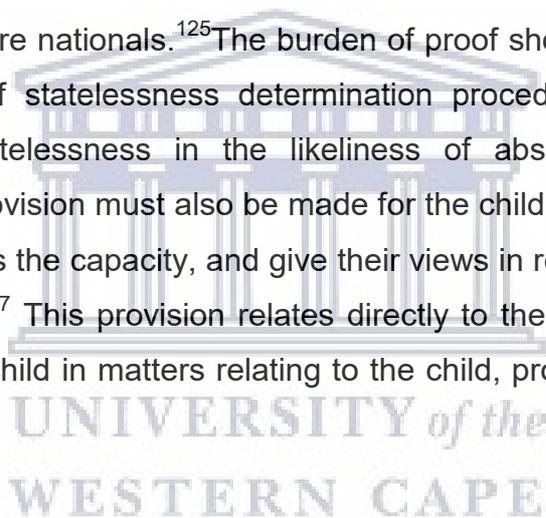
<sup>117</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 47.

<sup>118</sup> UNHCR ‘*Lawfully Staying*’ – A Note on Interpretation’ (1988).

<sup>119</sup> George, JP and Elphick, R ‘*Promoting Citizenship and Preventing Statelessness in South Africa a Practitioner’s Guide*’ (2014) Pretoria University Law Press, 18.

“lawfully in” the territory of the State party.<sup>120</sup> Therefore an individual who does not have immigration status and does not take the opportunity to enter a statelessness determination procedure is not lawfully in the States territory.<sup>121</sup>

Children face specific challenges in regards to the establishment of their nationality status. When States establish procedures for statelessness determination in regards to children, the guiding principle should be the best interest of the child and the importance of protection against statelessness.<sup>122</sup> Safeguards for a child’s claim include preference given to the processing their claims and that there is a greater portion of the burden of proof placed on the State in regards to the statelessness determination procedure.<sup>123</sup> In trying to establish proof of statelessness, States should review the relevant national legislation of those States to which the child has any prior links.<sup>124</sup> These links can either be through birth, previous habitual residence and the State of which the child’s parents or grand-parents are nationals.<sup>125</sup> The burden of proof should be in line with the humanitarian objectives of statelessness determination procedure and the inherent difficulties of proving statelessness in the likeliness of absence of evidence of documentary nature.<sup>126</sup> Provision must also be made for the child to have the right to be heard, where he or she has the capacity, and give their views in regard to statelessness determination procedure.<sup>127</sup> This provision relates directly to the fundamental principle of the participation of the child in matters relating to the child, provided for in Article 12 of the CRC.



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<sup>120</sup> Edwards, A ‘*The meaning of nationality*’ in Edwards, A & van Waas, L *Nationality and Statelessness under International Law* (2014) 39.

<sup>121</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 48.

<sup>122</sup> The outcome of a statelessness determination procedure forms part of best interest’s determination. With regard to best interest determinations see UNHCR Guidelines on Determining the Best Interests of the Child (2008).

<sup>123</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 43. Canadian Centre on Statelessness ‘*Joint Submission to the Human Rights Council at the 30th Session of the Universal Periodic Review*’ (2017) 5.

<sup>124</sup> UNHCR ‘*Nationality and Statelessness: A Handbook for Parliamentarians*’ (2005) 20.

<sup>125</sup> UNHCR ‘*Nationality and Statelessness: A Handbook for Parliamentarians*’ (2005) 20.

<sup>126</sup> UNHCR ‘*Good practices in nationality laws for the prevention and reduction of statelessness*’ (2018)

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<sup>127</sup> The United Nations Refugee Agency (UNHCR) ‘*Handbook on the Protection of Stateless Persons – Under the 1954 Convention Relating to the Status of Stateless Persons*’ (2014) 29.

## 2.2.4 International Convention on the Reduction of Statelessness, 1961 (1961 Convention)

The 1961 Convention is the core international legal instrument that currently focuses on avoiding statelessness. It aids as a guide to draft nationality law that prevents statelessness from occurring in a States territory due to their nationality laws.<sup>128</sup> This gives effect to Article 15 of the UDHR that provides for the right to nationality. The underlying principle of the 1961 Convention is that while States, through their sovereignty, have the right to determine their nationality laws, their nationality laws should be in line with international norms relating to nationality.<sup>129</sup> The 1961 Convention aims to find equilibrium between the interests of the State and the interests of the individual, by allowing rule for the prevention of statelessness and allowing some deviation to these rules.<sup>130</sup>

A central focus of the 1961 Convention is to prevent statelessness at birth by obligating States to grant citizenship to children at birth, that were born within their territory and that would be classified as 'otherwise stateless.'<sup>131</sup> This would mean that States should provide for children to automatically acquire nationality at birth or that there is an application to acquire nationality at a later stage.<sup>132</sup> The 1961 Convention is protecting against the loss, renunciation and deprivation of nationality.<sup>133</sup> It also encourages against discrimination against family members when one member is deprived of their nationality and also prevents discrimination on the basis of race, religious, ethnic or on a political basis.<sup>134</sup>

The 1961 Convention requires State Parties to provide nationality to an individual that would otherwise be stateless.<sup>135</sup> It also allows the UNHCR to hear stateless persons'

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<sup>128</sup> George, JP and Elphick, R 'Promoting Citizenship and Preventing Statelessness in South Africa a Practitioner's Guide' (2014) 19.

<sup>129</sup> Introductory Note by the Office of the UNHCR on the 1961 Convention on the Reduction of Statelessness, (2014) 3.

<sup>130</sup> Introductory Note by the Office of the UNHCR on the 1961 Convention on the Reduction of Statelessness, (2014) 3.

<sup>131</sup> De Groot, R 'Children, their right to a nationality and child statelessness' (2014) in Edwards, A & van Waas, L Nationality and Statelessness under International Law (2014) Van Waas, L 'The UN statelessness conventions' in Edwards, A & van Waas, L Nationality and Statelessness under International Law (2014) Cambridge University Press 145.

<sup>132</sup> 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) 2.

<sup>133</sup> Article 8 of the 1961 of the Convention on the Reduction of Statelessness (1961 Convention).

<sup>134</sup> George, JP and Elphick, R 'Promoting Citizenship and Preventing Statelessness in South Africa a Practitioner's Guide' (2014) 19.

<sup>135</sup> Article 1 (3) on the 1961 Convention.

claims and aiding them in regards to a claim against the applicable State authorities.<sup>136</sup> A reservation can be made to the 1961 Convention on the basis of national security.<sup>137</sup>

### 2.2.5 Other international instruments

Various other legal instruments provide for the right to nationality and statelessness. Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides that there is an obligation on States to guarantee the right of every individual, without any distinction based on race, colour or national or ethnic origin, to equality before the law with regards to nationality. It also provides that no provisions in CERD may be interpreted as affecting any legal provisions of State parties concerning nationality, citizenship or naturalization and that such provision does not discriminate against any particular nationality.<sup>138</sup>

Article 24(3) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that every child shall be registered immediately after birth and shall have a name and every child has a right to acquire a nationality. This right should be closely linked to a child's legal personality.<sup>139</sup> The purpose of the obligation placed on State parties to register children after birth is to reduce the danger of abduction, sale or trafficking in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the ICCPR.<sup>140</sup> States parties should ensure that in their reports they indicate in detail the measures that have been put into place to ensure the immediate registration of children born in their territory.<sup>141</sup>

Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that there ought to be equal nationality rights for men and women.<sup>142</sup> This includes the transmission of nationality to their children.

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<sup>136</sup> UNHCR 'Representing Stateless Persons before U.S. Immigration Authorities: A Legal Practice Resource from the United Nations High Commissioner for Refugees' (2017) 1.

<sup>137</sup> Article 17 of the 1961 Convention.

<sup>138</sup> Article 1 (3) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

<sup>139</sup> HRC General Comment 17, para 7.

<sup>140</sup> HRC General Comment 17, para 7.

<sup>141</sup> HRC General Comment 17, para 7.

<sup>142</sup> Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). European Network on Statelessness 'No Child Should be Stateless' (2015) available at: <https://www.refworld.org/docid/5729b6d54.html> [accessed 15 August 2019].

Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD) provides that States parties shall ensure that persons with disabilities have ‘the right to acquire and change a nationality’.<sup>143</sup> It goes further and provides that children with disabilities have immediate birth registration, have the right to acquire a nationality and as far as reasonably possible known and be cared for by his or her parent(s).<sup>144</sup>

## 2.2.6 Sustainable Development Goals (SDGs)

SDGS is not a legally binding international instrument and is rather a developmental guide to end poverty and that people enjoy peace and welfare.<sup>145</sup> SDGs can play a critical role in the eradication of statelessness as the overshadowing objective is to ensure that “no one is left behind”.<sup>146</sup> Statelessness is most often referred to as a human rights issue and rarely regarded as a developmental issue.<sup>147</sup> This is as a result of the lack of understanding of what statelessness is and how it occurs. The SDGS lends itself to be more in line with international human rights framework and indirectly focuses on rights such as civil, cultural, economic and social rights and the right to development.<sup>148</sup> The first SDG that would have an effect on childhood statelessness is SDG 10. Target 10.3 provides for equal opportunity and to reduce inequalities, this includes eliminating discriminatory laws.<sup>149</sup> This would place an obligation on states to amend nationality laws that are discriminatory in nature and does not permit women to transfer nationality to her child. The second SDG that would have an effect on preventing statelessness among children is SDG 16. Target 16.9 focuses on the prevention of statelessness through birth registration.<sup>150</sup>

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<sup>143</sup> Article 18 (1) (a) of the International Convention on the Rights of Persons with Disabilities, 2006 (CRPD).

<sup>144</sup> Article 18(2) of CRPD.

<sup>145</sup> Morton S, Pencheon D, Squires N ‘Sustainable Development Goals (SDGs), and their implementation: A national global framework for health, development and equity needs a systems approach at every level’ (2017) British Medical Bulletin, Volume 124, Issue 1 81.

<sup>146</sup> UN General Assembly (UNGA) ‘Transforming our World: The 2030 Agenda for Sustainable development’ (2015) 1.

<sup>147</sup> Govil, R ‘The Sustainable Development Goals and solutions to statelessness’ in Waas, L and Khanna MJ ‘Solving Statelessness’ (2017) Wolf Legal Publishers 47-48.

<sup>148</sup> UN High Commissioner for Human Rights ‘Human Rights in the Post-2015 Agenda’ (2013) available at <https://www.ohchr.org/EN/Issues/SDGS/Pages/The2030Agenda.aspx> (accessed on 24 August 2019).

<sup>149</sup> Govil, R ‘The Sustainable Development Goals and solutions to statelessness’ in Waas, L and Khanna MJ ‘Solving Statelessness’ (2017) Wolf Legal Publishers 56.

<sup>150</sup> UN Economic and Social Council ‘Special edition: progress towards the Sustainable Development Goals: Report of the Secretary-General’ (2019) 22.

The SDGs require countries to submit Voluntary National Review (VNR) that tracks the progress that the country is making towards the implementation of the SDGs.<sup>151</sup> Zimbabwe submitted their VNR report in 2017 and South Africa submitted their VNR report in 2019. Neither of the countries included in their report how they were addressing the issue of childhood statelessness, as provided for in Goal 16.

### **2.2.7 The UNHCR Global Action Plan to End Statelessness 2014-2024 (Global Action Plan)**

The UNHCR, as part of the #IBelong campaign, established the Global Action Plan in 2014 that is aimed at preventing and eradicating statelessness by 2024.<sup>152</sup> The Global Action Plan aims at resolving existing cases of statelessness, preventing the occurrence of statelessness and to more effectively protect and identify stateless persons.<sup>153</sup> The 10 Actions include two Actions that are specifically focussed on addressing childhood statelessness. Action 2 is aimed at ensuring that no child is born stateless and Action 7 ensures birth registration for the prevention of statelessness.<sup>154</sup> The Actions are interlinked and will aid each other to effectively address the issue of statelessness; Action 7 will also aid Action 2 in preventing statelessness and promoting the eradication childhood statelessness.<sup>155</sup>

Action 2 of the Global Action Plan cannot be applied in isolation from the other actions to be taken under the Plan. Action 2 is closely connected to Action 1 that aims at resolving existing major situations of statelessness, Action 4 that aims at the prevention of denial, loss or deprivation of nationality on discriminatory grounds, Action 7 that aims to ensure birth registration to prevent statelessness and Action 8 that provides for the of issuing nationality documentation to those entitled to it.<sup>156</sup>

Action 2 of the Global Action Plan places an obligation on States to ensure that no child is born stateless.<sup>157</sup> Addressing childhood statelessness globally will be the only way in which to fulfil the objectives of the Global Action Plan to end statelessness by

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<sup>151</sup> UN Sustainable Development Knowledge Platform 'Voluntary National Review Database' (2019) available at <https://sustainabledevelopment.un.org/vnrs/> [accessed on 20 November 2019].

<sup>152</sup> UNHCR 'Global Action Plan 2014-2024 to End Statelessness' (2014) 4.

<sup>153</sup> UNHCR 'Global Action Plan 2014-2024 to End Statelessness' (2014) 4.

<sup>154</sup> UNHCR 'Global Action Plan 2014-2024 to End Statelessness' (2014) 4.

<sup>155</sup> Belton, KA 'Ending Statelessness through Belonging: A Transformative Agenda?' (2016) *Ethics & International Affairs* 30, No 4 423.

<sup>156</sup> UNHCR 'Global Action Plan 2014-2024 to End Statelessness' (2014) 4.

<sup>157</sup> UNHCR 'Good Practices Paper- Action 2: Ensuring no child is born stateless' (2017) 1.

2024.<sup>158</sup> Taking into consideration the best interest of the child as provided for in the CRC, children that would otherwise be stateless, should be granted nationality automatically and not be subjected to an application process.<sup>159</sup>

Action 7 of the Global Action Plan provides that States utilize birth registration as a mechanism to address statelessness.<sup>160</sup> The aim of Action 7 is to ensure that new cases of statelessness that occur are not due to the lack of birth registration.<sup>161</sup> Though birth registration does not automatically confer citizenship on the child, a birth certificate does contain important information regarding the place of birth and the parentage of the child.

## **2.3 Regional African Instruments in Africa:**

### **2.3.1 African Charter of Human and Peoples' Rights (ACHPR):**

The two main causes of statelessness in Africa are the neglect to integrate historical and present-day migrants and their descendants and discrimination in law on the basis of gender, race or ethnicity.<sup>162</sup> The ACHPR does not explicitly provide for the right to nationality. The African Commission on Human and Peoples Rights (the African Commission) has established that Article 5 of the ACHPR includes the right to nationality.<sup>163</sup> Further the African Commission has focused a study on the right to nationality in Africa and established a draft optional protocol on the Right to Nationality and the Eradication of Statelessness (Draft Protocol). The Draft Protocol was adopted by the African Commission in July 2015 and was approved by the Executive Committee of the African Union in July 2016, thus commencing the process of its adoption as a legal standard.<sup>164</sup>

As required by Article 60 of the ACHPR, the African Commission is required to draw inspiration from international law on human rights.<sup>165</sup> Therefore the African Commission looked to Article 15 of the UDHR, providing for the right to nationality, when formulating

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<sup>158</sup> UNHCR 'Good Practices Paper- Action 2: Ensuring no child is born stateless' (2017) 1.

<sup>159</sup> UNHCR 'Good Practices Paper- Action 2: Ensuring no child is born stateless' (2017) 2.

<sup>160</sup> UNHCR 'Good Practices Paper- Action 7: Ensuring birth registration for the prevention of statelessness' (2017) 1.

<sup>161</sup> UNHCR 'Good Practices Paper- Action 7: Ensuring birth registration for the prevention of statelessness' (2017) 1.

<sup>162</sup> Manby, B 'Statelessness in Southern Africa' (2012) 7.

<sup>163</sup> African Commission on Human and Peoples' Rights (African Commission), Resolution 234 on the Right to Nationality, 23 April 2013.

<sup>164</sup> AU Executive Council of Ministers 'Decision on the Activity Report of the African Commission on Human and Peoples' Rights' (2016), AU Doc. EX.CL/968 (XXIX).

<sup>165</sup> Article 60 of the African Charter on Human and Peoples' Rights, 1981 (ACHPR).

the Draft Protocol.<sup>166</sup> The African Commission established that the right to nationality is a fundamental right and that statelessness is a violation of the legal status and human dignity of a person, as provided for in Article 5 of the ACHPR.<sup>167</sup> The purpose of the Draft Protocol is to create an obligation on States to ensure the right to nationality and to provide a mechanism to eradicate statelessness.<sup>168</sup> States have the freedom to determine who qualifies as a citizen under its laws and these laws ought to be in line with the provisions of the Draft Protocol and international law.<sup>169</sup> There is an obligation on State parties to recognise that each person has the right to nationality, that no one shall be arbitrarily deprived of his or her nationality and that States should alone and in cooperation with other States, implement measures to eradicate statelessness.<sup>170</sup>

There is an obligation also placed on States to ensure that through legislative and other measures, children are given a nationality at birth and is registered immediately after birth.<sup>171</sup> Article 5 of the Draft Protocol provides for the attribution of nationality on a child and the circumstances under which it will occur. These circumstances include children born within and outside the States territory<sup>172</sup>, a child born to stateless parents<sup>173</sup>, foundlings<sup>174</sup>, adoptive children<sup>175</sup> and child taken care of by Kafala<sup>176</sup>. When ensuring

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<sup>166</sup> Preamble of the Draft Protocol to the African Charter on Human and Peoples' Rights on the aspect of the Rights to a Nationality and the Eradication of Statelessness in Africa, 2015. (Draft Protocol).

<sup>167</sup> Preamble of the Draft Protocol.

<sup>168</sup> Article 1 of the Draft Protocol.

<sup>169</sup> Article 3 of the Draft Protocol.

<sup>170</sup> Article 3 of the Draft Protocol.

<sup>171</sup> Article 10 (1) of the Draft Protocol.

<sup>172</sup> Article 5 of the Draft Protocol:

(1) A State Party shall, subject to any exceptions that may be provided in its national law, attribute nationality by operation of law from the moment of birth to the following persons:

a) A child born in its territory one of whose parents had the nationality of that State at the time of the child's birth;

b) A child born outside its territory one of whose parents had the nationality of that State at the time of the child's birth subject to any exceptions which may be provided for by its national law as regards children born abroad. A State shall, however, always provide for the attribution of nationality to a child born abroad if:

i. either of the child's parents has its nationality and was born in its territory, or

ii. the child would otherwise be stateless.

c) A child born in the territory of the State of one parent also born there.

<sup>173</sup> Article 5 (1) (d) of the Draft Protocol provides that a State Party shall also attribute nationality to a child born in the territory of the State of parents who are stateless or of unknown nationality or in other circumstances in which the child would otherwise be stateless.

<sup>174</sup> Article 5 (2) (a) of the Draft Protocol provides a child found in its territory of unknown parents, who shall be considered to have been born in its territory of parents possessing the nationality of that State, unless his or her parentage is established during his or her minority and he or she acquires the nationality of one parent.

<sup>175</sup> Article 5 (2) (c) of the Draft Protocol provides that a State Party shall also attribute nationality to a child adopted by a national.

<sup>176</sup> Article 5 (2) (d) of the Draft Protocol provides that a State Party shall also attribute nationality to a child taken care of by Kafala. The CRC Committee affirmed in *Y.B and N.S v Belgium* under the Optional

the right to nationality of a child, State Parties shall ensure that the best interest of the child should be the primary consideration.<sup>177</sup> Where a child is capable of expressing their views an opportunity shall be provided for the participation of the child in determining their views on their nationality.<sup>178</sup>

Jurisprudence has played a large role in the development of the right to nationality under the ACHPR. In the case of *Modise v. Botswana*, African Commission, the African Commission found that the Botswana government's refusal to recognise his nationality from birth caused Mr Modise personal suffering and indignity and was in violation of Article 5 of the ACHPR.<sup>179</sup> Similarly, in *Amnesty International v. Zambia*<sup>180</sup>, the African Commission took into consideration the deportations of William Banda and John Chinula from Zambia to Malawi and determined that the Zambian government had forced the complainants to live as stateless persons under degrading conditions and deprived them of their family and that this was a violation of their dignity of a human being and as a result a violation of Article 5 of the ACHPR.<sup>181</sup>

*Anudo Ochieng v Tanzania (Anude case)*<sup>182</sup> is the first case decided by the African Court on Human and Peoples' Rights ('African Court') that took into consideration the right to a nationality. The judgement builds upon the current jurisprudence as mentioned above of the African Commission.<sup>183</sup> The main issues discussed in the *Anude* case was the right to a nationality and not to be arbitrarily deprived of nationality; the right not to be expelled arbitrarily from a country; and the right to be heard by an impartial tribunal.<sup>184</sup> The African Court noted that there is no general provision to the right to nationality in the ICCPR or ACHPR.<sup>185</sup> Article 15(2) of the UDHR, which states that '[n]o one shall be arbitrarily deprived of his nationality' was quoted by the Court. As a result, the African Court asserted that the UDHR, specifically the right to nationality, forms part of customary international law.<sup>186</sup> The African Court did affirm that the determination of

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Protocol on Communications Procedure (OPIC) that family reunification must be done in line with the best interest of the child principle.

<sup>177</sup> Article 10(2) of the Draft Protocol.

<sup>178</sup> Article 10(2) of the Draft Protocol.

<sup>179</sup> Communication 97/93, *Modise v. Botswana*, African Commission 2000, para 91.

<sup>180</sup> Communication No. 212/98, *Amnesty International v. Zambia*, African Commission 1999, para 50.

<sup>181</sup> Communication No. 212/98, *Amnesty International v. Zambia*, African Commission 1999, para 50.

<sup>182</sup> *African Court on Human and Peoples' Rights*, App No 012/2015, 22 March 2018 (*Anude* case).

<sup>183</sup> *Anudo* Case para 17.

<sup>184</sup> *Anudo* Case para 17.

<sup>185</sup> *Anudo* Case para 17.

<sup>186</sup> *Anudo* Case para 17.

nationality does fall within the sovereignty of the State and the deprivation of the right to nationality can only occur in very exceptional circumstances.<sup>187</sup>

Regardless of the fact that the ACHPR does not provide for the explicit right to nationality, the jurisprudence by the African Commission provides that Article 5 of the ACHPR includes the right to nationality. It can also be conferred from the Draft Protocol that the African Commission is aimed at creating a legally binding instrument that solely provides for the right to nationality and the eradication of statelessness. The African Court has also in the *Anudo* case confirmed that the right to nationality forms part of customary international law. This will then result that all states are obligated to ensure that no person is arbitrarily deprived of their right to nationality.

### **2.3.2 African Charter on the Rights and Welfare of the Child (ACRWC):**

The ACRWC was established by the AU as a standardising framework to provide for the rights of children. The ACRWC was brought into effect in 1990, shortly after the creation of the CRC. Article 6 of the ACRWC identifies three interlinked rights and prompts an obligation on State Parties to take legislative and administrative measures to prevent childhood statelessness.<sup>188</sup> These three rights are the right to a name<sup>189</sup>, the right to birth registration<sup>190</sup> and the right to a nationality.<sup>191</sup> An obligation is also placed on States in regards to providing for the right to a nationality, specifically the right to nationality of a child.<sup>192</sup> The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) adopted a General Comment on Article 6 of the ACRWC in order to clarify the obligations that are placed on States by this Article. The ACERWC established that Article 6 is one of the rights that is continually not fully realised by State parties. Therefore, it was necessary that more emphasis is placed on the protection of the right to a name, birth registration and to acquire a nationality. In order for the realisation of the rights enshrined in Article 6, there is an obligation on State parties to provide measures to ensure that legislative and other measures are taken to eradicate

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<sup>187</sup> *Anudo Case* para 18.

<sup>188</sup> Assefa, AG 'Safeguards against childhood statelessness under the African human rights system' (2017) available at <http://children.worldstateless.org/3/safeguarding-against-childhood-statelessness/safeguards-against-childhood-statelessness-under-the-african-human-rights-system.html> [accessed on the 24 August 2019].

<sup>189</sup> Article 6(1) of the ACRWC.

<sup>190</sup> Article 6(2) of the ACRWC.

<sup>191</sup> Article 6(3) of the ACRWC.

<sup>192</sup> Article 6(4) of the ACRWC.

childhood statelessness.<sup>193</sup> With a focus on childhood statelessness the ACERWC has provided that countries that do not have civil registration laws shall adopt them and countries that do have civil registration laws should align these laws with the required standards as provided for in the General Comment by the ACERWC on Article 6 of the African Charter on the Rights and Welfare of the Child (General Comment on Article 6).<sup>194</sup>

The right to a name, birth registration and to acquire a nationality cannot be completely actualized except if the fundamental standards of children's rights are strictly adhered to.<sup>195</sup> The application of the above mentioned rights requires taking into account the best interests of the child, non-discrimination principles and the development of the child.<sup>196</sup> The ACRWC provides that the best interest of the child shall always be taken into as the primary consideration in regards to action being taken that involves the child.<sup>197</sup> Any laws and policies related to birth registration as well as the acquisition of nationality shall adhere to the principle of the best interests of the child.<sup>198</sup>

The principle of non-discrimination in terms of the right to a name, birth registration and to acquire a nationality provides that no child should be deprived of his/her right to a name and birth registration based on his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, birth or other status<sup>199</sup> and that none of these grounds can be used as a justification for the deprivation of a child's right to acquire a nationality under Article 6 of the ACRWC.<sup>200</sup>

The right to birth registration is a fundamental right of a child and establishes the legal ties between a State and a child.<sup>201</sup> A child who birth is not registered has no legal existence and therefore falls outside the realm of legal protection of the rights of a child

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<sup>193</sup> Article 1 of the ACRWC.

<sup>194</sup> General Comment on Article 6 of ACERWC, para 11.

<sup>195</sup> General Comment on Article 6 of ACERWC, para 12.

<sup>196</sup> General Comment on Article 6 of ACERWC para 13.

<sup>197</sup> Article 4 (1) of the ACRWC.

<sup>198</sup> General Comment on Article 6 of ACERWC para 13.

<sup>199</sup> Article 3 of the ACRWC.

<sup>200</sup> General Comment on Article 6 of ACERWC, para 16.

<sup>201</sup> General Comment on Article 6 of ACERWC, para 43.

by the State.<sup>202</sup> Birth registration in many countries is rudimentary to the acquisition of nationality by any person; this includes refugees and asylum seekers.<sup>203</sup> Birth registration does not merely just establish the place of birth of a child but also the parental affiliation of a child. Due to the fact that nationality is usually acquired by *jus sanguinis* or by *jus soli*, birth registration will serve as documentary proof in establishing either of these ways of acquiring a nationality and also provides the identity and nationality of the child's parent(s) and place of birth of the child.<sup>204</sup> Birth registration in itself is not normally a manner in which nationality is conferred upon a child, birth registration does provide a link between a child and a State and therefore can serve as a means to prevent statelessness.<sup>205</sup> Birth registration remains a challenge for many African countries and it has been reported that Sub-Saharan Africa has one of the lowest rate of birth registration in the world.<sup>206</sup> Children born in a State should also be afforded the right to acquire nationality after being resident in a territory for a substantial period of time and this should not be limited to them attaining majority.<sup>207</sup> Furthermore children not born within a territory but that were resident there for the majority of their childhood should be provided nationality by the State.<sup>208</sup>

Emphasis has been placed on the significance of providing a nationality for children that are found abandoned (foundlings) within a State.<sup>209</sup> Foundlings are often in a very vulnerable position due to them living in orphanages or on the streets.<sup>210</sup> This often causes them to be at a higher risk of exploitation and trafficking.<sup>211</sup> The ACRWC provides that the best interest of the child shall be the primary standard to which an action concerning a child should be taken.<sup>212</sup> Therefore due to the vulnerability of a foundling not having a nationality, it would be within the best interest of the child that the

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<sup>202</sup> General Comment on Article 6 of ACERWC, para 43. Manby, B, Getachew, A & Sloth-Nielsen, J 'The right to a nationality in Africa: New norms and new commitments' in Waas, L & Khanna, MJ *Solving Statelessness* (2016) Wolf Legal Publishers 278.

<sup>203</sup> General Comment on Article 6 of ACERWC, para 62.

<sup>204</sup> General Comment on Article 6 of ACERWC, para 62.

<sup>205</sup> 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) para 42.

<sup>206</sup> UNICEF 'Every child's birth right: inequalities and trends in birth registration' (2013) available at [https://www.un.org/ruleoflaw/files/Embargoed\\_11\\_Dec\\_Birth\\_Registration\\_report\\_low\\_res.pdf](https://www.un.org/ruleoflaw/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf) [accessed 24 August].

<sup>207</sup> *Kenyan Nubian Children case*, para 92.

<sup>208</sup> *Kenyan Nubian Children case*, para 92.

<sup>209</sup> General Comment on article 6 of ACERWC, para 96.

<sup>210</sup> Parker, L 'Foundlings in Côte d'Ivoire' in ISI 'The World's Stateless Children' (2017) Wolf Legal Publishers 370.

<sup>211</sup> Parker, L 'Foundlings in Côte d'Ivoire' in ISI 'The World's Stateless Children' (2017) Wolf Legal Publishers 370.

<sup>212</sup> Article 4 of the ACRWC.

State provides the child with a nationality, if not doing so would render the child stateless. There is an obligation on the State to base their decision regarding a child on what would be within the best interest of that child.<sup>213</sup> In regards to the age of foundlings, at a minimum, safeguards should be provided for foundlings of a very young age that are not able to communicate their place of birth or identity of their parent(s).<sup>214</sup> This does however create a gap in regards to children that have no knowledge of their parentage or place of birth and do not fall within the definition of 'very young age'.<sup>215</sup> Ultimately due to the vulnerability that statelessness causes, it is important that the definition of what constitutes a foundling is applied as far as possible and ideally to all children.<sup>216</sup>

The very first decision on the merits of a communication to the ACRWC involved the nationality of children of Nubian descent born in Kenya, *Children of Nubian descent in Kenya v The Government of Kenya Decision* (Nubian children case). It was found that the Kenyan State was in violation of its obligations under Article 6 of the ACRWC since it does not provide that children born in Kenya of stateless parents or who would otherwise be stateless can acquire Kenyan nationality at birth.<sup>217</sup> In the Nubian Children case, it was determined that the obligation of States parties with regard to ensuring immediate birth registration includes not merely passing laws but also addressing all *de facto* limitations and obstacles to in regards to birth registration. After the communication given in the Nubian children case, there has been progress in addressing statelessness in Kenya however there remain gaps in the legal and regulatory frameworks that govern the right to nationality and statelessness in Kenya.<sup>218</sup> The government of Kenya should work with UN agencies, experts and civil society in designing and implementing measures in communities already known to be at risk of

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<sup>213</sup> Article 4 of the ACRWC.

<sup>214</sup> De Groot, R 'Children, their right to a nationality and child statelessness' (2014) nationality' in Edwards, A & van Waas, L Nationality and Statelessness under International Law (2014) Wolf Legal Publishers 162.

<sup>215</sup> Council of Europe 'Committee of Ministers, Recommendation CM/Rec (2009) para 24. (Recommendation CM/Rec 2009/13).

<sup>216</sup> Recommendation CM/Rec 2009/13, para 24. Article 2 of the ACRWC defines a child as any human being below the age of 18.

<sup>217</sup> *Kenyan Nubian Children case*, para 53.

<sup>218</sup> Kegoro G 'Makonde issue shows different people care for Kenya and are concerned for common interest, Op-Ed, *The Nation*' available at <http://www.nation.co.ke/oped/Opinion/makonde-issue-shows-people-care-for-kenya/440808-3418162-yxrbx> (accessed on 24 August 2019).

statelessness and remedy any discrimination that occurs in regards to access to documentation of identity.<sup>219</sup>

## 2.4 Conclusion:

Due to the effect statelessness has on an individual, ample international and regional instruments exist to guide States to implement nationality laws to prevent statelessness and to protect individuals who are stateless. Although there may be many instruments that focus on the right to nationality and stateless, there is still a worldwide problem with the number of stateless individuals, especially stateless children that exist. In the following chapter an analysis will be done regarding the right to nationality and childhood statelessness in South Africa and Zimbabwe. These two countries nationality laws will be analysed and it will be determined whether they are in line with the international and regional instruments they have ratified.



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<sup>219</sup> African Committee of Experts on the Rights and Welfare of the child: Written Comments on Implementation *Kenyan Nubian children case*, 13.

## CHAPTER 3: CHILDHOOD STATELESSNESS IN SOUTH AFRICA AND ZIMBABWE

### 3.1 Introduction

In chapter 2 the international and regional African instruments relating to childhood statelessness and how these instruments attempt to protect and prevent statelessness was discussed. These instruments create a definition of what statelessness is and how it can be prevented, as well as provide the human rights of persons that are stateless or at risk of being stateless. The primary cause of statelessness is discrimination in law and in fact against minority groups, failure in regards to integration of migrants and their descendants, absence of political will and gaps in laws regarding nationality.<sup>220</sup>

South Africa and Zimbabwe have to some extent incorporated the international and regional African law into their national laws but the success thereof is dependent on the implementation of these laws. In this chapter the national laws and practices of South Africa and Zimbabwe will be examined, and it will be established whether their national laws are in line with the international and regional African instruments that they are a party to. Under international and regional African human rights law, there is an obligation on State parties, that have ratified these instruments, to incorporate the norms into their domestic law and that they are applied when making decisions that may conflict with a provision found within international and regional African law.

Further the political attitude of the governments of South African and Zimbabwe will be discussed, and whether this has impacted their success in addressing the issue of childhood statelessness in both countries will be analysed. South Africa and Zimbabwe fall within the regional political and economic arrangement called Southern African Development Community (SADC). As neighbouring countries and forming part of this regional group, they have an obligation to address issues, specifically statelessness within SADC. An analysis will be done on what this obligation entails, what provision has been made for it within the domestic law of South Africa and Zimbabwe to fulfil their obligation to prevent statelessness as part of SADC. Added to this discussion will be the flight of migrants to South Africa from Zimbabwe and the number of Zimbabwean children in South Africa that are at risk of being stateless.

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<sup>220</sup> Manby, B 'Statelessness in Southern Africa' (2011) UNHCR 1, 5.

## 3.2 Childhood statelessness in South Africa

### 3.2.1 History of citizenship law and international and regional law ratified by South Africa

South Africa's history greatly influences the current citizenship regime and the on-going challenges that are faced in birth registration, acquisition and deprivation of citizenship. When South Africa declared independence in 1961, all persons became South African citizens and were no longer British subjects.<sup>221</sup> In 1970 the Apartheid government enacted the Black Homeland Citizenship Act No. 26 of 1970 and this created independent homelands based on ethnic groupings.<sup>222</sup> Once a person had the nationality of their Homeland, they were deprived of their South African citizenship.<sup>223</sup> Consequently, in 1994 when the first democratic election came about, many people that were citizens of the Homelands had no South African Identity documents (ID) and as a result could not vote.<sup>224</sup> In a hurry to provide people with ID documents, many people were given a 'dompas' which resulted in people having the duplicate ID numbers.<sup>225</sup> Many people in rural areas still today remain without an ID document.<sup>226</sup>

In South Africa lack of documentation is often confused with statelessness.<sup>227</sup> Lack of documentation, such as lack of a birth certificate, can cause children to be at risk of statelessness.<sup>228</sup> Of all the undocumented children in South Africa, 40 % are estimated to be at risk of statelessness, and 27% are at 'considerable risk' of statelessness.<sup>229</sup> It is unknown as to the amount of stateless children in South Africa and abandoned children

<sup>221</sup> Hobden, C 'Report on Citizenship Law: South Africa' (2018) European University Institute 2.

<sup>222</sup> Khunou, SF 'Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid' (2009) *PER: Potchefstroomse Elektroniese Regsblad* 89.

<sup>223</sup> Khunou, SF 'Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid' (2009) *PER: Potchefstroomse Elektroniese Regsblad* 89.

<sup>224</sup> Muller, L 'ID blocking: A growing threat to nationality' (2013) available at <https://www.lhr.org.za/blog/2013/9/id-blocking-growing-threat-nationality> [accessed on 13 September 2019].

<sup>225</sup> Muller, L '*ID blocking: A growing threat to nationality*' (2013) available at <https://www.lhr.org.za/blog/2013/9/id-blocking-growing-threat-nationality> [accessed on 13 September 2019].

<sup>226</sup> Martin, P '*Children's rights to birth registration: A review of South Africa's Law*' in Proudlock, P (ed) '*South Africa's Progress in Realizing Children's Rights: A Law review*' (2014) Children's Institute, University of Cape Town & Save the Children South Africa 15.

<sup>227</sup> Guam, A & Esterhuizen, E 'Thousands of 'undocumented' children are being deprived of the basic right to education' (2019) South African Human Rights Commission available at <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen> [accessed on 12 October 2019].

<sup>228</sup> UNHCR 'What is statelessness?' (2014) 1.

<sup>229</sup> Scalabrini Centre of Cape Town 'Foreign Children in Care: South Africa Comparative Report of Foreign Children Placed in Child and Youth Care Centre in Gauteng, Limpopo And Western Cape Provinces of South Africa' (2019) 6.

and children born to irregular or undocumented migrants are also at an increasing risk of statelessness.<sup>230</sup>

South Africa has ratified various international human rights instruments such as the ICCPR, CRC, CEDAW and regional African instruments such as the ACHPR and the ACRWC. In Chapter 2, each of these instruments and how they provide for the right to nationality and guard against statelessness was discussed in detail. In 2017, South Africa presented its third national report to the Universal Periodic Review (UPR) on the developments regarding human rights and fundamental freedoms.<sup>231</sup> During the UPR process for South Africa, 12 states chose to utilize their recommendations to address the lack of protection and prevention of stateless persons in South Africa.<sup>232</sup> This shows that statelessness, specifically childhood statelessness is an important issue in South Africa that needs to be urgently addressed.

### **3.2.2 The Constitution of the Republic of South Africa, 1996 (the South African Constitution)**

The South African Constitution has been described as 'international law friendly'<sup>233</sup> and it provides that consideration must be given to international law when interpreting any rights as provided for in the Bill of Rights.<sup>234</sup> The Bill of Rights is the foundation of democracy in South Africa and contains fundamental human rights applicable to all people in South Africa.<sup>235</sup> There is also an obligation on the State to advance, preserve and realize the rights provided in the Bill of Rights.<sup>236</sup> Section 7(2) of the South African Constitution places a positive obligation on States to realise the rights provided in the Bill of Rights, of everyone in South Africa, which is not subject to being a citizen of South Africa.<sup>237</sup>

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<sup>230</sup> Mbiyoz, A 'Statelessness in Southern Africa - Time to end it, not promote it' (2019) Institute for Security Studies (ISS) 13&14.

<sup>231</sup> Human Rights Council 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21- South Africa' (2017) UN General Assembly 1.

<sup>232</sup> LHR 'States ask South Africa to give rights to the stateless' (2017) available at <https://www.lhr.org.za/news/2017/press-statement-states-ask-south-africa-give-rights-stateless> [accessed on 20 November 2019].

<sup>233</sup> Tladi, D '*Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga*' (2016) African Human Rights Journal 311.

<sup>234</sup> Section 39(1) (b) of the Constitution of the Republic of South Africa, 1994 (the South African Constitution).

<sup>235</sup> Section 7(1) of the South African Constitution.

<sup>236</sup> Section 7(2) of the South African Constitution.

<sup>237</sup> Section 19 (Political Rights), Section 20 (Citizenship), Section 21 (3) & (4) (Freedom of movement), Section 22 (Freedom of trade, occupation and profession) of the South African Constitution is only available to citizens of South Africa.

The South African Constitution provides that every child has the right to a name and a nationality from birth.<sup>238</sup> This right is not limited to only citizens and provides that 'every' child be granted a nationality and a name from birth. As mentioned in Chapter 2, there is a difference between the right to a nationality and the right to acquire a nationality.<sup>239</sup>

The ACRWC provides that a child has a right to acquire a nationality<sup>240</sup>, whereas the South African Constitution goes further and provides for the right to a nationality. It is however important to note that this does not guarantee the right to a South African nationality<sup>241</sup>, but rather that provision should be made to accommodate the acquisition of nationality of the child's parent(s), if the parents are asylum seekers, refugees or undocumented migrants, on the child.<sup>242</sup> This would give effect not only to the right of a child to a nationality, but also ensure that the best interest of the child is of cardinal importance in all matters pertaining to the child.<sup>243</sup>

As mentioned in Chapter 2, statelessness can cause various other fundamental rights of a child to be violated. Many of these rights are provided for in the Bill of Rights and are applicable to everyone, including stateless children in the territory of South Africa. Among these rights are the right to health care<sup>244</sup>, education<sup>245</sup>, dignity<sup>246</sup> and many other human rights.<sup>247</sup>

Section 28 of the South African Constitution goes further and specifically provides that all children have the right to basic health care services.<sup>248</sup> Though there is no provision that provides specifically that a child must produce documentation when accessing the public healthcare system in South Africa, it has become practice that facilities require a form of identification documents such as birth certificates and refugee permits.<sup>249</sup> Therefore though the South African Constitution provides for the right to adequate

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<sup>238</sup> Section 28 (1) (a) of the South African Constitution.

<sup>239</sup> See Chapter 2.

<sup>240</sup> Article 6(3) of the ACRWC.

<sup>241</sup> LHR and ISI 'The Committee on the Rights of the Child, 73rd Pre-Sessional Working Group, South Africa, Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC' (2015) para 8.

<sup>243</sup> Section 28 (2) of the South African Constitution.

<sup>244</sup> Section 27 of the South African Constitution.

<sup>245</sup> Section 29 of the South African Constitution.

<sup>246</sup> Section 10 of the South African Constitution.

<sup>247</sup> Open Society Justice Initiative 'Children's right to a nationality' available at:

<https://www.ohchr.org/Documents/Issues/Women/WRGS/RelatedMatters/OtherEntities/OSJChildrenNationalityFactsheet.pdf> [accessed on 16 October 2019].

<sup>248</sup> Section 28 (1) (c) of the South African Constitution.

<sup>249</sup> Human Rights Watch 'No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa' (2009) available at <https://www.hrw.org/report/2009/12/07/no-healing-here/violence-discrimination-and-barriers-health-migrants-south-africa> [accessed on 12 October 2019].

health care of all children, in reality stateless children are not afforded this right. Stateless children or children at risk of becoming stateless face challenges in accessing the right to health care.<sup>250</sup> The right to health care is linked to the ability to provide a form of identification, lack of birth registration and documentation result in stateless child and children at risk of statelessness not being able to access adequate healthcare services.<sup>251</sup>

The South African Constitution provides that 'everyone' has the right to education.<sup>252</sup> To enter school, a child is required to provide a birth certificate and immunisation certificate and for non-South African citizenship, must further provide a study permit, temporary or permanent residence permit.<sup>253</sup> Therefore stateless children will not be able to have access to education as they lack documentation. The right to a basic education is an empowering right and a fundamental instrument for the eradication of poverty and should be guaranteed to everyone regardless of documentation or legal status.<sup>254</sup>

### **3.2.3 South African Citizenship Act 88 of 1995 (South African Citizenship Act)**

The South African Citizenship Act regulates the manner in which citizenship is acquired and withheld in South Africa. Citizenship can be acquired through birth, descent or naturalization.<sup>255</sup> Section 2 of the South African Citizenship Act governs acquisition of citizenship by birth. A person is a citizen by birth if they were born, within or outside of the territory of South Africa, to one parent that, at the time of his or her birth was a citizen of South Africa.<sup>256</sup> This is the main provision through which citizenship is attained in South Africa. Citizen by birth can also be obtained by a child who is born in South Africa and does not have a claim to any citizenship or nationality of another country.<sup>257</sup> This is in line with Section 28(1) (a) of The South African Constitution which guarantees

<sup>250</sup> LHR and ISI 'The Committee on the Rights of the Child, 73rd Pre-Sessional Working Group, South Africa, Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC' (2015) para 47.

<sup>251</sup> Manicom, L, Moyo, S, Mudarikwa, M and Roos, E 'Submission To The Special Rapporteur At The Office Of The Un High Commissioner For Human Rights' (2018) Legal Resource Centre and Scalabrini Centre para 5.1.2.

<sup>252</sup> Section 29 of the South African Constitution.

<sup>253</sup> Department of Basic Education- Republic of South Africa 'Admission of Learners to Public Schools' (2019) available at <https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolAdmissions.aspx> [accessed 12 October 2019].

<sup>254</sup> South African Human Rights Commission 'Media Statement: SAHRC's Application to Join Undocumented Learners Litigation to be Heard in Grahamstown High Court' (2019) available at <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-to-join-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> [accessed on 13 August 2019].

<sup>255</sup> Chapter 2 of the South African Citizenship Act 88 of 1995 (South African Citizenship Act).

<sup>256</sup> Section 2 (1) (b) of the South African Citizenship Act.

<sup>257</sup> Section 2 (2) of the South African Citizenship Act.

the right of every child to a nationality from birth. This Section is in line with article 7 of the ACRWC and article 6 of the CRC as it provides citizenship to children who were born in South Africa and who would otherwise be stateless. Birth registration is however a prerequisite for this form of acquisition of citizenship, which means that citizenship, will only be attained once the birth of the child is registered.<sup>258</sup>

Section 2(2) of the South African Citizenship Act does not make it possible for stateless children to apply for citizenship as there is no regulation that provides for a form to fill out and there are no determination procedures to ascertain whether a child is stateless.<sup>259</sup> *DGLR and another v The Minister of Home Affairs and Others (NGHC) Case no 38428/13 (DGLR case)* deals with the interpretation of Section 2(2) of the South African Citizenship act. The first issue was whether DGLR was indeed stateless as there is no regulation or legislative framework in South Africa that defines what a stateless person is. If the child does not have a claim to another nationality, Section 2(2) applies, regardless of whether the Section does not use the term stateless, the Section is clearly a safeguard against statelessness. Two of the main arguments by the Department of Home Affairs were that the child's parents were Cuban and that she had not exhausted all the remedies in Cuba to obtain Cuban citizenship.<sup>260</sup> The Department of Home Affairs offered her permanent residence and also argued that her handwritten birth certificate was not valid even though the South African BDRA provided this was a valid birth certificate.<sup>261</sup> The Court held that to limit her right to permanent residence was not within the best interest of the child and did not change her status as 'stateless' and therefore held that DGLR receive citizenship through Section 2(2) of the South African Citizenship Act.<sup>262</sup>

Section 2 (3) of the South African Citizenship Act provides for citizenship to children born in South Africa to parents who are permanent residents. Prior to the South Africa Citizenship Amendment Act 17 of 2010 (South African Citizenship Act amendment, 2010), children born to permanent residents acquired South African citizenship by birth. After the 2010 Citizenship Act amendment, these children do not automatically become citizens as there are three requirements that must be met in order for them to apply to

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<sup>258</sup> Section 2 (2) (b) of the South African Citizenship Act.

<sup>259</sup> Lawyers for Human Rights and Institute on Statelessness and Inclusion 'Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review- The Republic of South Africa' (2016) para 39.

<sup>260</sup> *Minister of Home Affairs and others v DGLR and another (Case number 1051/2015 SCA) (DGLR case).*

<sup>261</sup> *DGLR case.*

<sup>262</sup> *DGLR case para 12.*

acquire nationality.<sup>263</sup> These requirements are that they live in South Africa until the age of attaining majority, the child's birth is registered in terms of the BDRA and that he or she was born in South Africa.<sup>264</sup> This right is subject to birth registration and can only be acquired through application. The implication of this Section is that children born to permanent residents, who do not have a claim to the citizenship of their parents, will remain stateless until they attain majority. This does not meet the best interest of the child, as such a child will be denied various human rights, as mentioned above, and could also suffer the psychological effect of not belonging to any country.<sup>265</sup>

Section 3 of the South African Citizenship Act provides for citizenship by descent. Citizenship by descent is given to for non-national children adopted by South African parents.<sup>266</sup> Prior to the South African Citizenship Act amendment, 2010, children born to South African parents outside of South Africa, would be referred to as citizens by descent. However this distinction has been removed and only adopted children are referred to as Citizens by descent.<sup>267</sup> This provision is also subject to birth registration and that such a registration was done under the adoptive parents' names.<sup>268</sup>

The provision relating to naturalization was amended in the 2010 Citizenship Act amendment and now creates a way for acquisition of citizenship to individuals who are born to non-citizens and non-permanent resident parents. The requirements for naturalization are that the child is born in South Africa, he or she lived in South Africa until the age of 18 and that his or her birth was registered in terms of the BDRA.<sup>269</sup> The application for naturalization is subject to the Minister of Home Affairs discretion and also subject to birth registration.<sup>270</sup> Citizenship through naturalisation can only be obtained once an individual has had permanent resident status for 5 years.<sup>271</sup> Other requirements that must be met is that the person intends to reside in South Africa, is of

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<sup>263</sup> Section 2 (3) South Africa Citizenship Amendment Act 17 of 2010 (South African Citizenship Act amendment, 2010).

<sup>264</sup> Section 2 (3) (a) & (b) of the South African Citizenship Act amendment, 2010.

<sup>265</sup> UNHCR 'UNHCR report reveals debilitating impact of statelessness on children' (2015) available at <https://www.unhcr.org/news/press/2015/11/563762946/unhcr-report-reveals-debilitating-impAct-statelessness-children.html> [accessed on 13 October 2019].

<sup>266</sup> Section 3 of the South African Citizenship Act.

<sup>267</sup> Section 3 of the South African Citizenship Act.

<sup>268</sup> Department of Home Affairs- Republic of South Africa 'Media statement on how citizenship is acquired and children registered in South Africa' (2017) available at <http://www.dha.gov.za/index.php/statements-speeches/958-media-statement-on-how-citizenship-is-acquired-and-children-registered-in-south-africa> [accessed on 13 October 2019].

<sup>269</sup> Section 4(3) of the South African Citizenship Act.

<sup>270</sup> Department of Home Affairs- Republic of South Africa 'Citizenship' (2019) available at <http://www.dha.gov.za/index.php/civic-services/citizenship> [accessed on the 13 October 2019].

<sup>271</sup> Section 5(1) (c) of the South African Citizenship Act.

good character, knows their responsibilities as a citizen of South Africa, can speak in one of the official languages and renounced their previous citizenship, if his or her country does not permit dual-citizenship.<sup>272</sup> These requirements for naturalisation is however not applicable to children<sup>273</sup> and the Minister of Home Affairs is given discretion to provide a certificate of naturalisation to a child if the child has been lawfully and permanently resident in South Africa.<sup>274</sup> There is no regulation that has been put into place to act as a guide in which the discretion of the Minister of Home Affairs is determined. This Section is only applicable to children born after 2013, which means that children born prior 2013 will remain stateless until they turn 18 and can apply for naturalisation under Section 4(3) of the South African Citizenship Act. There is also no form that allows children themselves to apply for naturalisation and thus such a measure is practically not attainable.<sup>275</sup>

In South Africa protection against deprivation of citizenship is only applicable to citizens by birth deprived of nationality as a result of participating in a war against South Africa, and naturalised citizens who have committed an ordinary crime.<sup>276</sup> The South African Constitution states that no citizen may be deprived of their nationality.<sup>277</sup> The South African Citizenship Act is in contradiction with the South African Constitution as it provides for the deprivation of citizenship.<sup>278</sup> In the recommendations given to South Africa in 2017 during the UPR review, Hungary recommended that South Africa desist from deprivation of citizenship through ID blocking.<sup>279</sup>

### **3.2.4 The Births and Deaths Registration Act 51 of 1992 (South African BDRA)**

Birth registration coverage in South Africa is around 95%<sup>280</sup> and there are still difficulties that occur in birth registration nationally. The South African BDRA is the crucial legislation for birth registration in South Africa.<sup>281</sup> As seen in the above section on the

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<sup>272</sup> Section 5(1) of the South African Citizenship Act.

<sup>273</sup> Section 5(1) (a) of the South African Citizenship Act.

<sup>274</sup> Section 5 (4) (a) of the South African Citizenship Act.

<sup>275</sup> Lawyers for Human Rights and Institute on Statelessness and Inclusion 'Childhood Statelessness in South Africa' (2016) 3.

<sup>276</sup> Bronwen M 'Statelessness in Southern Africa' (2011) UNHCR 24.

<sup>277</sup> Article 20 of the South African Constitution.

<sup>278</sup> Section 8 of the South African Citizenship Act.

<sup>279</sup> HRC 'Draft report of the Working Group on the Universal Periodic Review(UPR) - South Africa' Working Group on the UPR twenty-seven session, Geneva, 1-12 May 2017 para 139.243

<sup>280</sup> United Nations Children's Fund (UNICEF) 'every child's birth right: inequities and trends in birth registration.' (2013).

<sup>281</sup> George, JP & Elphick, R 'Promoting Citizenship and Preventing Statelessness in South Africa: A practitioners guide' (2014) 32.

South African Citizenship Act, in almost all cases<sup>282</sup>, birth registration is a prerequisite for acquiring nationality. Birth registration is not proof of citizenship but access to birth registration is fundamental in the acquisition of citizenship.<sup>283</sup> The South African BDRA makes provision that all children born alive on the territory should be registered at the DHA within 30 days of birth.<sup>284</sup> Late registration is also provided for and must be done in adherence to the requirements provided.<sup>285</sup> There is a distinction made between late registration after 30 days but before 1 year and after one year, and each type of registration has different requirements that must be provided and the applicants are required to pay a fee.<sup>286</sup> The provision for late registration was established to make provision for persons who had not been registered under the previous Birth and Deaths Registration Acts.<sup>287</sup> Regulation 4 and 5 of Registration of Births, 2014 in their heading only provides that children born to South African Citizens will be permitted to apply for birth registration after the 30 day period for registration has lapsed. This could create a situation where children born to non-national parents will not be able to apply for late birth registration and if the child has no claim to any other nationality, would have the potential of becoming stateless.<sup>288</sup>

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<sup>282</sup> A birth certificate is not a prerequisite for children born to parents that are citizens of South Africa. Section 2 of the South African Citizenship Act.

<sup>283</sup> Manby, B 'Citizenship in Africa: The Law of Belonging' (2018) Hart Publishing 304.

<sup>284</sup> Section 9 (1) of the South African BDRA.

<sup>285</sup> Section 9(3A) of the South African BDRA. Regulations 4 and 5 on Registration of Births, 2014.

<sup>286</sup> Regulation 4 (3) on Registration of Births, 2014 provides for the requirements of birth registration later than 30 days after the birth but before the child is older than one year. These requirements are : (a) proof of birth on Form 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 South African citizen who witnessed the birth of the child where the birth occurred at a place other than a health institution (c) biometrics, in the form of a palm, foot or fingerprint, of the child whose birth is sought to be registered (d) fingerprints of the parents, which shall be verified online against the national population register: Provided that where the fingerprints cannot be verified online, the full set of fingerprints of the parents shall be taken (e) a certified copy of the identity document of the biological or adoptive mother or father or both parents of the child whose birth is sought to be registered, as the case may be; (f) a certified copy of a valid passport and visa or permit, where one parent is a non- South African citizen. (g) where applicable, a certified copy of the death certificate of any deceased parent; (h) where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered; (i) where applicable, a certified copy of the identity document or valid passport and visa or permit of the next -of-kin or legal guardian; and (j) proof of payment of the applicable fee.

The requirements for late registration for a child older than one year in Regulation 5 Registration of Births, 2014, is similar to the registration in Regulation 4, there is however a distinction made on children older than the age of 7 years. If the child is above the age of 7 years, fingerprints of the child and two identity photos must be provided.

<sup>287</sup> George, JP & Elphick, R 'Promoting Citizenship and Preventing Statelessness in South Africa: A practitioners guide' (2014) 32.

<sup>288</sup> Section 2(2) of the South African Citizenship Act provides that a child born in South Africa does that does not have the nationality of any other country shall be a South African citizen by birth. The acquisition of citizenship is subject to the requirement of having a birth certificate.

The stricter requirements for late birth registration have been made in an attempt to control fraudulent claims to South African citizenship by unsuccessful asylum seekers that have not yet left South Africa.<sup>289</sup> This furthers the misconception that a birth registration is proof of citizenship. Fraudulent birth registration is not a valid excuse to deny a child a birth certificate. These restrictions have also influenced children that live in rural areas, children whose parents or guardians do not have identity documents, children living with grandparents, relatives or in child headed households, abandoned children and children born in South Africa to migrant parents.

The birth registration statistics for children living in rural areas is much lower than children living in urban areas.<sup>290</sup> This causes that children in rural areas are more likely to be registered late or not to be registered at all.<sup>291</sup> The cost, length of travel and high level of poverty in rural areas, also result in a delay in birth registration.<sup>292</sup> Lack of birth registration can cause a child to be at risk of statelessness and therefore it is important that all children receive a birth certificate.

If the caregiver of the child does not have an identity document, it will make it difficult for them to register the birth of their child, as proof of identity of the parent of the child is a prerequisite for birth registration.<sup>293</sup>

Prior to 1994 in South Africa, birth registration was optional for Africans that lived in rural areas and therefore many people today remain without an Identity Document (ID) in South Africa.<sup>294</sup> A large amount of children in South Africa do not live with their biological parents and are cared for by extended relatives.<sup>295</sup> The law does make provision for extended relatives to register the birth of a child and the burden of proof is

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<sup>289</sup> eNCA 'Parents to face penalties for late birth registration' (2015) available at <https://www.enca.com/south-africa/parents-face-penalties-late-birth-registration> [accessed on 23 August 2019].

<sup>290</sup> Provinces with large rural areas have a high percentage of late birth registrations. Department of Women, Children and People with Disabilities 'The United Nations Convention on the Rights of the Child. South Africa's Combined Second, Third and Fourth Periodic State Party Report to the United Nations Committee on the Rights of the Child' (2013) 96.

<sup>291</sup> Martin, P 'Children's rights to birth registration: A review of South Africa's Law' in Proudlock, P (ed) 'South Africa's Progress in Realising Children's Rights: A Law review' (2014) Children's Institute, University of Cape Town & Save the Children South Africa 15.

<sup>292</sup> Martin, P 'Children's rights to birth registration: A review of South Africa's Law' in Proudlock, P (ed) 'South Africa's Progress in Realising Children's Rights: A Law review' (2014) Children's Institute, University of Cape Town & Save the Children South Africa 15.

<sup>293</sup> Section 9 (1) of the South African BDRA, prior to the 2010 amendment read with Regulation 3(2) of the Regulations on Birth Registration, 2014.

<sup>294</sup> Muller, L 'ID blocking: A growing threat to nationality' (2013) available at <http://www.lhr.org.za/blog/2013/9/id-blocking-growing-threat-nationality>. [accessed on 23 August 2019].

<sup>295</sup> Meintjies, H & Hall, K 'Demography of South Africa's children' in Berry L, Dawes A, Lake L & Smith, C (eds) 'South African Child Guage 2013' (2013) Children's Institute, University of Cape Town 87.

very high and does not truly take into consideration the realities of children living with extended families.<sup>296</sup> Since the ID of a mother must be provided for extended families to register the birth of a child, this could be problematic if the mother has disappeared, cannot be contacted or never had an ID document.<sup>297</sup> DHA also discourages extended relatives from registering the birth of the child, by informing them that they need a report from a social worker or an order from the Children's Court to register the birth of the child.<sup>298</sup> While this may be necessary in order to prevent fraudulent birth registration practices and in some instances protects children against trafficking. This does also create a burden on the extended relatives to register the birth and also raises the cost of registering the birth, which is problematic as the majority of people that are in these situations live in poverty. The amendments made to the South African BDRA in 2010 and the Regulations on Birth Registration made in 2014, have the effect of being narrowly interpreted and as a result will only allow for birth registration of a child by extended relatives if both the child's biological parents are deceased.<sup>299</sup>

The South African BDRA provides that abandoned or orphaned children must be registered, if not registered before.<sup>300</sup> This is only applied to younger children and it requires the DHA register the child as 'foreign' if the child appears as if they are clearly 'foreign'.<sup>301</sup> The DHA has an attitude of being reluctant to register a child, if the child appears 'foreign'.<sup>302</sup> The DHA discriminates on children that appear to be a non-national and cause these children to be at risk of statelessness due to the inability of being able to identify the country of origin of the child and lack of documentation.<sup>303</sup> All abandoned children should receive a birth certificate and South African citizenship, if the child's parentage cannot be established. Once an abandoned child's birth is registered, they

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<sup>296</sup> Section 9 (1) of the South African BDRA, prior to the 2010 amendment read with Regulation 3(2) of the Regulations on Birth Registration, 2014.

<sup>297</sup> Giese, S & Smith, L 'Rapid Appraisal of Home Affairs Policy and Practice Affecting Children in Southern Africa.' (2007) Alliance for Children's Entitlement to Social Security 64.

<sup>298</sup> Giese, S & Smith, L 'Rapid Appraisal of Home Affairs Policy and Practice Affecting Children in Southern Africa.' (2007) Alliance for Children's Entitlement to Social Security 40.

<sup>299</sup> Martin, P 'Children's rights to birth registration: A review of South Africa's Law' in Proudlock, P (ed) 'South Africa's Progress in Realising Children's Rights: A Law review' (2014) Children's Institute, University of Cape Town & Save the Children South Africa 15.

<sup>300</sup> Section 12 of the Regulations on Birth Registration, 2014.

<sup>301</sup> Lawyers for Human Rights and Institute on Statelessness and Inclusion 'Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review- The Republic of South Africa' (2016) para 30.

<sup>302</sup> Lawyers for Human Rights and Institute on Statelessness and Inclusion 'Childhood Statelessness in South Africa' (2016) 9.

<sup>303</sup> Lawyers for Human Rights and Institute on Statelessness and Inclusion 'Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review- The Republic of South Africa' (2016) para 19.

will be able to apply for citizenship under section 2(2) of the South African Citizenship Act.<sup>304</sup>

The Regulations made in 2014 to the BDRA make a distinction between parents who are permanent residents or refugees as compared to parents with a temporary work permit, asylum seekers or parents with no documentation.<sup>305</sup> Provision is made for parents who are permanent residents or refugees that ought to be assisted to obtain birth certificates for their children, the same way as parents that are citizens of South Africa.<sup>306</sup> As a result, permanent residents and refugees will receive an unabridged birth certificate and an ID number.<sup>307</sup> The Regulations entail that parents that are asylum seekers or parents that have work-permits submit their passport and visa or asylum seeker permit.<sup>308</sup> This might possibly prevent many children born to migrants from being registered as many migrants are without proof of legal residence.<sup>309</sup> Due to the high level of migration to South Africa, many asylum seekers permits may have expired or they have a valid asylum permits but do not have a passport.<sup>310</sup> As a result and due to the requirements for birth registration in the South African BDRA, many children born in South Africa to migrants may not be registered and therefore will be at risk of becoming stateless.

In 2018 an amendment to the South African BDRA was proposed that would change the position regarding the access of birth registration for children born to non-South African citizens who are not permanent residents or refugees.<sup>311</sup> This amendment would provide that children born to non-South African citizens who are not permanent residents or refugees will no longer receive a birth certificate, but will be issued with a notice of birth following a confirmation of birth that contains no identity number.<sup>312</sup> This confirmation of birth has to be taken to the embassy in order to receive a birth certificate

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<sup>304</sup> Manby, B 'Citizenship and Statelessness in Africa: The law and politics of belonging' (2015) Wolf Legal Publishers 397.

<sup>305</sup> Regulation 7 & 8 of the Regulations on Birth Registration, 2014.

<sup>306</sup> Regulation 7(1) of the Regulations on Birth Registration, 2014.

<sup>307</sup> Regulation 7(2) of the Regulations on Birth Registration, 2014.

<sup>308</sup> Regulation 8 (3) (c) of the Regulations on Birth Registration, 2014.

<sup>309</sup> Lawyers for Human Rights 'Submission on The Draft Regulations to The Births and Deaths Registration Act, No. 51 Of 1992' (2012) 4.

<sup>310</sup> Martin, P 'Children's rights to birth registration: A review of South Africa's Law' in Proudlock, P (ed) 'South Africa's Progress in Realising Children's Rights: A Law review' (2014) Children's Institute, University of Cape Town & Save the Children South Africa 26.

<sup>311</sup> Department of Home Affairs - *Publication of The Draft Regulations on The Registration of Births And Deaths* (2018) NO. 1085 (Draft Regulations to the South African BDRA).

<sup>312</sup> Regulation 8 (5) of the Draft Regulations to the South Africa BDRA.

from their country of nationality.<sup>313</sup> This could prove to be problematic as stateless children that do not have a nationality, will not be able to have access to a birth certificate. A birth certificate provides stateless children the ability to apply for safeguards that will enable them to obtain citizenship, where they have no claim to one.<sup>314</sup>

The South African BDRA only allows mothers to register the births of their children born out of wedlock, even if the father is documented.<sup>315</sup> Due to the fact that it is required that a child's parent produce an identity document, passport or permit when registering their child, undocumented mothers will not be able to register their child and as a result that child will be at risk of becoming stateless. *In Naki and Others v Director General: Department of Home Affairs and Another (4996/2016) [2018] 3 All SA 802 (Naki case)* the father, a South African citizen, was unable to register the birth of his child as he was unmarried, and the mother of the child was undocumented.<sup>316</sup> As a result of the lack of birth registration for NNs, she cannot be added to the population registry and no right to citizenship can be enforced by her parents on her behalf.<sup>317</sup> Regulation 3, 4, 5 and 12 of the South African BDRA was declared unconstitutional and the wording of the regulation was amended to ensure that a father was able to register the birth of his child in the absence of the mother.<sup>318</sup> Section 9 and 10 of the South African BDRA was not declared unconstitutional.<sup>319</sup> As a result this judgement creates confusion in the law as section 10 and regulation 12 do not concur and section 10 of the South African BDRA still does not permit unmarried fathers to register the birth of their child.<sup>320</sup> As a result the child will be at risk of statelessness due to the fact that the father is unable to confer his nationality to her and the mother is undocumented.

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<sup>313</sup> Draft Regulation to the South African BDRA.

<sup>314</sup> Centre for Child Law, Lawyers for Human Rights, the Scalabrini Centre of Cape Town, the UCT Refugee Law Clinic 'Home Affairs To Discontinue Birth Certificates For Foreign Children' (2018) available at <https://www.lhr.org.za/news/2018/home-affairs-discontinue-birth-certificates-foreign-children> [accessed on 16 October 2019].

<sup>315</sup> Regulation 12 of the Regulations on Birth Registration, 2014.

<sup>316</sup> *In N and Others v Director General: Department of Home Affairs and Another (4996/2016) [2018] 3 All SA 802. (Naki case).*

<sup>317</sup> *Naki case*, para 5.

<sup>318</sup> *Naki case*, para 34 & 35.

<sup>319</sup> *Naki case*, para 27.

<sup>320</sup> Lawyers for Human Rights 'Centre for Child Law And Lawyers For Human Rights Ask High Court To Ensure Birth Registration For Children Of Unmarried Fathers' (2018) available at <https://www.lhr.org.za/news/2018/press-release-centre-child-law-and-lawyers-human-rights-ask-high-court-ensure-birth-registion> [accessed on 25 October].

### 3.2.5 South African Immigration Act 13 of 2002 (South African Immigration Act)

The South African Immigration Act governs the law pertaining to people who do not have a claim to South African nationality. The South African Immigration Act can be used in instances of statelessness, where the DHA can grant an exemption for permanent residence for an individual or category of non-nationals for an indefinite or definite period.<sup>321</sup> The granting of permanent residence can be used to apply for naturalisation, if the requirements for naturalisation is met as provided for in the South African Citizenship Act.<sup>322</sup>

Section 31(2) (b) of the South African Immigration Act provides that permanent residence be granted to children that are at risk of being stateless. This section allows the Minister of Home Affairs to grant permanent residence to any non-national when special circumstances exist.<sup>323</sup> The Minister of Home Affairs has the discretion to grant these rights to stateless children, but it does not resolve their statelessness. It has also been determined by courts in South Africa that permanent residence alone (without citizenship) is not in the best interest of the child if such a child is stateless.<sup>324</sup>

### 3.2.6 The Refugees Act 30 of 1998 (the South African Refugees Act)

In terms of the South African Refugees Act stateless children can apply for asylum-seeking status that then aids them to access fundamental human rights.<sup>325</sup> This is only applicable where children travel with their parents, abandoned and unaccompanied children are not eligible to be granted temporary asylum-seeking status.<sup>326</sup> In the *Mubakev Minister of Home Affairs*<sup>327</sup> the Refugee Act was to be interpreted to include separated and abandoned children that are accompanied by adult asylum-seekers.<sup>328</sup> Therefore children that are stateless can apply for asylum-seeking status. This however is not a permanent solution and children who remain stateless are often subject to human rights violations.

### 3.2.7 Stateless Children in South Africa from Zimbabwe

As mentioned in the introduction, South Africa and Zimbabwe are neighbouring countries and both form part of the SADC regional area. There has been a large influx

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<sup>321</sup> Section 31 (2) (b) of the South African Immigration Act 13 of 2002 (South African Immigration Act).

<sup>322</sup> Section 5 of the South African Citizenship Act.

<sup>323</sup> Section 31 (2) (b) South African Immigration Act 13 of 2002 (South African Immigration Act).

<sup>324</sup> *DGLR case*, para 12.

<sup>325</sup> Section 22 of the Refugees Act 30 of 1998 (the South African Refugees Act).

<sup>326</sup> Section 22 of the South African Refugees Act.

<sup>327</sup> *Mubake v Minister of Home Affairs 2016 2 SA 220 (GP) (Mubake case)*.

<sup>328</sup> *Mubake para 26*.

of migrants to South Africa over the past few years and 40% of the migrant children entering South Africa are at risk of being stateless.<sup>329</sup> Of the 40% the largest majority of children are from Zimbabwe.<sup>330</sup> Due to an amendment made in 2001 to the Zimbabwean Citizenship Act in regards to the prohibition of dual-citizenship, many Zimbabweans that resided in South Africa had lost their citizenship.<sup>331</sup> As a result, these people had no Zimbabwean citizenship and had no claim to South African citizenship and as a result were at risk of statelessness.<sup>332</sup> Children born to these individuals were also at risk of becoming stateless due to status of their parents.

Another problem that persists is the amount of unaccompanied migrant children that migrate from Zimbabwe to South Africa. A large amount of unaccompanied minor children in South Africa are from Zimbabwe.<sup>333</sup> These children are often without documentation and it is difficult to establish their claim to nationality due to their lack of documentation.<sup>334</sup> The process for applying for as an asylum seeker in South Africa does not make provision for children and therefore these children are placed into a more vulnerable position with limited access to socio-economic rights such as the right to health-care.<sup>335</sup> These children are also at risk of becoming stateless as they may not have a claim to Zimbabwean or South African citizenship.

In the SADC region statelessness can be linked to large migration due to labour practices over many years, displacement caused by conflict, migration of unaccompanied minors, discrimination against certain groups based on their nationality or ethnicity and the refurbishing of the civil registration mechanism without adequate

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<sup>329</sup> Scalabrini Centre of Cape Town 'Foreign Children in Care: South Africa Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo And Western Cape provinces of South Africa' (2019) 6.

<sup>330</sup> Scalabrini Centre of Cape Town 'Foreign Children in Care: South Africa Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo And Western Cape provinces of South Africa' (2019) 4.

<sup>331</sup> George, JP & Elphick, R 'Promoting Citizenship and Preventing Statelessness in South Africa: A practitioners guide' (2014) 100.

<sup>332</sup> Scalabrini Centre of Cape Town 'Foreign Children in Care: South Africa Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo And Western Cape provinces of South Africa' (2019) 4.

<sup>333</sup> Chiweshe, MK 'Unaccompanied child migrants from Zimbabwe to South Africa' available at <https://medium.com/people-on-the-move/unaccompanied-child-migrants-from-zimbabwe-to-south-africa-dda921c8f468> [accessed on 23 August 2019].

<sup>334</sup> Sloth-Nielson, J & Ackerman, M 'Unaccompanied and Separated Foreign Children in the Care System in the Western Cape – A Socio-Legal Study' (2016) Potchefstroom Electronic Law Journal 13.

<sup>335</sup> Chiweshe, MK 'Unaccompanied child migrants from Zimbabwe to South Africa' available at <https://medium.com/people-on-the-move/unaccompanied-child-migrants-from-zimbabwe-to-south-africa-dda921c8f468> [accessed on 23 August 2019].

access to administrative justice.<sup>336</sup> One of the biggest contributors to statelessness within SADC is lack of birth registration<sup>337</sup> Both South Africa<sup>338</sup> and Zimbabwe<sup>339</sup> makes provision for the renunciation of dual-citizenship of migrants from SADC however these provisions are very limited and do not address issues such as statelessness. In order to address statelessness in the SADC area it would be ideal that all states with the regional area ratify the International Conventions relating to statelessness and therefore co-operate as a regional group towards ending statelessness.

### 3.3 Childhood statelessness in Zimbabwe

#### 3.3.1 History of Citizenship law and causes of statelessness in Zimbabwe

The law pertaining to citizenship in Zimbabwe traces its foundation in British Law due to the fact that Zimbabwe was a British colony.<sup>340</sup> The primary manner in which citizenship was acquired during this period was through *jus soli* and only an exception was made in instances where fathers were enemy aliens or has diplomatic status.<sup>341</sup> In the Constitution of Zimbabwe, 1979 a limitation on the acquisition of citizenship through *jus soli* was implemented and this limited the transmission of citizenship to a child born in Zimbabwe to a father (or mother, if out of wedlock) who was a citizen or legally resident in Zimbabwe and also limited the acquisition of citizenship to children born outside of Zimbabwe, to only one generation.<sup>342</sup> Later, citizenship was used as a political weapon and dual-citizenship was not permitted.<sup>343</sup> Gender discrimination was removed from nationality law in 1996 and this allowed women to transmit their citizenship on to their child.<sup>344</sup>

Zimbabwe has ratified international instruments such as the ICCPR, CRC and CEDAW and regional African instruments such as the ACHPR and the ACRWC. As a result, Zimbabwe has a duty to incorporate these international and regional instruments into its

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<sup>336</sup> Muller, L 'Legal Identity for all - Ending Statelessness in SADC' in *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* (2017) Southern African Litigation Centre 140.

<sup>337</sup> Muller, L 'Legal Identity for all - Ending Statelessness in SADC' in *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice* (2017) Southern African Litigation Centre 140. *Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017) [2019] ZAECHGHC 126.*

<sup>338</sup> Section 5(1) (h) of the 2010 amendment to the South African Citizenship Act.

<sup>339</sup> Section 9A of the Zimbabwean Citizenship Act.

<sup>340</sup> Manby, B 'Citizenship and Statelessness in African: The law and politics of belonging' (2015) 228.

<sup>341</sup> Section 6 of the Southern Rhodesia Citizenship and British Nationality Act 1949 (No. 13 of 1949).

<sup>342</sup> Article 5 of the Constitution of Zimbabwe, 1979. Manby, B 'Citizenship and Statelessness in African: The law and politics of belonging' (2015) 230.

<sup>343</sup> Manby, B 'Report on Citizenship Law – Zimbabwe' (2019) European University Institute RSCAS/GLOBALCIT-CR 2019/1 1.

<sup>344</sup> *Rattigan and others v. Chief Immigration Officer, Zimbabwe, and others, 1995 (2) SA 182 (ZS) (Rattigan case).*

domestic law. Zimbabwe lay down the instrument of accession to the 1954 Convention relating to the status of stateless persons in 1998.

### **3.3.2 Constitution of Zimbabwe Amendment (No.20) Act, No. 1 of 2013 (Zimbabwean Constitution)**

The Constitution of Zimbabwe Amendment (No.19) Act, 2009 was aimed at the promotion of national unity and repealed and replaced the chapter relating to citizenship.<sup>345</sup> These amendments eliminate the limitations on transference of citizenship to children born outside Zimbabwe and expanded rights in some circumstances to those with a grandparent who is a Zimbabwean citizen.<sup>346</sup> In 2013 Zimbabwe adopted a new Constitution after years of continuous political turmoil between the ruling party, the Zimbabwe African National Union - Patriotic Front (ZANU-PF) and an opposition party formed in the Movement for Democratic Change (MDC).<sup>347</sup> The Zimbabwean Constitution now permits dual-citizenship for citizens by birth,<sup>348</sup> which was previously prohibited and this creates a legal issue of who is permitted to have dual-citizenship, specifically children born to one parent that is a Zimbabwean citizen by birth and the other parent which is a citizen of another country, also by birth.<sup>349</sup> The Zimbabwean Constitution preserved many of the amendments made in 2009 in relation to citizenship, specifically in regards to provisions relating to citizenship by birth and descent.<sup>350</sup>

The Zimbabwean Constitution provides for three ways in which nationality can be acquired- namely by birth, by descent and by registration.<sup>351</sup> A child born on the territory of Zimbabwe is a 'citizen by birth' if either parent is a citizen<sup>352</sup> or if any grandparent is a citizen by birth or descent.<sup>353</sup> This is not extended to grandparents that are citizens through registration<sup>354</sup>. A child born outside of Zimbabwe will also be regarded as a

<sup>345</sup> Article 5 (2) and 6(1) of the Constitution of Zimbabwe Amendment (No.19) Act, 2009.

<sup>346</sup> Article 5 (2) and 6(1) of the Constitution of Zimbabwe Amendment (No.19) Act, 2009.

<sup>347</sup> Manby, B 'Report on Citizenship Law – Zimbabwe' (2019) European University Institute RSCAS/GLOBALCIT-CR 2019/1 1.

<sup>348</sup> Article 42 (e) of the Zimbabwean Constitution. *Mutumwa Dziva Mawere v The Registrar General & 3 ORS CCZ 4/15 32. Farai Daniel Madzimbamuto v. The Registrar General & 3 Ors CCZ 114/13* the court held: A Zimbabwean citizen by birth does not lose his or her citizenship on acquiring a foreign citizenship. He or she is entitled to hold foreign citizenship and a foreign passport."

<sup>349</sup> Omino, M and Ndhlovu, N 'The Madzimbamuto Judgment of the Zimbabwean Constitutional Court - A missed opportunity to eradicate citizenship by descent' (2017) *Speculum Juris* Volume 31 Issue 1 120-121. *Madzimbamuto v The Registrar General Home Affairs CCZ 5/14.*

<sup>350</sup> Article 36 (1) and (2) of the Constitution of Zimbabwe Amendment (No.20) Act, No. 1 of 2013 (Zimbabwean Constitution).

<sup>351</sup> Article 35 (1) of the Zimbabwean Constitution.

<sup>352</sup> No distinction is made on citizenship by birth, descent or registration.

<sup>353</sup> Article 36(1) of the Zimbabwean Constitution.

<sup>354</sup> In Zimbabwe registration of citizenship is synonymous to naturalisation.

'citizen by birth' if either of the parents are citizens and 'ordinarily resident' in Zimbabwe or working for an international organisation or the Government of Zimbabwe.<sup>355</sup>

The first issue to be addressed in this provision is what is meant 'ordinarily resident'. 'Ordinarily resident' means that the permanent home or the place the person will return to is in Zimbabwe.<sup>356</sup> Secondly, the requirement that the parent(s) must have been working for an international organisation or the government of Zimbabwe could prove to be problematic. These are two very restrictive categories and the Constitution does not make provision for any other possible reasons for not being 'ordinarily resident' in Zimbabwe other than working for the government or an international organisation. The term 'and' used in Article 36(2) indicates that it is not sufficient that the parents of the child are citizens of Zimbabwe, but that they also have to be deemed 'permanently resident' in Zimbabwe or working for the government or an international organisation. This means that in this Article 36(2) no provision is made for children born to citizens that are not permanently resident and do not work for the government or an international organisation.

A child born outside of the territory of Zimbabwe who does not acquire citizenship by birth, as provided for in Article 36(2), is a 'citizen by descent' if either parent or grandparent was at the time of birth a citizen by descent or birth or if any parent was a citizen by registration.<sup>357</sup> This is subject to the birth being registered in accordance to the Zimbabwean law regulating birth registration.<sup>358</sup> The law relating to birth registration in Zimbabwe will be discussed in the section below, relating to the Births and Deaths Registration Act<sup>359</sup> of Zimbabwe (Zimbabwean BDRA). This requirement is not applied to children born in the territory of Zimbabwe and could cause a child's birth to not be registered if it does not fulfil the requirements for a valid birth registration as required by the law relating to birth registration in Zimbabwe.

The Zimbabwean Constitution provides for the registration for citizenship on the basis of the continuous residence for at least 10 years and [or?] adoption by a citizen.<sup>360</sup> Parliament has been given the mandate to provide further conditions upon which

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<sup>355</sup> Article 36(2) of the Zimbabwean Constitution.

<sup>356</sup> Section 2(2) (d) Citizenship of Zimbabwe Acts 23/1984, 7/1990 (s. 152(5)), as amended in 2003 (Zimbabwean Citizenship Act).

<sup>357</sup> Article 37 of the Zimbabwean Constitution.

<sup>358</sup> Article 37 of the Zimbabwean Constitution.

<sup>359</sup> 11/1986, 7/1994, 6/2000, 22/2001, 6/2005.

<sup>360</sup> Article 38 (2) and (3) of the Zimbabwean Constitution.

citizenship can be conferred through registration.<sup>361</sup> The requirements for citizenship through registration, due to long residence, is 'of full age and sound mind' and a 'fit and proper person'.<sup>362</sup> The registration of citizenship is also subject to renunciation of any other citizenship and the intention of continuance of residence in Zimbabwe.<sup>363</sup> The registration for citizenship of adopted children will only be considered once the formal adoption has been completed.<sup>364</sup> The cost for registration as a citizen in Zimbabwe is very expensive<sup>365</sup> and is generally inaccessible for the vast majority of people that do not qualify for citizenship by descent or birth.

With regards to the loss or deprivation of citizenship, the Zimbabwean Constitution does provide for instances where deprivation of citizenship is permitted. Provision is made for the revocation of citizenship in instances where the recognition of citizenship by birth or registration of citizenship was done in a manner in which it amounted to fraud, misrepresentation or concealment of a material fact.<sup>366</sup> The revocation of citizenship is however strictly not permitted in cases of where the revocation of citizenship will render the person stateless.<sup>367</sup> Provision is made that revocation of citizenship may not occur in instances of rendering a person stateless, no specific provision is made to give a person nationality, if they would be 'otherwise stateless'.

Zimbabwe is a party to the CRC which provides that nationality ought to be given to a child, that would 'otherwise be stateless'.<sup>368</sup> The Zimbabwean Constitution also has failed to incorporate its obligation under the ACRWC to provide nationality to a child born in its territory, if at the time of the child's birth; the child is not given nationality by any other State in accordance with its laws.<sup>369</sup> The Zimbabwean Constitution does provide for the protection against statelessness for children of unknown parents (foundlings) and who appears to be less than 15 years of age, to be presumed to be a Zimbabwean citizen by birth.<sup>370</sup> Though this age limit is very generous, it can become problematic when a child appears to be older than 15 years but is actually below the

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<sup>361</sup> Article 38 of the Zimbabwean Constitution.

<sup>362</sup> Section 4 of the Zimbabwean Citizenship Act.

<sup>363</sup> Section 4 of the Zimbabwean Citizenship Act.

<sup>364</sup> Section 7(5) of the Zimbabwean Citizenship Act, referring to the Children's Act (No. 22 of 1971 as amended: Part VIIA on foreign adoptions inserted by Act No. 23 of 2001).

<sup>365</sup> The cost of registration of citizenship in Zimbabwe is \$5 000.00 as provided for on Website of the Register-General's office, available at <http://www.rg.gov.zw/index.php/services/zimbabwean-citizenship> [accessed on 5 August 2019].

<sup>366</sup> Article 39 (1) (a) and (2) (a) of the Zimbabwean Constitution.

<sup>367</sup> Article 39 (3) of the Zimbabwean Constitution.

<sup>368</sup> Article 7 (2) of the CRC.

<sup>369</sup> Article 6 (4) of the ACRWC.

<sup>370</sup> Article 36(3) of the Zimbabwean Constitution.

age of 15. The requirement of 'appears to be less than 15' is problematic as it could be difficult to accurately guess the age of a child and this may cause children that look above 15 but in fact is not, to be excluded from obtaining citizenship and become at risk of becoming stateless.

In terms of the burden of proof to determine whether a child is stateless in Zimbabwe, such a burden is placed on the applicant and not the state. Due to the vulnerability that is caused due to statelessness, it should be the responsibility of the state to determine whether a child is at risk of statelessness and ensure that the child is provided a nationality, if they would otherwise be stateless. Non-Zimbabwean children are required to have their parents registered before they can be registered as citizens of Zimbabwe.<sup>371</sup> This is problematic as the parents of the child may also be stateless and as a result the child will remain stateless. The legal status of the parents of a child ought not to hinder the protection of the child against statelessness.

### **3.3.3 The Citizenship of Zimbabwe Act No. 23 of 1984<sup>372</sup> (Zimbabwean Citizenship Act)**

The Zimbabwean Citizenship act is currently still in effect and has up until now not been amended to reflect the changes to citizenship as made in the 2013 Zimbabwean Constitution. The preamble of the Zimbabwean Citizenship act in regards to citizenship by birth and descent still remains to quote the Constitution provisions that were entered into force in 1980 and creates confusion in regards to the law pertaining to citizenship by birth and descent.<sup>373</sup>

There is a Zimbabwean Citizenship Bill, 2018 (Citizenship bill) that has been accepted by Parliament; however, it has yet to come into effect. The Citizenship bill is set bring the law regulating citizenship in Zimbabwe more in line with Chapter 3 of the Zimbabwean Constitution. The Citizenship bill intends to establish a Citizenship and Immigration Board that will determine who is granted citizenship and the revocation of citizenship through registration.<sup>374</sup> This will take away the control from the Register General. This still leaves the discretion to grant or revoke citizenship by registration to a

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<sup>371</sup> 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, 26th Session, Zimbabwe (2016) 4.

<sup>372</sup> As amended by Act No. 7 of 1990, Act No. 12 of 2001, Act No. 22 of 2001, Act No. 23 of 2001, Act No. 1 of 2002 and Act No. 12 of 2003 (Zimbabwean Citizenship Act).

<sup>373</sup> Preamble of the Zimbabwean Citizenship Act.

<sup>374</sup> Section 3 & 4 of the Zimbabwean Citizenship Bill, 2018.

committee appointed by the president.<sup>375</sup> Registration of citizenship will be brought in line with the Zimbabwean Constitution nonetheless the application for registration is still very much determined by the executive. The requirements for the registration for citizenship remained very much the same and now include the possibility of a citizenship test.<sup>376</sup> When applying for citizenship through registration, the applicant will have to renounce their current citizenship.<sup>377</sup> The Citizenship bill also requires the applicant to have knowledge of a Zimbabwean language and be of legal capacity.<sup>378</sup>

The Citizenship bill provides that an inquiry be done to establish the nationality of an abandoned child and only when the nationality cannot be determined; the child will be a Zimbabwean citizen by birth as established by the register-general.<sup>379</sup> The Citizenship Bill also retained that only if the child perceived to below the age of 15, will he or she be able to become citizens by birth.<sup>380</sup> No clarification has been given as to how children that are abandoned between the ages of 15 and 18 will obtain citizenship, as citizenship through registration in the Citizenship bill is only allowed to people that are of 'legal capacity'<sup>381</sup> and currently that is interpreted as the age of 18. The requirement of proving permanent residence for 10 years<sup>382</sup> will also be difficult for an abandoned child to prove, as it is based on the duration of residence of the parent, and since the child was abandoned, there is not a parent or legal guardian to establish the duration of residence.

### **3.3.4 The Births and Deaths Registration Act of 1986<sup>383</sup> (the Zimbabwean BDRA)**

In Zimbabwe only around 38% of children will have had their birth registered by their 5<sup>th</sup> birthday.<sup>384</sup> In Zimbabwe the Ministry of Home Affairs (MHA) and Department of Register General (DRG) is responsible for birth registration and the acquisition of nationality.<sup>385</sup> The Zimbabwean BDRA is the primary legislation that governs the registration of birth in Zimbabwe. As seen above, a prerequisite for the acquisition of

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<sup>375</sup> Section 3 & 4 of the Zimbabwean Citizenship Bill, 2018.

<sup>376</sup> Section 6 of the Zimbabwean Citizenship Bill, 2018.

<sup>377</sup> Section 6 (2) of the Zimbabwean Citizenship Bill, 2018.

<sup>378</sup> Section 6 (2) of the Zimbabwean Citizenship Bill, 2018.

<sup>379</sup> Section 11 of the Zimbabwean Citizenship Bill, 2018.

<sup>380</sup> Section 11 of the Zimbabwean Citizenship Bill, 2018.

<sup>381</sup> Section 6(a) (i) of the Zimbabwean Citizenship Bill.

<sup>382</sup> Section 6(b) (i) of the Zimbabwean Citizenship Bill.

<sup>383</sup> As amended in 2005.

<sup>384</sup> ZIMSTAT 'Zimbabwe multiple indicator cluster survey 2014. Final report. Harare: ZIMSTAT' (2015) available at

[http://www.zimstat.co.zw/sites/default/files/img/publications/Health/MICS2014/MICS2014\\_Key\\_Findings\\_Report.pdf](http://www.zimstat.co.zw/sites/default/files/img/publications/Health/MICS2014/MICS2014_Key_Findings_Report.pdf) [accessed on 8 September 2019].

<sup>385</sup> UNICEF 'Zimbabwe' (2019) available at <https://data.unicef.org/crvs/zimbabwe/> [accessed on 20 November 2019].

citizenship is having a birth certificate. The Zimbabwean BDRA has yet been amended to be in line with the Zimbabwean Constitution. Section 10 and 11 of the Zimbabwean BDRA provides that the birth of a child must be registered and makes provision for other parties, such as caregivers that are above the age of 18 and present at the birth, to register the birth of the child. The registration of the birth of the child must be done within 42 days from the birth of the child.<sup>386</sup> For a birth registration done outside of Zimbabwe, the same requirements apply as given in section 10 and 11 of the Zimbabwean BDRA and the child will be a citizen by descent.

Section 12 (2) (b) of the Zimbabwean BDRA provides that a father can only register the birth of a child born out of wedlock and in his name, if the mother is accompanying him at the registration of the child or if the mother is dead or has abandoned the child and is accompanied by someone that can identify him as the father. An argument was made that this section is in violation of the prompt birth registration of a child and the child's right to a family name as provided for in the Zimbabwean Constitution.<sup>387</sup> Further it was argued that confirmation of the paternity of the child by a family relative was incorrect as it was not scientific or accurate.<sup>388</sup> The court held that section 12(2) (b) of the Zimbabwean BDRA was not unconstitutional and therefore the requirements set by this section is still applicable. This section could cause a delay in a child's birth registration if the father is not married to the mother of the child and the mother's family is not willing to confirm his paternity of the child, as required by section 12 (2)(b) of the Zimbabwean BDRA.

Farm workers of foreign descent often do not have access to birth registration and are considered one of the most vulnerable groups in Zimbabwe.<sup>389</sup> Zimbabwe should ensure that all children are granted a birth certificate and that it is not subject to the origin of their parents.<sup>390</sup> Birth registration should also be made accessible to children born in rural areas. This can be done through Information Communication technology

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<sup>386</sup> Section 11 (2) (a) of the Births and Deaths Registration Act of 1986, as amended in 2005 (the Zimbabwean BDRA).

<sup>387</sup> Section 81(1) (b) of the Zimbabwean Constitution.

<sup>388</sup> *Paunganwa v Register of Births & Deaths & Another 9HH 406-16 HC 9462/10* [2016] ZWHHC 406 (*Paunganwa Case*).

<sup>389</sup> Matimaire, K 'Zimbabwe: Farm workers of foreign descent vulnerable to statelessness' (2019) Citizenship Rights in Africa Initiative available at <https://citizenshiprightsafrika.org/zimbabwe-farm-workers-of-foreign-descent-vulnerable-to-statelessness/> [accessed on 18 December 2019].

<sup>390</sup> Save the Children 'UPR- Zimbabwe Child Rights Organizations' Submissions' (2011) 5.

(ICT) that can better keep records of birth registration and make birth registration more accessible.<sup>391</sup>

### **3.3.5 The Refugees Act No. 13 of 1978<sup>392</sup> (the Zimbabwean Refugees Act)**

The Zimbabwean Refugees Act makes no mention to children and as a result overlooks the vulnerabilities of children in regards to migration and forced displacement.<sup>393</sup> This causes that there is a lack of documentation and therefore can cause statelessness in regards to unaccompanied and separated minors.<sup>394</sup> The Zimbabwean Constitution does provide for the protection of people at risk of statelessness and the gaps in the legislation does not make provision of children at risk of becoming stateless. Zimbabwe has also signed the 1954 Convention relation to the status of a stateless person and acceded to the 1951 Convention relating to the Status of refugees. This means that there is an obligation on Zimbabwe to make provision for stateless persons and refugees. Due to the vulnerability of children classified as refugees, it is of importance that Zimbabwe makes provision for these children within the Zimbabwean Refugees Act. It has been reported that child protection within refugee camps in Zimbabwe is a major issue with significant low school attendance, early marriages and pregnancies, complaints about lack of foster care afforded to unaccompanied and separated children, and child labour.<sup>395</sup> A child that is stateless is vulnerable and at risk of exploitation as they have no legal identity and the lack of protection afforded to them by the Zimbabwean Refugee act is not within the best interest of the child.

### **3.4 Conclusion**

After a detailed discussion and analysis of the various national instruments, the application thereof and the issues surrounding citizenship, birth registration statelessness among children, there are many issues in South Africa and Zimbabwe that violates not only of stateless children's right to nationality but also their fundamental rights as identified above. It is seen above that South Africa national legislation has various gaps that potentially violate international and regional human rights instruments that South Africa is a party to these violations include gender discrimination on both

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<sup>391</sup> Save the Children 'UPR- Zimbabwe Child Rights Organizations' Submissions' (2011) 6.

<sup>392</sup> As amended by Act No 22 of 2001.

<sup>393</sup> Nolwazi, N, Chimbwanda, T and Ncumisa, W 'Citizenship Alterities: The case of childbirth registration in the Tongogara Refugee camp of Zimbabwe' (2019) African Journal for Social Work 67.

<sup>394</sup> Nolwazi, N, Chimbwanda, T and Ncumisa, W 'Citizenship Alterities: The case of childbirth registration in the Tongogara Refugee camp of Zimbabwe' (2019) African Journal for Social Work 67.

<sup>395</sup> 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, 26th Session' (2016) 5.

undocumented mothers and the fathers of children born out of wedlock. The government also has a negative attitude to provide access to citizenship to children that are perceived to be non-national. Also, the lack of legislation governing asylum and refugee status for children is alarming. On a positive note the case law in South Africa regarding citizenship and statelessness shows that through law reform and strategic litigation, the gaps that exist in South Africa's law can be remedied.

In Zimbabwe the enactment of the 2013 Zimbabwean Constitution provides comprehensive laws regarding the acquisition of citizenship, particularly the acquisition of citizenship to children born in and outside of Zimbabwe. The cost of citizenship through registration is however alarming and does cause that many people eligible for the acquisition of citizenship in this manner may not be able to have access to it. Another problem in Zimbabwe's domestic law is that the Zimbabwean Citizenship act has yet to be brought in line with the Zimbabwean Constitution and this causes uncertainty in regards to the acquisition of citizenship. Zimbabweans courts have however been proactive in developing the law to bring it more in line with the Zimbabwean Constitution by permitting dual citizenship to Zimbabweans that are citizens by birth. The Zimbabwean Refugee act does not make provision for children and as a result places children that qualify for refugee status in a compromising position causing them to be undocumented and at risk of being stateless.

In Chapter 4 a conclusion and recommendations will be made on how South Africa and Zimbabwe can reform their law and practices to prevent childhood statelessness. The recommendation will focus firstly on mechanisms under international law that can aid South Africa and Zimbabwe in addressing childhood statelessness and children that are at risk of statelessness. Secondly recommendations will be made based on the legislative, administrative and other measures South Africa and Zimbabwe can implement to address and prevent childhood statelessness.

## CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

### 4.1 Conclusion

In this thesis the international and regional African law pertaining to the right to nationality and childhood statelessness was examined and it was determined whether it effectively provides protection against childhood statelessness. Though there are various international and regional instruments that protect children against statelessness, the application of these instruments determines the effectiveness of the protection provided. Both South Africa and Zimbabwe have ratified the CRC and the ACRWC and therefore there is an obligation on both these countries to ensure that their domestic law is in line with these two instruments, which provide for the right of a child to acquire nationality.

In South Africa, at first glance it may seem as if the domestic law makes provision for birth registration and the acquisition of the nationality to a child. Though provision is made, there is still a gap in the law and therefore childhood statelessness remains an issue within South Africa. In various case law discussed, it is clear that the DHA is reluctant to provide nationality to children that are born to non-national parents and who have no access to any other nationality. This is more of a political mechanism where the South African government does not want to set a precedent of easily allowing children South African citizenship and as a result children that are at risk of being stateless, fall between the cracks. The reluctance of South Africa to provide a definition of statelessness, also shows that they are not willing provide for the best interest of the child to have acquired nationality, and do not want to acknowledge that statelessness is a problem. The backlog in processing asylum seekers and refugee applications create a cascading effect where people establish a family within South Africa without documentation and as a result are unable to register the birth of their children, because of their lack of documentation. The use of the judiciary is very important is addressing the issues of childhood statelessness, an example is the DGLR case where the court amended the legislation to be in line with international law and to enable the applicant to acquire nationality.

In South Africa lack of documentation is often confused with statelessness. This is one of the reasons it is important that South Africa establishes a stateless determination procedure, to correctly identify children that are indeed stateless and not just merely

lacks documentation. South Africa lacks procedural guidelines for the acquisition of nationality and is therefore in violation of their obligation to incorporate the CRC and ACRWC into their domestic law. In South Africa there are increasing signs of the lack of political will to afford non-citizens including stateless children services including the possibility to acquire a nationality.<sup>396</sup> The South African government uses nationality as a weapon against migrants from other African countries and most of the stateless population in South Africa consists of migrants, refugees and asylum seekers from other African countries.<sup>397</sup> The DHA proposed new regulations to the South African BDRA in 2018 to introduce 'birth confirmation' instead of birth certificates for children of non-national parents with is extremely troublesome and shows the States attitude towards the protection of children born to non-nationals and that childhood statelessness is not deemed an area of concern by South Africa. The DHA also has an attitude of uses the defence of "illegal' migrants are seeking legal loopholes that would compromise the country's security<sup>398</sup> in cases against granting citizenship.

Zimbabwe has been said to face the biggest citizenship crises in Southern Africa.<sup>399</sup> In Zimbabwe, citizenship law is used as a political tool and as a result political exclusion has led to many children being left at risk of statelessness.<sup>400</sup> The ruling party ZANU-PF implemented restrictive citizenship laws as a tool to prevent farm workers from other African countries, from accessing citizenship, even though most were born in Zimbabwe.<sup>401</sup> The amendment to the Zimbabwean Constitution, expanded citizenship law, but until recently accessing citizenship in Zimbabwe remains a struggle. The biggest issue is that the Zimbabwean Constitution and the Zimbabwean Citizenship Act is in conflict with each other regarding birth registration and providing nationality to children. The Zimbabwean Constitution provides various ways in which provision is

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<sup>396</sup> Mbiyoz, A 'Statelessness: an old problem with new threats' (2019) available at <https://www.dailymaverick.co.za/article/2019-11-13-statelessness-an-old-problem-with-new-threats/> [accessed on 20 November 2019].

<sup>397</sup> Mbiyoz, A 'Statelessness: an old problem with new threats' (2019) available at <https://www.dailymaverick.co.za/article/2019-11-13-statelessness-an-old-problem-with-new-threats/> [accessed on 20 November 2019].

<sup>398</sup> Broughton, T 'Mother challenges home affairs' (2019) available at <https://mq.co.za/article/2019-08-16-00-mother-challenges-home-affairs> [accessed on 20 November 2019].

<sup>399</sup> Citizenship Rights in Africa Initiative 'Southern Africa' (2018) available at <http://citizenshiprightsafrika.org/region/southern-africa/> [accessed on 20 November 2019].

<sup>400</sup> Mbiyoz, A 'Statelessness in Southern Africa - Time to end it, not promote it' (2019) Institute for Security Studies (ISS) 13.

<sup>401</sup> LHR 'Statelessness in Zimbabwe, the only country they have ever called home' (2011) available at <https://www.lhr.org.za/news/2011/blog-stateless-zimbabwe-only-country-they%E2%80%99ve-ever-called-home> [accessed on 20 November 2019].

made for the registration for birth and that this is a prerequisite for a child acquiring nationality. The Zimbabwean Constitution also does not distinguish between citizenship by descent and citizenship by birth. It is important that the Zimbabwean Citizenship act is amended to reflect the manners in citizenship can be acquired as provided for in the Zimbabwean Constitution. It is of the utmost importance that the questions regarding citizenship of child to unknown parents and children with no claim to Zimbabwean citizenship is addressed. The high cost of registration for Zimbabwean citizenship should also be addressed as children that qualify for citizenship by registration will be denied citizenship because of their inability to pay the registration fee.

South Africa and Zimbabwe should as individual countries and in co-operation with each other provide for the protection of children against statelessness. Both these countries have an obligation to uphold the best interest of the child and in no instances can childhood statelessness be justifiable. It is important that both these countries create awareness among the people in its territory surrounding statelessness and how a child could be at risk of statelessness. It is also important that statelessness be widely addressed and defined and not be ignored as a problem that does not occur within the country. The issue of data collection has also been raised as a concern for both countries and also an indication of lack of political will by the government of both countries to acknowledge the rising issue of childhood statelessness.<sup>402</sup>

## **4.2 Recommendations**

### **4.2.1 International law**

In chapter 2 both the 1954 Convention and 1961 Convention was discussed and how it provides for the protection of stateless individuals. South Africa is not a party to either of the Conventions relating to statelessness and while Zimbabwe has acceded to the 1954 Convention, however it has failed to incorporate into their domestic law. In order to effectively prevent and reduce childhood statelessness, it would be of paramount importance that both countries accede to the 1954 Convention regarding the status of stateless persons and the 1961 Convention on the reduction of statelessness and ensure that their domestic law is in line with these two conventions.

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<sup>402</sup> Committee on the Rights of the Child (2016) 'Concluding observations on the second periodic report of South Africa' CRC/C/ZAF/CO/2 para 11&12. Committee on the Rights of the Child (2016) 'Concluding observations on the second periodic report of Zimbabwe' CRC/C/ZWE/CO/2 para 18&19.

One of the main ways to effectively prevent statelessness is by a country establishing a stateless determination procedure (SDPs). The importance of determining whether a person is stateless is to ensure that he or she has access to basic human rights and their right to dignity is protected until they are granted a nationality.<sup>403</sup> The 1954 Convention demonstrates a level of treatment which is specifically for stateless persons, thus it is important for states to have procedures to determine whether a person is in fact stateless.<sup>404</sup> Therefore in order for South Africa and Zimbabwe to provide effective protection for stateless children, it is important that each country establishes procedural framework to identify and define who is stateless. The 1954 Convention also provides a definition for statelessness and this definition can be implemented as a guide for the above mention SDPs.

The 1961 Convention as mentioned in Chapter two, makes provision for children born in the State that would be 'otherwise stateless'.<sup>405</sup> It is recommended that South Africa and Zimbabwe ratify the 1961 Convention as the ratification will place a duty on the State party to incorporate into their domestic law, law that provides for birth registration as a mechanism to obtain nationality for children that would be 'otherwise stateless' and to effectively provide protection for foundlings from being at risk of statelessness. The 1961 Convention can aid these countries to effectively develop their law to protect children from being at risk of statelessness.

As mentioned in Chapter 2, the SDGs require countries to submit Voluntary National Review (VNR) that tracks the progress that the country is making towards the implementation of the SDGs.<sup>406</sup> Neither South Africa nor Zimbabwe included in their report the issue of childhood statelessness. This shows the lack of commitment of the country to address the issue of the right to nationality of children. It is recommended that in the process of the VNR that South Africa and Zimbabwe place more focus on reporting on the issue of eradicating childhood statelessness.

The Global Action Plan aims to resolve existing situations of statelessness, prevent new instances of statelessness from occurring and to effectively identify and protect

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<sup>403</sup> UNHCR 'Statelessness determination procedures- Identifying and protecting stateless persons' (2014)

<sup>404</sup> UNHCR 'Expert Meeting- Statelessness Determination Procedures and the Status of Stateless Persons: Summary Conclusions' (2010) 2.

<sup>405</sup> Article 1 of the 1961 Convention.

<sup>406</sup> See Chapter 2, pg 26.

stateless persons.<sup>407</sup> If South Africa and Zimbabwe were too effectively implementing the above-mentioned Action Plans within their legislation, both countries would be able to eradicate childhood stateless. The Action Plans aid as a guide for States to bring their domestic legislation in line with global practices that are aimed at the eradication and prevention of childhood statelessness.

#### **4.2.2 Legislative Measures:**

In Chapter 3 the domestic legislation of South Africa and Zimbabwe in regards to birth registration and citizenship law was discussed. This Section will focus on the amendments that should be made to domestic law to ensure that children are protected from being at risk of statelessness and that the domestic law is in line with international and regional African human rights law.

The Zimbabwean Constitution provides extensively for manners in which citizenship can be acquired. Article 36 (2) provides that for a child born outside of the territory of Zimbabwe to be deemed a citizen, the birth had to be registered in line with the Zimbabwean BDRA. This provision can cause a child not to be recognised as a Zimbabwean citizen because his or her birth was not done in line with the Zimbabwean BDRA, which provides that a child should have a valid birth certificate. This provision should be amended to give citizenship to child based on the citizenship of their parents and allow the parents to apply for late registration of the child, if the country where the child was born failed to provide the child with a valid birth certificate.

The primary legislation in South Africa relating to citizenship is the South African Citizenship Act. Section 2(2) of the South African Citizenship Act provides for nationality to be bestowed upon children that are born stateless in South Africa. There is no regulation that provides for the application for citizenship under Section 2 (2) of the South African Citizenship Act. In order for this application to be implemented effectively, it would require that a regulation is established by the DHA, in which a form is provided for a child or a parent of a child to apply for citizenship under Section 2(2) and that, as mentioned above, an effective statelessness determination procedure is established to identify children that are born stateless in South Africa.

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<sup>407</sup> See Chapter 2, pg 26.

The Zimbabwean Constitution makes no provision for children that would otherwise be stateless, and no provision is made for a mechanism that is used to determine whether a person is indeed stateless. The Zimbabwean Constitution should make provision that citizenship will be provided to children that would be otherwise stateless and that a stateless determination procedure is established to aid officials in recognising children that are at risk of being stateless.

Section 4(3) of the South Africa Citizenship Act allows for a child to apply for naturalization when they attain majority. This is only applicable to children born after 2013 and that fulfils all the requirements to apply for naturalisation in terms of Section 4(3). This Section should be amended to allow children to apply for citizenship by naturalisation prior to reaching majority and that children born prior to 2013, should be permitted to apply for naturalisation.

Article 38 of the Zimbabwean Constitution provides for citizenship through registration, this is however subject to various requirements. The cost of citizenship through registration is also very expensive and therefore unobtainable to the majority of people resident in Zimbabwe. The cost of citizenship by registration should be removed and the stringent requirements should be amended to make it more accessible to children that are at risk of being stateless and have no other way of obtaining citizenship in Zimbabwe.

Regulation 4 and 5 of 2014 to the South African BDRA only makes late birth registration accessible to South African citizens. As a result children born to non-national parents will not be afforded late birth registration and therefore could be at risk of statelessness. Regulation 4 and 5 of the South African BDRA must be amended to ensure that all children have access to late birth registration. The fee for late registration should be removed to ensure that all children in South Africa have access to birth registration.

The Zimbabwean BDRA does provide for late birth registration, it is however subject to stringent requirements. Due to the low birth registration in Zimbabwe, more must be done to promote birth registration. One way this can be done, is by making birth registration more accessible and to remove any undue requirements that may hinder the late birth registration of a child. By removing stringent requirements like providing a

witness of a birth with a national identity card, will enable more parents or guardians to register the birth of their child.

Regulation 3, 4 and 5 of 2014 to the South African BDRA states that in order to register the birth of the child, the parents have to provide a proof of identity or valid passport with a permit. These regulations should be amended to allow undocumented parents to register the birth of their child.

Section 9 of the South African BDRA read with Regulation 3 of 2014 to the South African BDRA does not allow relatives to register the birth of a child unless the ID document of the mother is provided and both parents are deceased. This Section should be amended to allow legal guardians to register a child's birth in instances whether the parents are alive, however not able or available to register the birth.

Section 12 of the South BDRA provides for the registration of children that have been abandoned and whose birth had not previously been registered. This Section also requires that the child be registered as 'foreign' if there is reasonable suspicion that the child seems as if they are non-national and the birth of abandoned children is only applicable for very young children. The South African BDRA must be amended so that Section 12 is extended to all abandoned children and not just young children. All abandoned children birth should be registered and should receive citizenship if they would 'otherwise be stateless' and no distinction should be made on whether a child appears 'foreign' or not.

Regulation 7 and 8 of the South African BDRA makes provision that migrants must provide proof of legal residence to register the birth of their child. This requirement places an onerous burden on the applicant, as there is a backlog in South Africa in processing asylum-seekers documents and as a result many migrants do not have the correct documents to prove legal residence. This regulation should be amended that all parents that apply for birth registration, are given unabridged birth certificates with an ID number.

Regulation 12 of 2014, to the South African BDRA, provides that a child born out of wedlock, birth can only be registered by the mother and only by the unmarried father, if consent was given by the mother. This Section should be amended to allow unmarried

father to register the birth of their child without needing the consent of the mother. Due to the importance of birth registration it would be an unreasonable not to allow an unmarried father to register the birth of his child, if the mother of the child is unavailable or unreachable.

Section 12(2)(b) of the Zimbabwean BDRA provides that a father can only register the birth of his child is his name if the mother is accompanying him or if the mother is dead, that the father can provided a witness that he is in fact the father.<sup>408</sup> The requirement that a father may only register the birth of a child if the mother is dead or has abandoned the child is detrimental to the best interest of the child to have his or her birth registered and the requirement that a witness prove paternity if not accurate and has the potential of being fraudulent. This Section should be amended to allow unmarried fathers to register the birth of their child without being subject to any restrictive requirements.

Section 31 (2)(b) of the South African Immigration Act provides that the Minister of Home Affairs has the discretion to grant children with permanent residence in exceptional circumstances, one being that the child is at risk of statelessness. This does not remedy the fact that the child remains stateless until being a permanent resident for 5 years and then only qualifying to apply for citizenship. South Africa should as far as possible realise the right of a child to acquire a nationality and provide the right of a child to healthcare and education regardless of their legal status. This Section should also be amended that if the child is deemed at risk of statelessness, the child be granted citizenship rather than permanent residence.

The Zimbabwean Citizenship Act has not been amended to reflect the Zimbabwean Constitutions position on citizenship. The Zimbabwean Citizenship Act has to be brought in line with the Zimbabwean Constitution. There is a Zimbabwean Citizenship Bill that has been accepted by Parliament; however, it has yet to come into effect. It is important that the Zimbabwean Citizenship Bill comes into effect to remedy the confusion created by the conflict that arises between the Zimbabwean Constitution and the Zimbabwean Citizenship Act.

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<sup>408</sup> See Chapter 3, pg. 19.

The Zimbabwean Refugees Act does not make reference to children and therefore does not provide for documentation of children that have applied for asylum or refugee status. The Zimbabwean Refugees act should be amended to make provision for unaccompanied minors that apply for asylum seeker or refugee status and that specific provision must be given to these children and whether they are at risk of being stateless.

#### **4.2.3 Administrative Measures**

As mentioned in Chapter 3, there is a lack of guidelines that is provided in South Africa and Zimbabwe for officials in regards to birth registration and granting nationality. The interpretation of legislation that provides for birth registration and acquisition of nationality is left to the interpretation of officials and as a result is not implemented effectively and may lead to inadequate application.

In South Africa the DHA is responsible for the administration of birth registration and the administrative aspect of the acquisition of nationality. DHA officials should be trained to ensure that they fully understand the legislation pertaining to birth registration and the importance of birth registration. DHA officials should also be informed of any regulations made to the South African Citizenship act and the effect it has on the acquisition of citizenship. DHA officials should also assist caregivers in registering the birth of the child, if the parents are not able to register the child. Discrimination should also not occur towards non-national parents to register the birth of their child. Effective regulations should be adopted to ensure that the discretion of the DHA officials to register the birth of the child is minimal and that in instances of childhood statelessness, citizenship should be provided to these children if they are at risk of statelessness.

In Zimbabwe the MHA and DRG is responsible for birth registration and the acquisition of nationality.<sup>409</sup> Under the current Zimbabwean Citizenship act birth registration is subject to the discretion of the DRG and is not accessible to all children in Zimbabwe, specifically children born to farm-workers are most likely not to register the birth of their child and as a result can therefore not access nationality, as birth registration is a prerequisite for nationality in Zimbabwe. Regulations must be implemented to ensure that birth registration and access to nationality is not in the sole discretion of the DRG

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<sup>409</sup> See Chapter 3, pg. 55.

and that it is in line with Zimbabwe obligation to incorporate the CRC and ACRWC into their domestic legislation. Zimbabwe should amend the Zimbabwean Births and Deaths Registration Act to ensure that all children born in Zimbabwe, regardless of the parents' origin, receive birth certificates.<sup>410</sup>

#### 4.2.4 Other measures

In South Africa and Zimbabwe birth registration in urban areas is much higher than in rural areas. In both countries birth registration should be made more accessible to all children regardless of whether they live in urban or rural areas. A manner in which to address this is to set-up mobile registration throughout areas that are not easy to access to and to promote birth registration and ensure that all children births are registration. Education about the importance of birth registration will also aid parents and caregivers to ensure that the birth of their child is registered. Education regarding statelessness is also important, as a child may not be aware that they are at risk of being stateless until they have trouble accessing education, healthcare and other social security. South Africa and Zimbabwe should establish a national data base that determines the amount of children that are stateless or at risk of statelessness.

In South Africa, one of the most effective ways of addressing childhood statelessness was through litigation. Strategic litigation can be used to address the issue of childhood statelessness through the court system. In this manner, courts are given the opportunity to interpret legislation and ensure that the right to nationality is correctly applied. When using strategic litigation as a tool to address childhood stateless, it is important that the defendant and the issue before the court are correctly identified.<sup>411</sup>

In order to address the issue of stateless children in South Africa that are from Zimbabwe, South Africa and Zimbabwe can enter into a bilateral agreement in which children are able to apply for Zimbabwean citizenship while resident in South Africa. This should be extended to children from asylum seekers and refugees from Zimbabwe and these parents and children should not be at risk of persecution when such individuals apply for citizenship from outside the territory of Zimbabwe.

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<sup>410</sup> See Chapter 3, pg. 55.

<sup>411</sup>Weiss, A 'Strategic litigation to address childhood statelessness' (2017) Worlds Stateless Children – ISI available at <http://children.worldsstateless.org/3/litigating-against-childhood-statelessness/strategic-litigation-to-address-childhood-statelessness.html> [accessed on 19 December 2019].

South Africa and Zimbabwe fall within the SADC region. The SADC Parliamentary Forum adopted a resolution aimed at addressing statelessness within the region. One of the resolutions is that countries within the area work towards adopting and developing a SADC Ministerial Declaration and Action Plan to address statelessness.<sup>412</sup> By implementing this on a regional level, it would be within the best interest of South Africa and Zimbabwe to work together within the SADC community to establish an Action Plan to address statelessness, specifically childhood statelessness. This can be achieved by allowing the Freedom of Movement of people with the SADC region. South Africa and Zimbabwe should also seek technical assistance from UNICEF, Office of the High Commissioner for Human Rights and the Office of the High Commissioner for Refugees to effectively address childhood statelessness.



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<sup>412</sup> SADC Parliamentary Forum 40<sup>th</sup> Plenary Assembly Session, 3-15 November 2016, Harare, Zimbabwe.

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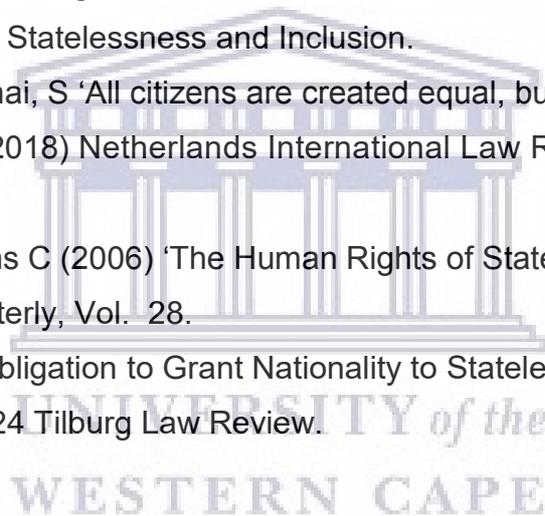
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