LEGAL RESPONSES TO THE RIGHT TO NATIONALITY AND PREVENTION OF STATELESSNESS AMONG CHILDREN IN AFRICA

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DECLARATION

By submitting this dissertation electronically, I, **Ayalew Getachew Assefa**, declare that **Legal Responses to the Right to Nationality and Prevention of Statelessness Among Children in Africa** is my original work, which has never been presented to any other University, or to the University of the Western Cape. I have acknowledged the work of others and provided references correctly.

Signature 

Date: 14 December 2022

Signature

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NB. The information contained in this thesis is valid as at November 2022.

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Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on the Rights and Welfare of the Child
AfCHPR	African Court on Human and Peoples' Rights
AU	African Union
CAR	Central Africa Republic
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	The Convention on the Rights of the Child
CERD	Elimination of All Forms of Racial Discrimination
DRC	Republic of Congo
ECOWAS	Member States of the Economic Commission of West African States
ECN	European Convention on Nationality
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IOM	International Organisation for Migration
ILA	International Law Association
ISI	Institute of Statelessness and Inclusion
OHCHR	Office of the High Commissioner for Human Rights
OCHA	UN Office for the Coordination of Humanitarian Affairs
UDHR	The Universal Declaration on Human Rights
UN	United Nation
UNICEF	United Nations Children's Fund

UNHCR	The Office of the UN High Commissioner for Refugee
UPR	Universal Periodic Review

Abstract

The challenge of statelessness among children is a persistent problem that requires a wide range of measures. Already constituting a societal group in a vulnerable situation, children born into situations of statelessness often find it difficult to access essential services they are entitled to and to meet their basic developmental needs. Studies reveal that statelessness affects several million worldwide, among whom the most vulnerable are children, representing 60 per cent of the global stateless population. Although international and regional laws protect every person's right to a nationality, statelessness among children persists as a human rights challenge globally as well as in Africa.

Children find themselves stateless due to various reasons and in different situations. Principally, there are cases where children are born stateless without being able to identify a state that should grant them nationality; such cases occur for various reasons, including inequitable laws, transfers of territory between countries, flawed or discriminatory administrative practices, and lack of birth registration. Children become stateless later in life due to measures states may take in withdrawing their or their parents' nationality without ensuring that they acquire nationality from another country. The situation is exacerbated by factors such as conflicts, forced displacement and other forms of movements, harmful traditional practices and the general disregard for the child in the political, legal and economic discourse of countries at the domestic level.

This thesis explores the legal responses that countries have put in place to ensure the right to nationality and prevent statelessness among children in Africa. At the centre of this thesis is the argument that ensuring the right to nationality and preventing statelessness among children would be futile if it fails to take child protection systems and mechanisms as its core. Substantiating its arguments, the thesis takes inspiration from Pan-African initiatives, case laws, relevant jurisprudence at national and international levels and an interdisciplinary approach to theories of nationality.

Keywords – Statelessness, Nationality, Child rights, Legal Responses, Legislative Measure, African Responses.

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Chapter One:
Legal Responses to the Right to Nationality and Prevention of Statelessness among Children in Africa: Setting the Context

1.1. Proposal

1.1.1 Background

'If our future hopes are to be realised, that generation must be a meaningful part of the present. None of our children should be stateless. All children should belong.'[1]

Statelessness is an old problem affected by rapidly changing new dynamics and impacting on millions of people worldwide. Though the question, 'How many people are stateless in the world today?' does not have an easy answer, there is a consensus on the ever-increasing gravity of the problem. Counting the stateless is methodologically difficult, mainly due to the invisibility of stateless people. One needs to belong and be recognised by a certain polity to be counted. Moreover, identifying statelessness is complicated by the fact that in some contexts the issue is politically charged.[2] This was further evidenced by the author's experience of participation in meetings and conferences involving representatives of various African governments, where many tend to deny the existence of the problem of statelessness in their territories. Hence, national authorities hardly record and keep information regarding the size and magnitude of stateless communities in their jurisdictions.

However, attempts, have been made by a diverse range of organisations, including United Nations (UN) agencies, research institutes, international humanitarian and development actors, and academia to record and report on the number of stateless people globally. In 2014, the Office of the UN High Commissioner for Refugees (UNHCR) launched the IBelong Campaign to End Statelessness by 2024. Recognising the lack of data and statistics on statelessness as a major challenge, a target was set to increase the number of states with quantitative estimates of the size of their stateless populations from 75 to 100 by 2017, but the UNHCR managed to report statelessness data for only 79 countries by 2020.[3] The UNHCR reported a global number of 4.2 million stateless persons, including those of undetermined nationality, in 76 countries at the end of 2019.[4]

However, as the report by the UNHCR indicates, the true extent of statelessness is estimated to be much higher, 'as fewer than half of all countries in the world did not submit any data

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[1] Antonio Guterres, former UN High Commissioner for Refugees.

[2] Institute on statelessness and inclusion 'World's Statelessness: Deprivation of Nationality (2020) 13-14.

[3] UNHCR 'Campaign update October-December 2020' available at https://www.refworld.org/docid/5ffc72a84.html (accessed 5 February 2021).

[4] UNHCR 'Global Trends Forced Displacement in 2019' available at https://www.unhcr.org/5ee200e37.pdf (accessed 10 December 2020) 70.

and some of the most populous countries in the world with large suspected stateless populations do not report on statelessness at all'.[5] An analysis of global statistics produced by the Institute on Statelessness and Inclusion (ISI) in 2020 takes a different view, and projects the number of stateless persons globally to be 15 million.[6] Among the ten countries that report the largest stateless populations in the world, Côte d'Ivoire takes precedence. A 2019 study on statelessness in Côte d'Ivoire, jointly undertaken by the Ivorian government and the UNHCR, indicates that a total of 955,400 persons were reported as stateless in 2019, an increase of 263,400 from 692,000 in 2018.[7] The UNHCR's report *Global Trends* states that in Côte d'Ivoire, 'women and children are disproportionately affected … Children, for instance, make up 54 per cent of those identified as stateless, while accounting for 48 per cent of the general population of Côte d'Ivoire'.[8]

Statelessness remains a universal challenge affecting millions of people globally,with millions of children in vulnerable situations. In Asia and the Pacific region, a UNHCR report shows that an estimated 2.1 million people are stateless[9]. Myanmar, India, China and Indonesia hold the largest number of stateless people in Asia and the Pacific regions.[10] In India, the newly established Citizenship Act, which amended some of the provisions of the 1955 Citizenship Act,[11] created new cases of statelessness among Muslims and other minority sects by giving priority to Hindus, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians resident in India before 2014.[12] Other cases of statelessness in the region are reported in Bangladesh, Thailand, Syria, and Uzbekistan.[13]

In the Americas, despite the fact that most nationality law frameworks in the region already provide a combination of *jus soli* and *jus sanguinis* provisions and that the right to a nationality enjoys a strong position in domestic legal frameworks, statelessness remains a significant challenge. Reports show that more than 215,000 people in the region are stateless, mainly because of gaps in nationality laws, arbitrary deprivation of nationality, and restrictive administrative practices.[14] Statelessness is particularly grave in the Dominican Republic. On

[5] For instance, five countries that reported at the end of 2018 did not submit data for 2019, leaving 3,200 stateless persons unaccounted for; UNHCR (n 4 above) 56.

[6] ISI 'Statelessness in numbers: 2020 An overview and analysis of global statistics' (2020) available at https://files.institutesi.org/ISI_statistics_analysis_2020.pdf (accessed 12 January 2021) 1.

[7] UNHCR (n 4 above) 57.

[8] *Ibid.*

[9] UNHCR 'Who is stateless and where' available at http://www.unhcr.org/pages/49c3646c15e.html (accessed 1 April 2015).

[10] UNHCR, 'Global Trends Forced Displacement in 2018' available at: Latvia (accessed 10 April 2021) 42; ISI (n 6 above) 71.

[11] The Citizenship (Amendment) Act 47 of 2019; Agrahayana 21, 1941 (2019).

[12] New citizenship law in India 'fundamentally discriminatory': UN human rights office, https://news.un.org/en/story/2019/12/1053511 (accessed 10 December 2020).

[13] European Network on Statelessness (ENS) 'Statelessness in numbers: An overview and analysis of global statistics' (2020) available at https://files.institutesi.org/ISI_statistics_analysis_2020.pdf (accessed 12 January 2021).

[14] The State of Statelessness in the Americas: Implementing the UNHCR Action Plan, available at

23 September 2013, the nation's Constitutional Court retroactively stripped more than 200,000 people of Haitian descent of their Dominican nationality on the grounds that their parents held irregular migratory status (Constitutional Court Decision 168/13). The Court assumed that those affected by the decision would be entitled to Haitian nationality. However, gaps in Haitian nationality laws and the lack of a strong civil registry system resulted in statelessness among thousands of people. Despite legislative efforts made in 2014, and the 2020 decision which allowed the naturalisation of about 750 people born and raised in the country who had previously been deprived of citizenship due to the immigration status of their parents, the problem continues to affect scores of Dominican men, women, and children of Haitian descent.[15] In early 2020, reports showed that in the United States, the estimated number of people affected by or at risk of statelessness had reached about 218,000.[16] Other cases of statelessness in the region are reported in such countries as Barbados and the Bahamas, Colombia, Peru, Ecuador, Argentina, Chile and Brazil.[17]

As in the case of other regions, statelessness is also reported in Europe, with its causes traced mainly to the political upheaval of the 1990s, in particular the dissolution of the Union of Soviet Socialist Republics (USSR) and Yugoslavia.[18] Latvia, Russia, Estonia and Ukraine make up a large percentage of the total reported stateless population in Europe.[19] One of the main groups affected by statelessness in Europe are the Roma, a group of roughly 10 to 12 million who reside mainly in the Western Balkans and Ukraine.[20] Other cases of statelessness in the region are reported in such countries as Sweden, Norway, Denmark, Germany, Italy, Switzerland, Belgium, the Netherlands, Turkey and the United Kingdom.[21]

The root causes of statelessness vary across regions. For instance, in South East Asia and South Asia, discriminatory laws, policies and practices on the basis of gender, race and religion have contributed significantly to statelessness. Nepal, Brunei Darussalam, Malaysia and Kiribati continue to discriminate against women's ability to confer nationality on their children or spouses.[22] In Europe, migration is the main context in which statelessness arises.[23]

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https://www.statelessness.eu/updates/blog/state-statelessness-americas-implementing-unhcr-action-plan (accessed 10 December 2017).

[15] Seizing new opportunities to address statelessness in the Dominican Republic available at https://www.statelessness.eu/updates/blog/seizing-new-opportunities-address-statelessness-dominican-republic (accessed 25 January 2021).

[16] Centre for Migration Studies 'Statelessness in the United States: A Study to Estimate and Profile the US Stateless Population' available at https://cmsny.org/wp- content/uploads/2020/01/StatelessnessReportFinal.pdf (accessed 15 January 2020).

[17] World Stateless 2020 (n 2 above) 57.

[18] World Stateless 2020 (n 2 above) 91.

[19] Latvia has the largest stateless population, at 224,844, the only country in Europe with a stateless population of over 100,000; UNHCR Global Trends (n 10 above) 69.

[20] ENS 'Statelessness in Europe' available at https://www.statelessness.eu/issues (accessed 22 June 2021).

[21] Ibid.

[22] UNHCR 'Background Note on Gender Equality, Nationality Laws and Statelessness 2016' available at https://www.refworld.org/docid/56de83ca4.html (8 March 2016).

[23] With the increase in 2015 of migrants and refugees into Europe, the number of stateless persons in some

Moreover, the nationality laws of many European states have been found to fail to adequately protect children born on their territory from statelessness.[24] Other factors, such as child abandonment, international surrogacy or cross-border adoption, and systemic birth-registration obstacles for particular groups are also producing statelessness in Europe.

The scenarios above are just a few examples of statelessness where the numbers are estimated to be larger than what is publicly reported. Considering the challenges in quantifying statelessness, there are initiatives requesting that the statistics on stateless persons should be revised to account for a number of emerging factors, such as intensified cross-border migration, and a massive refugee influx.[25] For instance, as the World Bank indicates in a 2015 report,

> [i]n the last couple of years alone, some fifty thousand Syrian refugee children have been born abroad and over 70 per cent of them have not been registered at birth, making it almost impossible for them to prove their citizenship later on … in countries hosting the 20 largest stateless populations, at least 70,000 stateless children are born each year.[26]

The ISI also indicates that most of the studies undertaken by the UNHCR on the nature of statelessness in the world do not consider emerging contexts. These include developments in Assam, India, in 2019, which increase the risk of statelessness among various communities. Hence, the ISI estimates that there are at least 15 million stateless people globally.[27]

Statelessness is a status that occurs when a person 'is not considered as a national by any state under the operation of its law'.[28] Statelessness could leave people unable to exercise the rights that are derived from having a nationality of a particular country. If one is stateless, the implications are many- one may not have the birth of one's children registered or be able to enroll them in school; one may not have access to public health services, or be able to obtain travel documents; one may not get a job, or run for political office, or work for state institutions.

The reason why stateless persons find themselves in a situation where they are deprived of

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receiving states has grown significantly. For instance, in Sweden the reported figure for stateless persons in the country climbed from 20,450 at the end of 2013 to 31,062 at the end of 2015; the figure remained above 31,000 at the end of 2018; UNHCR, 'Global Trends; UNHCR Global Trends (n 10 above).

[24] ENS 'No Child Should be Stateless' available at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf (accessed 20 June 2017).

[25] M Dahan & J Edge 'The World Citizen: Transforming Statelessness into Global Citizenship' (2015) available at https://blogs.worldbank.org/digital-development/world-citizen-transforming-statelessness-global-citizenship (accessed 20 June 2017).

[26] *Ibid.*

[27] World Stateless 2020 (n 2 above).

[28] Article 1 of the Convention on the Status of Statelessness, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954; entered into force on 6 June 1960.

their rights is that they are not recognised as citizens of the country where they reside or by any other country. According to the 1961 Convention on Reduction of Statelessness (the 1961 Convention),[29] there are four main ways in which a person may become stateless: not obtaining a citizenship,[30] voluntarily renouncing his or her citizenship,[31] having his or her citizenship removed,[32] or by extinction of the state.[33] In cases where countries establish their modes of conferring nationality on the basis of laws with discriminatory provisions, it is very likely that statelessness may occur.

Statelessness may also result from gaps in and between the nationality laws of states, gaps and barriers in administrative practices, gaps in civil registration, particularly the lack of registration of births, in situations of state succession, the redrawing of international borders, and systematic marginalisation of specific racial, religious or ethnic minorities. In certain countries, as discussed in this thesis, there are groups or communities who, for a number of reasons, find themselves in a protracted marginalisation, leaving them in a legal limbo without the nationality of any state. Moreover, '[l]arge-scale statelessness may also arise in the context of mass expulsions and refugee movements, the formation of new states, resulting from decolonisation or the disintegration of a federal polity, may leave people stateless or at least with a disputed claim to citizenship'.[34]

The problem of statelessness is particularly acute in Africa, where hundreds of thousands of persons become stateless in the only country they have ever known.[35] The peculiar link of statelessness with the history of state formation and creation of borders, coupled with trans-border populations and migration in the continent, makes Africa a case study in this regard. The challenges of statelessness are particularly grave among children. Many stateless children grow up in extreme poverty and are denied basic rights and services such as access to education and health care. Lack of identity documentation limits their freedom of movement. They may also be subjected to arbitrary and prolonged detention, and be vulnerable to social exclusion, trafficking and exploitation.[36]

In response to the challenges that statelessness poses, various international and regional normative instruments have been established. Though it was not directly related to the question of statelessness, an attempt was made in 1930, under the auspices of the League of Nations, to draft The Hague Convention on Certain Questions Relating to the Conflict of

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[29] The UN Convention on the Reduction of Statelessness was adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly Resolution 896 (IX) of 04 December 1954; entered into force on 13 December 1975.

[30] Articles 1, 2, 3, 4, 8, & 9 of the 1961 Convention.

[31] Article 7 of the 1961 Convention.

[32] Articles 5 & 6 of the 1961 Convention.

[33] Article 10 of the 1961 Convention.

[34] UNHCR 'the State of the world's refugees- a humanitarian agenda' (1997) Chapter Six available at https://www.unhcr.org/3eb7ba7d4.html (accessed 10 July 2021).

[35] Open Society Initiative 'Fact Sheet: Children's Right to a Nationality' (2011) available at https://www.justiceinitiative.org/uploads/b40dcb99-8a9b-47f2-9f2f-d3be16dbdbd6/children-nationality-20110624.pdf (accessed 20 February 2018).

[36] *Ibid.*

Nationality Laws (the 1930 Convention).[37] Though the 1930 Convention provided some limits on the autonomy of states in matters of nationality, it was not 'rigorous enough to seriously impact on the existence of statelessness, nor has it ever attracted many State Parties'.[38] In the following decades, international law developed at a rapid pace in the areas of state sovereignty and nationality matters, which resulted in the current position of international law that 'favors human rights over claims of state sovereignty'.[39] This shift in international law led to the development of the 1954 Convention and the 1961 Convention.[40]

Looking at the response of the international community, the challenges of statelessness have, for a long period of time, generally been regarded as 'a minor problem affecting just a small number of people who fell into the interstices of the international system'.[41] As a result, the issue failed to attract a significant amount of attention from governments.[42] This can be inferred from the tardy levels of accession to the 1954 and 1961 Conventions.

Besides the 1954 and 1961 Conventions, the right to a nationality, as it relates to the prevention of statelessness, is protected under various international human rights laws. The Universal Declaration on Human Rights (UDHR)[43] provides that 'everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality'.[44] The right of every child to acquire a nationality was subsequently set out in the 1966 International Covenant on Civil and Political Rights (ICCPR),[45] which provides that '[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth the right to such measures of protection as are required by his status as a minor, on the part of his family, society and State'.[46] The 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD)[47] obliges States to 'guarantee the

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[37] L Van Waas 'Nationality matters: statelessness under international law' (2008) 37; The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930.

[38] Only 20 countries have signed the Convention; Van Waas (n 36 above) 40.

[39] UNHCR 'Nationality and Statelessness: A Handbook for Parliamentarians' (2005) available at http://www.unhcr-centraleurope.org/pdf/resources/publications/nationality-and-statelessness-a-handbook-for-parliamentarians.html (accessed 02 April 2015) 9.

[40] The drafting history and content of these two conventions is discussed in detail in Chapter Three.

[41] This was particularly the case during the Cold War as there was a period of relative stability in the configuration of states; The World's Refugees (n 33 above).

[42] *Ibid.*

[43] UDHR, proclaimed by the UN General Assembly in Paris on 10 December 1948 (General Assembly Resolution 217A).

[44] Article 15 of UDHR.

[45] International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976.

[46] Article 24 of the ICCPR; see too article 26 of the ICCPR, which also sets out a non-discrimination clause that applies broadly to nationality legislation and how it is implemented. It states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

[47] CERD, adopted by General Assembly Resolution 2106 (XX) of 21 December 1965; entered into force on 4 January 1969.

right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law', particularly in the enjoyment of several fundamental human rights, including the right to nationality.[48] Moreover, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[49] addresses a major cause of statelessness – discrimination against women in nationality laws – where it reads,

> States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.[50]

It further prescribes that States Parties shall grant women equal rights with men with respect to the nationality of their children.

The Convention on the Rights of the Child (CRC)[51] is exceptionally important when it comes to the protection of children's rights to nationality, not least because nearly every country has ratified it. Children's rights to acquire a nationality is guaranteed under article 7 of the Convention, which also obligates State Parties to implement this right in particular where the child would otherwise be stateless. Regarding African regional instruments, article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC)[52] recognises three interlinked rights and imposes an obligation on State Parties to take legislative measures to prevent statelessness among children.[53] Article 6(4) provides safeguards against statelessness where it imposes an obligation on State Parties to ensure that 'a child shall acquire the nationality of the State in the territory of which he/she has been born if, at the time of the child's birth, he/she is not granted nationality by any of other State in accordance with its laws'.[54]

In recognition that statelessness as a growing global challenge, this thesis examines factors that could lead to statelessness among children in Africa and the legal responses that could prevent it. The sections below present the statement of the problem, research questions, the scope of the study, and the methodology employed, all with a view to setting the scene for further discussion.

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[48] Article 5 of CERD.

[49] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the General Assembly on 18 December 1979 in resolution 34/180; entered into force on 3 September 1981.

[50] Article 9 of CEDAW.

[51] The Convention on the Rights of the Child (CRC) adopted by General Assembly Resolution 44/25 on 20 November 1989; entered into force on 2 September 1990.

[52] African Charter on the Rights and Welfare of the Child (ACRWC/the African Children's Charter), adopted by the Assembly of the OAU on 1 July 1990; entered into force on 29 November 1999.

[53] Article 6(1) of the ACRWC establishes the right to a name; article 6(2) provides for the right to birth registration; and article 6(3) provides for the right to a nationality.

[54] Article 6(4) of ACRWC.

1.1.2 Statelessness among children in Africa: Mapping the root causes and affected communities

Though statelessness is poorly documented in Africa, it is reported to be a significant challenge on the continent and its main causes are known.[55] The largest number of stateless populations in Africa are reported in four countries, namely Burundi, Cape Verde, Côte d'Ivoire and Kenya.[56] The immediate causes of statelessness in these four countries and beyond relate mainly to factors such as gaps in nationality laws, discriminatory provisions, lack of birth registration, conflicts, mobility and the creation of new states. For instance, gender discrimination in nationality laws remains one of the challenges that leave children stateless, or at the risk of statelessness. Though Africa has witnessed numerous reforms in nationality laws, as of July 2021 there are seven countries which fail to ensure equality between men and women relating to conferral of nationality upon children.[57] Eswatini[58] and Somalia[59] have provisions which do not allow mothers to confer their nationality on their children, with no, or very limited, exceptions.

Racial, religious, and ethnic discrimination are also present in the nationality laws of several African states.[60] Many African states do not have safeguards guaranteeing nationality to children born in their territory who would otherwise be stateless.[61] Moreover, cases related to state succession, migration, lack of functional birth registration systems, and lack of due process, as well as the broad discretion granted to state officials responsible for nationality and birth registration matters, constitute the main causes of statelessness in Africa.

The problem of statelessness in Africa has its roots mainly in the practices, laws and regulations inherited from the European colonial powers. In the 1960s and 70s, while African states in the post-colonial era were struggling with a 'nation-building' agenda, they could barely achieve what they aspired to because of a number of practical challenges. Citing Ranger, Manby explains the difficulty that colonisation imposed in African nationality laws:

> In Africa, the European colonial powers applied an extreme version of ascriptive membership, in two senses: both that the residents of annexed territories were

[55] B Manby, *Citizenship in Africa: The law of belonging* (2018) 312.

[56] UNHCR '2018 Global Trends: Persons under UNHCR's statelessness mandate' available at: https://www.unhcr.org/statistics/18-WRD-table-7.xls (accessed 20 June 2021).

[57] The countries are Burundi, Eswatini, Libya, Mauritania, Somalia, Sudan and Togo. Globally, there are 25 countries throughout the world with gender discriminatory provisions in their nationality laws: 11 in the Middle East and North Africa; six in Asia and the Pacific; two in the Americas; and seven in Africa; see UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness (2020) available at https://www.refworld.org/pdfid/5f0d7b934.pdf (accessed 17 August 2021).

[58] Eswatini's Constitution of 2005 stipulates that any child born inside or outside of Eswatini prior to 2005 to at least one Eswatini parent acquires Eswatini citizenship by descent; children born after 2005 acquire Eswatini citizenship only from their fathers.

[59] Article 2(a) of the 1962 Citizenship Law of Somalia provides that a child can acquire citizenship by operation of law if his or her father is a Somali.

[60] Manby (n 55 above) 60-62.

[61] Manby (n 55 above) 49-52.

> ascribed the nationality of their annexing State; and that 'natives' in Africa were subsequently ascribed the identity of particular 'tribes', which further determined the legal rules to which they might be subject. In neither case was there any ability to expatriate themselves and choose another allegiance (and, notoriously, tribes were often invented as much as described).[62]

For instance, most of the residents in the 'independent' territories spoke several hundred different languages, practised different religions, hosted many hundreds of thousands of people following a nomadic lifestyle, or included large settler populations from other parts of Africa or other parts of the world during the colonial period. This made the 'nation-building' process extremely difficult. Colonisation greatly increased the number of 'strangers' in any society, and also took questions of membership out of the control of the traditional systems of host communities.[63] It was difficult to establish nationality, whether based on birth or descent, as registration of births and documentation of the population before independence was rudimentary and often discriminated on grounds of race, religion or ethnicity.

Since independence, the trend to reduce rights to those based on birth in the territory has left some countries providing for nationality at birth exclusively by descent, sometimes not even allowing for abandoned infants. In addition, a number of countries have adopted nationality laws that explicitly discriminate on the basis of race, ethnicity or religion.[64] The legacy of the colonial and post-colonial eras, which includes inherited laws, has left many at risk of statelessness. There are migrants no longer living in their 'original' communities. Among these, perhaps the most important groups are those who migrated before independence and their descendants. In those countries with very limited rights based on birth in the territory, people who moved when borders within the same empire were open find themselves unwelcomed and unrecognised as nationals where they now live, even though they have little connection to their country 'of origin'.[65]

Moreover, there are cross-border populations, where the colonial powers drew lines on maps that completely disregarded commonalities of language, culture, religion, or lifestyle. Often, both states to which such populations might belong regard them with suspicion, leaving many unrecognised as citizens in either.[66] There are also children who cannot obtain recognition of the nationality of one or both of their parents, whether through discrimination on the basis of gender, or of birth out of wedlock, or because their parents are not known or are themselves not documented, or because their births were not registered in time, or they have been

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[62] Manby (n 55 above) 28 citing T Ranger 'The Invention of Tradition in Colonial Africa' in EJ Hobsbawm and TO Ranger (eds), *The Invention of tradition* (1983).

[63] M Chanock, Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia (1998).

[64] Discriminatory laws in nationality matters are discussed in detail in Chapter Four.

[65] The case of Côte d'Ivoire and the Democratic Republic of Congo; nationals of Eritrea and South Sudan, but who remained resident in Ethiopia or Sudan when the new states seceded; Stateless Persons in Africa available at http://www.worldsstateless.org/continents/africa/stateless-persons-in-africa (accessed 5 May 2019)

[66] The case of Bakassi peninsula between Nigeria and Cameroon. This includes nomadic populations in Africa; Stateless Persons in Africa available at http://www.worldsstateless.org/continents/africa/stateless-persons-in-africa (accessed 5 May 2019).

separated from their parents by war or as child workers trafficked to another country.

As has been the case elsewhere in the world, state succession, through the (re)drawing of borders and (re)definition of national belonging, has also led to statelessness in Africa, especially for minority groups and historical migrants who arrived pre-independence. As Ziemele writes, 'the period of decolonization in the 1960s and 1970s saw similar problems, with the emergence of many newly independent states'.[67] Nomadic and cross-border populations have been among those affected in this context. They continue to face practical and political challenges to acquisition or recognition of nationality today because relevant laws and procedures were not designed to accommodate them.[68] As discussed in Chapter Four, the laws and policies regarding matters of nationality are ill-adapted to deal with the realities of nomadic and cross-border communities and their children.

As discussed in Chapter five, people in situations of forced displacement, especially those without regular immigration status, are also among the affected communities as they frequently face difficulties acquiring documentation that could enable them to obtain nationality in their country of residence. Refugees, and especially former refugees, from countries where it has been declared that the circumstances justifying refugee status no longer apply, and that a refugee document no longer provides a valid immigration status, face similar difficulties.[69] Although this thesis argues against the notion of 'inheritance of statelessness', the challenges of immigration may generate statelessness in subsequent generations, particularly among those who are born outside their parents' country.

The problem of statelessness among children in Africa can also be examined within the context of historical and political antecedents of the various geographical regions.[70] In West Africa,[71] migration and prolonged conflicts are the root causes of statelessness among children in the region. As discussed in Chapter five, migration and forced displacement may rupture the bond that people on the move have with their countries of origin, leading to a high risk of statelessness.

There are also countries with discriminatory nationality laws that create statelessness in West African countries. The UNHCR states that 'the overwhelming majority of stateless persons in West Africa are stateless within their own country, lacking proof of the criteria required to guarantee their nationality'.[72] Lack of birth registration is also another practical challenge that

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[67] I Ziemele 'State succession and issues of nationality and statelessness' in A Edwards & L Van WaasT (eds) The meaning of nationality in international law in an era of human rights in Nationality and Statelessness under international law (2014) 217.

[68] B Manby 'Citizenship Law in Africa: A Comparative Study' (2016) 1.

[69] B Manby 'Nationality, Migration and Statelessness in West Africa: A study for UNHCR and IOM' (2015) 2.

[70] The African Union recognises five geographical regions: the Central, East, North, South and West African Regions. See https://au.int/en/member_states/countryprofiles2 (accessed 25 August 2020).

[71] West Africa is composed of 15 countries: Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and the Togolese Republic.

[72] The New Humanitarian 'Statelessness=invisibility in West Africa' (2014) available at http://www.irinnews.org/report/100348/statelessness-invisibility-in-west-africa (accessed 15 January 2015).

exacerbate statelessness among children in West African countries. Reports indicate that West Africa has the lowest birth registration rates in the world, 'with only 45 per cent of children under five years of age who are registered, an estimated 47 million children'.[73] The registration rate for children under one year of age is even lower, standing at 43 per cent or 10 million children.[74]

In Eastern Africa,[75] the challenge of statelessness is prevalent due to historical antecedents relating to colonial amalgamation or integration of territory. Moreover, contentious conflicts, natural disaster, and forced migration have contributed significantly to statelessness in the region. There is also an underlying issue of discrimination, usually on the basis of race or ethnicity, religion, or sex. In many cases, statelessness affects entire minority populations (such as people of Nubian descents in Kenya) that have never been recognised as nationals of the state where they are habitually resident.

There is also 'inheritance of statelessness', caused in part or whole by ethnic discrimination handed down from one generation to the next. For instance, 'the consequences of the collapse of government in Somalia … has led to a large outflow of refugees, many of whom have been unable to integrate as nationals in neighboring states despite long residence'.[76] Similarly, the secessions in Ethiopia and Sudan that created Eritrea and South Sudan left large populations at risk of statelessness.[77] Matters of nationality in 'unrecognised countries' are also major issues peculiar to the region, as in the cases of Somaliland and Puntland – they claim independence from Somalia and have been issuing nationality documents, but have not been recognised either by states or by intergovernmental organisations such as the African Union and UN.

Looking at Southern Africa,[78] statelessness there could be attributed to 'failure to integrate historical and contemporary migrants and their descendants, and discrimination in law or in fact on the basis of gender, race or ethnicity (whether against migrants, or people who have never moved)'.[79] These causes are interlinked; hence, as discussed in Chapter Five, they need to be examined keeping in mind the region's pre-colonial and post-colonial history.

In Northern Africa,[80] migration and movements of people, coupled with gaps in nationality

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[73] UNICEF 'Birth Registration key results for children' available at https://www.unicef.org/wca/birth-registration#:~:text=West%20and%20Central%20Africa%20has,cent%20%E2%80%93%20or%2010%20million%20children (accessed 19 February 2022).

[74] *Ibid.*

[75] Eastern Africa region is composed of 14 states: Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, Sudan, South Sudan, Tanzania, and Uganda.

[76] Citizenship Rights in Africa Initiative 'East Africa' available at https://citizenshiprightsafrica.org/region/east-africa/ (accessed 10 June 2020).

[77] *Ibid.*

[78] Southern Africa is composed of ten countries: Angola, Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia and Zimbabwe.

[79] B Manby 'Statelessness in Southern Africa' (2011)5 available at https://www.refworld.org/docid/50c1f9562.html (accessed 5 July 2020).

[80] North Africa is composed of seven countries: Algeria, Egypt, Libya, Mauritania, Morocco, Sahrawi Arab Democratic Republic, and Tunisia.

laws, play the major role in creating statelessness among children. The contested status of Sahrawi Arab Democratic Republic also creates groups at greatest risk of statelessness in the region, as refugees from the country in Algeria have their Sahrawi nationality recognised by only a few states internationally.[81] There is large population of stateless Palestinians, especially in Egypt; a number of Saharan nomadic groups speaking languages related to Berber (Tamasheq) have historically faced difficulties in obtaining recognition of nationality, a situation exacerbated by the breakdown of order in Libya.[82] Gender discrimination in nationality laws is also one of the primary causes of statelessness among children in the region.

In the Central Africa region,[83] ethnic conflicts and the multiple crises and refugee flows generated by the war in the Democratic Republic of Congo (DRC), a war that was at least in part generated by conflicts over nationality, are the major causes of statelessness among children. Among those affected, some are descendants of people who have always been resident in what is now the DRC, whether as forced labourers brought in by the Belgians or as refugees who fled Rwanda in 1959; others are more recent migrants. In Burundi, ethnic conflict has led to cycles of conflict that caused hundreds of thousands to flee the country. The largest waves of refugees fled in the early 1970s and early 1990s.[84] Those who fled in the 1970s were offered the opportunity to naturalise in Tanzania, but some opted to return to Burundi. Those who fled in the 1990s were not given this opportunity, and were expected to return. Both groups and their children, however, have faced difficulties in re-accessing full citizenship rights on return.[85] The resolution of the conflict over the Bakassi Peninsula, which was transferred from Nigeria to the Cameroon territory, has also left many at risk of statelessness. Most of those who remained in now-Cameroonian Bakassi continue to consider themselves Nigerian, but have no identity documents recognising them as such and have not acquired Cameroonian citizenship.[86]

In its attempt to compile the number of stateless people globally, the UNHCR reports the presence of hundreds of thousands of stateless persons; the figure is comprised almost exclusively of the data reported for just Côte d'Ivoire and Kenya. There is also information available about the estimated number of stateless people in a few other countries, including Burundi, the Democratic Republic of Congo, Eritrea, Ethiopia, Madagascar, South Africa, Zimbabwe and Libya.[87] With a view to demonstrating the challenges of statelessness in

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[81] Citizenship Rights in Africa Initiative 'North Africa' available at http://citizenshiprightsafrica.org/region/north-africa/ (accessed 05 July 2020).

[82] *Ibid.*

[83] Central Africa is composed of nine countries: Burundi, Cameroon, Central African Republic, Chad, DRC, Equatorial Guinea, Gabon, Republic of Congo, and São Tomé and Príncipe.

[84] Citizenship Rights in Africa Initiative 'Central Africa' available at http://citizenshiprightsafrica.org/region/central-africa/ (accessed 05 July 2020).

[85] *Ibid.*

[86] Open Society Initiative 'Stateless in Bakassi: How a Changed Border Left Inhabitants Adrift' available at https://www.justiceinitiative.org/voices/stateless-bakassi-how-changed-border-left-inhabitants-adrift (accessed 5 July 2020).

[87] ISI 'The World's Stateless' (2014) 60.

countries where data and information are available, the paragraphs below present a brief account of the causes of statelessness, the groups of affected communities and the impact on children.

Going by the limited data and information gathered by various organisations, mainly by the UNHCR, the largest number of stateless people in Africa exist in Côte d'Ivoire, a significant proportion of whom are children.[88] The main cause of statelessness is linked to migration during the colonial era, when many people were brought into the country to work on plantations from what are now the neighboring countries of Burkina Faso, Mali and Guinea. They did not receive nationality when the country gained independence. Their descendants still have no nationality despite having been in the country for generations. In its report on 'the lost children of Côte d'Ivoire', the UNHCR estimates that 300,000 are facing statelessness there.[89] The nationality law of Côte d'Ivoire grants citizenship purely on the basis of descent, without including safeguards against statelessness.[90]

The challenge persists despite some progress towards reducing the number of stateless persons in Côte d'Ivoire. For instance, the 2013 amendment to the nationality law introduced gender neutral provisions on the conferral of nationality through marriage, which enabled persons who should have been entitled to nationality under the law in force before 1972 to acquire nationality by declaration.[91] Through this process, according to UNHCR's report, 10,2019 persons acquired nationality in 2016.[92] In 2020, through the support of the UNHCR and as part of the #IBelong Campaign, Côte d'Ivoire adopted what can be characterised as 'Africa's first statelessness determination procedure'.[93] This initiative will definitely help protect thousands of people in the country who were without nationality, but it also plays a meaningful role in preventing further cases of statelessness.

In Kenya, children of various communities, including the descendants of pre-independence Mozambican migrants in Kwale County, Pemba and Comorian migrants from Zanzibar, descendants of Zimbabwean missionaries, those of Nubian descent, Somalis, and groups of individuals of Burundian, Congolese, Indian and Rwandan descent, are facing the risk of statelessness mainly due to gaps in the law and discriminatory procedures that limit their access to Kenyan identity documents.[94] For instance, the Pemba community originated from

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[88] B Manby 'Who Belongs? Statelessness and Nationality in West Africa' (2016) available at https://www.migrationpolicy.org/article/who-belongs-statelessness-and-nationality-west-africa (accessed 10 September 2017).

[89] UNHCR 'The lost children of Côte d'Ivoire' available at http://www.unhcr.org/ibelong/the-lost-children-of-cote-divoire/ (accessed 10 September 2017).

[90] See the discussion in Chapter Four of safeguards against statelessness among children.

[91] Cote d'Ivoire Loi No. 61-415 portant Code de la nationalité ivoirienne telle que modifiée et completée 2013.

[92] UNHCR Statelessness in West Africa #IBelong Campaign update (2017) available at https://reliefweb.int/sites/reliefweb.int/files/resources/55252.pdf (accessed 10 February 2018).

[93] Côte d'Ivoire adopts Africa's first legal process to identify and protect stateless people, available at https://www.unhcr.org/afr/news/press/2020/9/5f51f33b4/cote-divoire-adopts-africas-first-legal-process-identify-protect-stateless.html (accessed 30 July 2021).

[94] UNHCR Kenya 'Stateless People Know Where They Belong' available at https://www.unhcr.org/ke/1904-stateless-people-know-where-they-belong.html (accessed 05 November 2018)

that Tanzanian island and arrived in Kenya in two major waves of migration between 1935 and 1940 and 1963 and 1970. In 1963, the Pemba community failed to register with the post-colonial government, and so faces statelessness.[95] Similarly, the Nubians still face challenges to be eligible for full Kenyan citizenship because they originally came from *somewhere else*.[96] Despite the increasing nature of the challenge, the legal framework, including the 2010 Constitution, has failed to comprehensively address the problem of statelessness in Kenya. There have, however, been some positive steps taken by the government. In October 2016, the Kenyan President issued a directive that recognises eligible Makonde people as Kenyan citizens.[97]

In South Africa, statistics on statelessness are not available due to a lack of procedures to capture data on the matter. Nonetheless, there are indicative estimates as to the prevalence in the country of stateless persons or persons at risk of statelessness. Looking at the trajectory, causes and factors of statelessness in South Africa, three major political and historical phenomena can be identified. The first is linked to the impact of imperialism, in that colonial powers established political borders that cut through communities which in the past had formed single social-political units. Secondly, the impact of the system of migrant labour which organised and coerced labour migration within Southern Africa caused mass migration without long-term consideration of legal status or nationality. The third is the impact of apartheid: the policy implemented by the National Party government under the doctrine of apartheid was that black South Africans would lose their South African citizenship and instead be allocated to one of the ten homelands.[98]

The risk of statelessness among children in South Africa is intertwined with ever-increasing cases of undocumented and irregular migrants in the country. Reports indicate that just over 15 million people are unregistered or undocumented in South Africa, of whom almost 3 million are children.[99] A 2019 study conducted by the Scalabrini Centre of Cape Town indicates that 39 per cent of the children born in South Africa to foreign parents did not have birth certificates.[100] While 'unregistered' or 'undocumented' is not synonymous with stateless, being unable to prove nationality due to a lack of documentation can place an

[95] The Pemba Minority Stateless in Kenya, available at https://ghrd.org/the-pemba-minority-stateless-in-kenya/ (accessed 30 July 2021).

[96] UNHCR Kenya 'Stateless People Know Where They Belong' available at https://www.unhcr.org/ke/1904-stateless-people-know-where-they-belong.html (accessed 05 November 2018).

[97] UNHCR's Report 'The Makonde: From Statelessness to Citizenship in Kenya' available at https://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html (accessed 07 November 2018).

[98] SF Khunou 'Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid' (2009) 89; L Muller 'ID blocking: A growing threat to nationality' (2013) available at https://www.lhr.org.za/blog/2013/9/id-blocking-growing-threat-nationality (accessed 7 November 2018).

[99] 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 available at https://scalabrini.org.za/wp-content/uploads/2019/07/Scalabrini_Centre_Cape_Town_Foreign_Children_in_Care_Comparative_Report_South_Africa_2019.pdf (accessed 8 May 2020).

[100] *Ibid*

individual at an elevated risk of statelessness. Of all the undocumented children in South Africa, 40 per cent are at risk of statelessness and 27 per cent are at 'considerable risk' of statelessness, primarily because birth registration is a prerequisite for obtaining citizenship.[101]

Cases of statelessness implicate several hundred thousand children of Banyarwanda in the DRC;[102] hundreds of thousands of European, Malawian, Mozambican and others of African descent in Zimbabwe;[103] and Ethiopians of Eritrean descent still living in Ethiopia.[104] The black Mauritanians expelled from their country in 1989/90;[105] thousands of Muslims in Madagascar;[106] thousands of Sierra Leoneans of Lebanese descent;[107] and tens of thousands of Ugandans of Asian descent, all form groups of children who are stateless or at risk of statelessness in Africa.[108]

1.1.3 Statement of the problem

The above instances clearly reveal that the problem of statelessness remains an issue of great concern in Africa and one with devastating effects on children's rights. In a world where getting basic services, such as education and health, is contingent on having a nationality, statelessness inflicts direct harm on the rights and welfare of children. Beyond constituting a violation of rights, the deprivation of children's rights to health care, to education, to social welfare and to housing has a cascading effect when stateless children become adults.[109]

To avert the challenges of statelessness in general and among children in particular, various measures have been taken by African countries both at the national and sub-regional level. Looking at the trend in the past 20 years, before the 2014 UNHCR's #IBelong Campaign,

[101] *Ibid.*

[102] Minority Rights Group International 'World Directory of Minorities and Indigenous Peoples' available at https://minorityrights.org/minorities/banyarwanda/ (accessed 7 November 2019).

[103] Amnesty International 'Zimbabwe: Statelessness crisis traps hundreds of thousands in limbo' available at https://www.amnesty.org/en/latest/news/2021/04/zimbabwe-statelessness-crisis-traps-hundreds-of-thousands-in-limbo/ (accessed 16 July 2021).

[104] UNHCR 'Citizenship and Statelessness in the Horn of Africa (2021) 12.

[105] Open Society Initiative 'We are Mauritanians' (2009) available at https://www.justiceinitiative.org/publications/we-are-mauritanians (accessed 16 March 2017).

[106] UPR Info Pre-sessions 34th session Statement by the Global Campaign for Equal Nationality Rights on behalf of co-submitting partners Focus Development Association, Institute on Statelessness and Inclusion 'Gender Discrimination and the Denial of Nationality Rights to Minority Groups in Madagascar' available at https://www.upr-info.org/sites/default/files/document/madagascar/session_34_-_november_2019/2._institute_on_statelessness_and_inclusion_ppt.pdf (accessed 20 July 2021); UNHCR 'Stateless minorities and their search for citizenship' available at https://www.unhcr.org/ibelong/stateless-minorities/ (accessed 20 July 2021).

[107] L Beydoun 'The Complexities of Citizenship among Lebanese Immigrants in Sierra Leone' (2013) 3 *African Conflict and Peacebuilding Review* 112.

[108] B Manby 'Struggles for Citizenship in Africa' (2009) 18.

[109] H Vales 'Human rights and stateless children' in Institute of Statelessness and Inclusion, *the World's Stateless Children* (2017) 165.

legislative measures were undertaken in countries such as Egypt[110], Algeria,[111] Morocco,[112] Zimbabwe,[113] Kenya,[114] Tunisia,[115] and Senegal.[116] In many cases, the relevant law reform relates to women's equal right to confer nationality on their children. Since 2014, when an intensified global campaign was launched by the UNHCR to end statelessness by 2024, countries such as Madagascar and Sierra Leone amended their nationality laws to give men and women equal rights to pass on nationality to children.[117]

Beyond legislative measures, countries have adopted various guidelines, action plans, and pledges to end statelessness in general and among children in particular.[118] As mentioned, Côte d'Ivoire established the statelessness determination procedure in 2020. Namibia and Somalia adopted national action plans to end statelessness. Chad, South Sudan, Burkina Faso and Mozambique launched initiatives to enhance birth registration services for all children born on their territories in their efforts to prevent statelessness.[119]

Similarly, at sub-regional level, initiatives have been undertaken to address statelessness in Africa. For instance, following two days of high-level consultations on 23-24 February 2015, Member States of the Economic Commission of West African States (ECOWAS) adopted a declaration on the prevention, reduction and elimination of statelessness in West Africa (Abidjan Declaration).[120] Following the adoption of the Abidjan Declaration, ECOWAS Member States have taken measures to prevent statelessness in their respective countries. Togo being the latest country, Guinea Bissau, Sierra Leone, and Mali have acceded to both the 1954 and the 1961 UN Conventions.[121] With the exception of Cape Verde, Niger and Sierra Leone, all countries in the region have developed plans of action

[110] Decree No. 12025 of the Year 2004 Concerning Certain Provisions Enforcing Law No. 154 of the Year 2004 on Amendment of Certain Provisions of Law No. 26 of the Year 1975 Concerning the Egyptian Nationality.
[111] Law No. 1/05 01 July 0f 2005 Nationality Law which revoked the law nº 13/91, of 11 May.
[112] The 2007 amendments to the Nationality Code of 1958.
[113] Act No. 1 of 2009 amendment to the Constitution of Zimbabwe.
[114] Republic of Kenya's Constitution of 2010.
[115] The 2010 amendments to the 196 Nationality Code.
[116] Nationality Law of the Republic of Senegal of 1961 with Amendments in 2013.
[117] Amendment to Ordinance No. 60-064 of 22 July 1960 of Madagascar; see also the Citizenship Amendment Act of 2017 to amend the Citizenship Act of 1973 of Sierra Leone.
[118] Results of the High-Level Segment on Statelessness (2019) available at http://citizenshiprightsafrica.org/wp-content/uploads/2019/12/UNHCR-High-Level-Segment-on-Statelessness-Oct-2019-Pledges-by-African-States-and-organisations.pdf (accessed 20 October 2020).
[119] UNHCR Campaign to End Statelessness Update April-June 2021 available at https://citizenshiprightsafrica.org/unhcr-campaign-to-end-statelessness-update-apr-jun-2021/ (accessed 20 August 2021).
[120] Declaration on Eradication of Statelessness in West Africa (2015) available at https://reliefweb.int/report/world/ecowas-members-adopt-declaration-eradication-statelessness-west-africa (accessed 15 February 2016); See also Citizenship Rights in Africa Initiative, available at https://citizenshiprightsafrica.org/unhcr-welcomes-togos-decision-to-intensify-its-fight-against-statelessness/ (accessed 07 July 2022).
[121] Achievements of the Abidjan Declaration on the Eradication of Statelessness (2017) available at https://reliefweb.int/report/world/abidjan-declaration-eradication-statelessness-achievements-abidjan-declaration-2-years (accessed 10 August 2018).

to end statelessness. In addition, in 2017, ECOWAS became the world's first region to adopt a binding Plan of Action to end statelessness.[122]

Partner States of the East African Communities (EAC), through a regional cooperation mechanism led by the International Conference on the Great Lakes Region (ICGLR), adopted the Brazzaville Declaration and Regional Action Plan to eradicate statelessness.[123] In 2018, Member States, including Cameroon, Central African Republic, Gabon, Equatorial Guinea, Republic of Congo and Chad, together with Partner States of the Economic and Monetary Community of Central Africa (CEMAC), namely the DRC and São Tomé and Príncipe, made pledges to adopt the necessary legislative and administrative reforms to prevent future cases of statelessness and resolve existing cases of statelessness.[124]

In the framework of the global campaign to end statelessness by 2024, by October 2019, 360 pledges were made, of which 252 were made by states.[125] From the total 360 pledges, 34 were made by countries in Africa relating to law reform, accession to the UN statelessness Conventions, data collection or mapping studies, capacity-building, awareness-raising and international cooperation.[126] It is important to note, however, that not all of these pledges contained concrete actions or specified timeframes for implementation.

Despite these and other initiatives, statelessness among children remains a challenge on the continent. Various factors exacerbate the challenges of statelessness among children in Africa, ranging from lack of appropriate legislative frameworks to administrative barriers and lack of political will. As the central theme of this thesis concerns the role that legal responses play in preventing statelessness, the thesis takes note of the absence of a comprehensive, appropriate and adequate legal framework as a major cause of statelessness among children in Africa.

The laws governing nationality in most African countries, as in most countries in the world, reflect a compromise between two basic concepts: *jus soli*, whereby an individual obtains citizenship because he or she was born in a particular country; and *jus sanguinis*, where citizenship is based on descent from parents who themselves are or have been citizens.[127] Many nationality laws apply the principle of protecting children against statelessness merely partially, by only providing for the acquisition of citizenship for children born in the country

[122] *Ibid.*

[123] Action plan of the international conference on the Great Lakes region on the eradication of statelessness: 2017-2024 (2017) available at https://reliefweb.int/sites/reliefweb.int/files/resources/Consolidated%20Action%20Plan%20of%20ICGLR.pdf (accessed 10 August 2018).

[124] N'Djamena Initiative on the Eradication of Statelessness in Central Africa (2018) available at https://reliefweb.int/report/cameroon/n-djamena-initiative-eradication-statelessness-central-africa (accessed 10 November 2019).

[125] Results of the High-Level Segment on Statelessness (n 115 above).

[126] Institute of Statelessness and Inclusion 'the World's Stateless 2020: Deprivation of Nationality' (2020).

[127] In addition to these two principles based on birth, two other factors are influential in determining citizenship for adults: marital status, in that marriage to a citizen of another country can lead to the acquisition of the spouse's citizenship, and residence within a country's borders.

to unknown parents.[128] As stated in a study conducted by the African Commission on Human and Peoples' Rights (ACHPR) on the right to nationality in Africa, more than half of African Union Member States do not guarantee that a child born in their territory will be protected from statelessness.[129]

Looking at the trends in constitutionalising the right to nationality, only a few countries expressly provide for the right to a nationality, either for everyone or for children.[130] However, this right is not translated into the nationality codes in all cases. For example, Ethiopian citizenship legislation does not address the way in which stateless children may acquire Ethiopian citizenship, nor does it provide any rights based on birth in the territory.

Lack of safeguards for children who would otherwise be stateless, gaps in laws that are based purely on descent in attribution of nationality at birth, restrictive naturalisation provisions, discriminatory provisions, and the fact that African nationality laws, at least in some respects, are not well adapted to the realities of the continent, form the basis of the investigation and analysis of this thesis.

According to international standards, safeguards should be provided in domestic laws to ensure that where children who would otherwise be stateless are born in a territory, they are granted nationality, preferably automatically at birth, or at the least according to a non-discretionary application procedure.[131] The large majority of nationality laws in Africa do not comply with this standard, as they prevent many such children from acquiring the nationality of the country of birth.[132]

Though a few countries allow children born in the territory to acquire the nationality of the country of birth, they limit this to the situation of children born to unknown parents, or to parents who have no nationality. Hence, the provisions do not cover all situations of children born in the territory who would be rendered stateless if they do not acquire the nationality of the country of birth. In particular, there are gaps in legislation where provisions do not constitute a safeguard against statelessness for children born to foreign parents and who cannot transmit their nationality to them because, for instance, they originate from *jus soli* countries.[133] There are also restrictive provisions, without any form of safeguard, in which

[128] These countries include Algeria, Burundi, Cote d'Ivoire, Djibouti, Egypt, Ethiopia, Guinea Bissau, Liberia, Madagascar, Mauritius, Somalia, Sudan and the Kingdom of Swaziland. See Right to Nationality, African Commission on Human and Peoples' Rights available at http://www.achpr.org/news/2015/02/d165/ (accessed 05 April 2015).

[129]ACHPR, Right to Nationality, available at http://www.achpr.org/news/2015/02/d165/ (accessed 05 April 2015).

[130] Constitution of Angola 2010, art 32; South African Constitution 1996, art 28; Constitution of the Federal Democratic Republic of Ethiopia 1994, art 36; Constitution of the Republic of Rwanda 2003, art 7; Constitution of Malawi 1994, art 23; Constitution of Malawi 1994, art 23; and Constitution of Guinea Bissau 1984, as revised in 1996, art 44.

[131] See Chapters Three and Four for detailed discussion of international standards on safeguards for the acquisition of nationality by children born on the state territory.

[132] See Chapters Three and Four for detailed discussion.

[133] See Chapter Three for more discussion.

nationality laws restrict transmission of nationality to children born to parents who are nationals (*jus sanguinis*), or in some cases, parents who were also born in the territory (*double jus soli*).

As will be discussed in relative detail in this thesis, a noteworthy gap in many African legislations exists in relation to 'foundlings'.[134] Even if most nationality laws allow foundlings who are adopted to receive the nationality of their new parents, a gap remains in that children who are never adopted pass through life with no legal identity or nationality. Other types of legal gaps that cause statelessness in Africa derive from circumstances surrounding changes of civil status, such as divorce, attempts to acquire another nationality, and prolonged residence abroad, particularly where nationality laws provide for the loss of nationality on account of residence abroad without a safeguard against statelessness. In many African countries,[135] nationality laws do not condition loss, renunciation or deprivation of nationality upon the possession of, or an assurance of, acquiring another nationality. In particular, there are gaps in legislation in regard to children, as there are laws that do not prohibit the automatic application or effect of the withdrawal of nationality by parents on their children.[136]

Furthermore, some laws establish discriminatory criteria for acquisition or transmission of nationality. Contrary to the principle of non-discrimination contained in the ACRWC and many other international human rights instruments, there are laws that place different groups on an unequal footing in relation to the right to nationality or the transmission of nationality and restrict eligibility for nationality to children based on racial or ethnic criteria.[137]

Statelessness among children is also caused by the gaps in laws of many African countries, as discussed in this thesis, regarding acquisition of nationality for children born abroad. International standards, set out in article 4 of the 1961 Convention, provide for the grant of nationality to children born to a national abroad who would otherwise be stateless. Many states allow transmission of nationality, on a nondiscriminatory basis, to a child if either parent is a national. Some allow for nationality to be passed on for only one generation; as such, a child born outside the territory of a particular country will not be able to transmit his or her nationality to his or her children if also born outside. There are also laws that restrict the power of transmission to children born abroad to the father alone and which may also impose additional criteria, such as that the father must also have been born in the country of origin, or have resided in the country of origin prior to the birth of the child.[138]

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[134] It is submitted that the word 'foundling' does not uphold the dignity of the child and that a change in terminology is hence required. The argument for this is discussed in Chapter Four.

[135] See the discussion in Chapter Four.

[136] On statelessness among children and safeguards under a withdrawal of nationality, see the discussion in Chapter Four.

[137] Chapter Four discusses the applicability of the principle of non-discrimination in matters regarding the right to nationality and the prevention of statelessness; the chapter also examines gaps in the laws of African countries.

[138] See Chapter Four's discussion of normative gaps regarding the acquisition of nationality by children born outside the territory of a given country.

These normative challenges, coupled with gaps in core administrative practices, greatly increase the risk of statelessness among children in African states. For instance, a birth certificate is considered one of the essential documents to prove nationality in various African countries. Yet despite its importance, birth registration rates remain low in the majority of countries in Africa. Rates are critically low in rural areas, where, in general, no specific arrangements are made for nomadic populations or populations residing in remote areas.[139] Ineffective civil registration and documentation systems create a marked risk of statelessness in every country in Africa. Common problems range from a lack of legislative and policy frameworks that ensure free, accessible and universal birth registration, to poor infrastructure, lack of awareness and education of parents on the need to register their children, and poor data-management systems.[140]

In countries where the birth registration rate is generally high, such as in most North African countries,[141] there are still challenges in ensuring the universality of the system and birth registration for all children everywhere in the country.[142] For instance, in Egypt and Morocco, refugees and migrants face serious difficulties in securing birth registration for their children and identity documents for themselves. Egypt demands a marriage certificate for all registrations of birth, and Morocco, for Muslim parents.[143]

Moreover, though most countries provide protection for abandoned infants in the relevant laws, there are gaps in protection systems when providing birth registration services to 'children born in transit countries, or to recognise new families or guardians for children separated from their parents'.[144]

On the basis of the legal problems around matters of nationality and statelessness in Africa, this thesis argues that, for nationality systems to be strengthened and address the risk of statelessness among children, they should pass the test of child protection systems. This thesis takes a child-rights-based approach to the issue of nationality and prevention of statelessness, and argues that that the right to a nationality is a fundamental right of the child and that it forms an integral part aspect of a child's identity.[145] Child protection systems entail

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[139] Good practices paper: Ensuring birth registration for the prevention of statelessness (2017) available at https://www.refworld.org/pdfid/5a0ac8f94.pdf (accessed 3 December 2017).

[140] Chapter Three discusses the relationship between birth registration systems and the prevention of statelessness among children and how norms and polices can help to address the associated challenges.

[141] UNICEF Birth Registration for Every Child by 2030: Are we on track? (2019) available at https://www.unicef.org/media/62981/file/Birth-registration-for-every-child-by-2030.pdf (accessed 15 May 2020).

[142] ACERWC General Comment No. 2 on article 6 of ACRWC available at https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment_Art6_ACRWC_English.pdf (accessed 5 May 2016).

[143] B Manby 'Preventing Statelessness among Migrants in North Africa and their Children: Birth registration and 'legal identity' (2019) available at ttps://www.statelessness.eu/updates/blog/preventing-statelessness-among-migrants-north-africa-and-their-children-birth (accessed 15 May 2020).

[144] *Ibid.*

[145] As Mezmur states, the child's right to a nationality is fundamental in that its application is cross-cutting in nature. He points out that 'looking at the 41 provisions within the UN-CRC, there is almost no provision which

that governments should ensure that they create legislative, institutional and other measures such that every child is recognised, respected and protected as a rights-holder with non-negotiable rights to protection without any form of discrimination. The prevention of any harm to children's rights requires a comprehensive response, which includes prevention, adequate care and meaningful redress in which the views of children are respected. In the context of international cooperation, transnational and cross-border mechanisms, preventative measures and responses need to speak to the rights and welfare of children, in line with the latter's peculiar vulnerabilities. Despite the vital role that strengthened child protection systems play in preventing statelessness among children, national and international responses to matters of statelessness are not linked to the former; hence, in most of the responses, children's rights are neglected.

The thesis further argues that preventing statelessness among children requires a holistic response guided primarily by the principles of child protection. Hence, acquisition, transfer, deprivation, renunciation and loss of nationality and their relationship with children must constitute part of child-rights laws in a given country, beyond incorporation of such provisions in nationality laws. The interplay between policy shortcomings, administrative deficiencies or obstacles to birth registration and barriers to accessing nationality should form part of the legal responses in the child protection systems. Child participation in matters concerning them, including in nationality-determination procedures, legal counselling and strategic litigation, should be ensured, as this plays an important role in breaking down these barriers and asserting the right of every child to a nationality. Statelessness among children is an urgent concern in the context of the humanitarian crisis in various African countries, where many have faced challenges in acquiring documentation and accessing consular assistance abroad. As a result, they may struggle to have their nationality recognised or documented.

These are a few instances that demonstrate the need for a holistic approach to legal responses for preventing statelessness among children in Africa. The thesis argues that the problems in nationality laws, and the resultant statelessness among children, can be addressed effectively addressed only when responses are geared to child protection systems that respond to the special challenges of children and speak to their special vulnerabilities.

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does not have at least some level of interaction or implication in relation to the right to nationality'; see Institute of Statelessness and Inclusion 'An interview with Benyam Dawit Mezmur, Chairperson of the United Nations Committee on the Rights of the Child by Maria Jose Recalde Vela' in the World's Stateless Children (2017) 130.

1.1.4 Research questions

The major research questions of this study are as follows:

What normative responses are needed to ensure the right to nationality of all children and prevent and/or address statelessness among children in Africa.?

To answer these questions, several subsidiary questions need to be examined, including:

- What child protection elements and systems should be considered in reforming domestic norms and standards such that they are able to prevent statelessness among children in Africa?
- What is statelessness, what are its causes, and how does it affect children in particular?
- What are the causes of child statelessness, and why is it a problem, in view of the historical and political contexts of the respective countries?
- What are the major child-rights principles and elements of child protection systems that should be in place to address matters of nationality and statelessness among children?
- What obligations can be derived from international and regional (human rights) treaties (and the jurisprudence established through their monitoring organs, particularly in the African human rights system) with regard to preventing statelessness among children?
- Are conceptual shifts required in the various global, regional, sub-regional, and domestic initiatives seeking to guarantee the right to nationality of children in Africa?
- Which groups of children are particularly vulnerable to statelessness in Africa? Are there sufficient norms in place to respond to their specific vulnerabilities?
- What does the future of statelessness among children in Africa look like, bearing in mind the link that technological advancements, free market systems, regional integration, movements of people, and new dynamics in conflicts and climate change have with the right to nationality and statelessness? What elements need to be considered in reforming norms?

1.1.5 Scope and limitations of the study

Geographically, the thesis has a continental scope, documenting and analysing the status, prevalence, drivers, consequences, and, most importantly, the normative measures in place to ensure the child's right to a nationality and prevent statelessness among children in Africa. The thesis presents an Africa-wide analysis and examination of the *legal responses* to matters

of the right to nationality and the prevention of statelessness among children. 'Legal responses' in the context of this thesis refers to legislation, policies, decrees, regulations, guiding principles and other similar frameworks which are normative in nature, as issued or adopted by state machineries to regulate matters of nationality and statelessness in a given country. In this regard, the thesis examines the comprehensiveness, appropriateness and adequacy of constitutions, acts, regulations, decrees, policies, and, as appropriate, action plans of states in Africa, in ensuring the right to nationality and preventing statelessness among children.

In order to substantiate the arguments, the thesis presents experiences and makes references to the laws of countries based on contextual relevance. It examines, for instance, laws which do not adequately protect children's rights in conferring nationality and so increase the risk of statelessness; countries where the laws do not have sufficient safeguards against statelessness; and countries where statelessness is evidenced through migration, forced displacement, state succession and conflict situations. However, it is important to note that the thesis does not attempt to provide case studies on individual countries. Instead the arguments and analysis are informed thematically by focusing on failure in legal responses, its impact on the child's right to a nationality, and the resultant statelessness.

Looking at nationality and belonging thematically through a pan-African lens, the thesis presents arguments and analysis on the universality and relativity of human rights, and how that shapes the understanding of the right to nationality of the child in Africa. Adopting a child-rights-based approach, one which recognises children as active subjects of rights and maintains that all interventions should be consistent with state obligations under the relevant international and regional laws, the thesis explores the ways in which nationality laws in Africa establish provisions that are suited to the African context.

In this regard, analysis will be made as to whether the legal discourse around nationality and prevention of statelessness among children distinctively applies to children and bears the application of African cultural fingerprints. Hence, challenges around the lack of cultural legitimacy of nationality laws in Africa are analysed, as is their role in exacerbating statelessness among children and the question of how legal responses strike a balance. The thesis examines the application and role of four cardinal principles regarded as the gold standard in the discourse on children's rights in the prevention of statelessness among children. Accordingly, arguments are presented on whether nationality legislation, or other relevant laws and policies, provides mechanisms which ensure that the views of the child are duly considered, that the principle of the best interests of the child remains the primary consideration in regard to all actions concerning the nationality of the child, and that all children have non-discriminatory enjoyment of the right to nationality.

The thesis also explores whether sufficient normative standards are in place to address the specific cases of children who could find themselves in vulnerable situations of statelessness. They include the children of refugee parents, children of foreign parents, children born out of wedlock, adopted children, victims of trafficking, children in conflict and disaster situations, children with disabilities, foundlings, children associated with terrorist groups, children of minority communities, separated children, and children on the move.

Finally, the thesis discusses the future of statelessness among children in Africa. While examining new trends and factors that lead to statelessness in Africa, the thesis argues for the establishment of normative standards which will stand the test of time.

1.1.6 Methodology

The thesis primarily uses an applied legal research approach. In doing so, it examines the formulation of relevant laws in the respective countries in line with the role that normative standards could play in preventing statelessness among children. To this end, the thesis draws on a variety of sources, including statutory materials, case reports, scholarly documents, general comments, State Party reports, and reports from international and local organisations. It should be noted that, while at most effort is done to cite original texts, because of language and accessibility issues, sometimes legislation referred to is drawn from secondary sources. By explaining the elements of the rules and standards on the right to nationality and statelessness among children in African countries, the thesis describes the relationship between domestic laws and international and regional instruments in a logical and coherent structure. In this regard, it takes the approach of considering legal norms as normative in nature, and hence applies an interpretative methodology. In analysing the relationship between domestic laws and international norms, the thesis applies the interpretive principle as included in the Vienna Convention on the Law of Treaties, along with case laws which prescribes that national law cannot be invoked to justify non-compliance of international law.[146]

In addition to employing an applied legal research methodology, to a limited extent, the thesis adopts an interdisciplinary approach with a view to defining legal norms in their proper context. In some instances, while one is trying to interpret the nationality laws of a given country, it is useful to view them in their proper historical, political, philosophical and social context. When necessary, the thesis thus makes reference to countries' experiences in the context of the legal measures they have put in place to ensure children's right to nationality and prevent statelessness among children. In referring to other jurisdictions, however, the thesis considers the social and political realities of African countries; hence the thesis uses a contextual approach to comparative laws, as opposed to a more open or pluralistic approach..

1.2. Nationality: Conceptual discussion and definition

For the purpose of this thesis, nationality and statelessness are primarily considered as legal issues. Without formal legal recognition of inclusion as nationals, people are left vulnerable to statelessness. The thesis, however, recognises the role of a multidisciplinary approach which considers the broader social, political and philosophical contexts of nationality and statelessness. Hence, this section attempts to present the multidisciplinary theories, arguments

[146] In this regard, the thesis makes reference to the discussion on general duties of states to bring their relevant laws in conformity with their obligations in international and regional laws under consideration.

and clarification on matters of nationality.

1.2.1 Nationality or citizenship?

Clarification of terms is important, as 'nationality' and 'citizenship' are understood in different ways across disciplines. In explaining nationality and citizenship, some argue that the two terms entail different concepts, while others use them interchangeably. For Social Science scholars, nationality and citizenship are analytically separate. David McCrone and Richard Kiely explain the difference as follows:

> Nationality and citizenship belong to different spheres of meaning and activity. The former is in essence a cultural concept which binds people on the basis of shared identity – in Benedict Anderson's apt phrase, as an 'imagined community' – while citizenship is a political concept deriving from people's relationship to the state. In other words, nation-ness and state-ness need not be, and increasingly are not, aligned.[147]

Scholars considering the two as separate notions argue that citizenship denotes 'a bundle of rights held by someone recognised as a citizen', while nationality refers to 'specific socially constructed identity characteristics which are taken to denote membership of a national group'.[148] Conceptualising citizenship as a package of rights and duties bestowed on individuals by the state has also been well articulated in Marshall's essay on 'Citizenship and Social Class'.[149] The reciprocity of rights and duties refers to citizenship as a particular kind of status that distinguishes citizens from other groups of the population within a state who do not enjoy all rights and do not have to comply with all obligations of citizenship.

Such claims do not disregard the inextricable link between nationality and citizenship; they simply argue that the right to claim citizenship has been an aspiration since its creation in the Greek *polis*, and so the concept of citizenship is older than the concept of nation-state and nationality.[150] As Weiss notes, 'conceptually and linguistically the term nationality and citizenship emphasis two different aspects of the same notion of state membership, nationality stresses the international, citizenship refers to the municipal aspect of membership to particular polity'.[151] In this regard, citizenship connotes full membership including possession of political rights.[152] Such approaches to citizenship accord with the domestic

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[147] D McCrone & R Kiely 'Nationalism and Citizenship' (2000) 34 *SAGE Journals* 25.

[148] K Tonkiss 'Statelessness and the performance of citizenship as nationality' in T Bloom *et al.* (eds) *Understanding statelessness* (2017) 241.

[149] TH Marshal 'Citizenship and Social Class and other essays' (1950).

[150] M Žagar 'Citizenship-Nationality: A proper balance between the interests of states and those of individuals' in the proceedings of the 1st European Conference on Nationality, Strasbourg, 18 and 19 October 1999 (200) 95 available at https://www.refworld.org/pdfid/43f202412.pdf (accessed 12 May 2020); L Bosniak 'Citizenship Denationalized (The State of Citizenship Symposium)' 7 Indian Journal of Global Studies 448.

[151] P Weiss 'Nationality and Statelessness in International Law' (1979) 5-6.

[152] K Rubenstein & D Adler 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 *Indiana Journal of Global Legal Studies* (2000) 519.

laws of a certain number of states that draw a distinction between various categories of persons within the population and accordingly grant them special rights.[153]

The terms may also have different meanings across legal traditions at different times. For instance, in the Commonwealth the most important criterion for international law is citizenship vis-à-vis the various Commonwealth states, whereas the status of the British subject or Commonwealth citizen is basically only of relevance to the domestic law of the countries in question. The distinction between French citizens and French subjects, later citizens of the French Union and lastly citizens of the 'Community', was only relevant under domestic law.[154] In national law, 'citizenship' is the term used by lawyers in the British common law tradition to describe the legal bond and the rules adopted at the country level by which it is decided whether a person does or does not have the right to legal membership of that state, and the status of a person who is a member. Nationality can be used in the same sense, but it tends to be restricted to international law contexts. As discussed below, disciplines such as political science or sociology have different ways of using the terms in other contexts.

In international law, nationality and citizenship are now used as synonyms to describe a particular legal relationship between the state and the individual, albeit that 'nationality' is more commonly used in international treaties. As Manby writes, '[n]either "citizenship" nor "nationality" is used to indicate the ethnic origin of the individual concerned: the terms refer only to the legal bond between a person and a state'.[155]

From the discussion above, it can be noted that nationality and citizenship could entail different notions depending on the context, jurisdiction and nature of the discipline. Hence this thesis recognises, when necessary, 'citizenship' and 'nationality' according to the terms used in the national context, and 'nationality' at the international level. However, as the context that the thesis deals with relates to matters of nationality and statelessness, informed by the trans-national legal discourse, it appreciates the meaning and applications of

[153] For instance, in a number of Latin American countries the word 'citizenship' has been used to designate all the political rights of which an individual can be deprived as a penalty or other measure, such that he or she loses citizenship without being deprived of nationality under international law. In the United States of America (USA), the words 'citizenship' and 'nationality' are often used interchangeably, whereas the word 'citizen' is generally used to designate those persons who enjoy full political and individual rights in the country, with certain individuals – such as those from territories or possessions which are not one of the States making up the Union – being referred to as 'nationals'. The latter owe allegiance to the USA and are nationals within the meaning of international law, but do not possess all the rights of United States' citizenship; LV Oppenheim 'International Law' (1955) 856-857.

[154] Article 8 of the Maastricht Treaty provides that 'every person holding the nationality of a Member State shall be a citizen of the Union'. Citizens of the Union are thus afforded rights of a constitutional nature which are traditionally linked to nationality (including the right to travel and settle freely within the Union and the right to vote and be elected in municipal elections); The Commission of the European Communities Report on Citizenship of the Union 21 December 1993, Document, COM (93) 702 final, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0702:FIN:EN:PDF (accessed 9 February 2016); in the European Convention on Nationality of 1997, the terms 'nationality' and 'citizenship' are synonymous.

[155] B Manby 'Citizenship Law in Africa: A Comparative Study' (2010) ix.

'citizenship' and 'nationality' in the context of international law.

1.2.2 Theories of nationality: A snapshot

The concept of nationality has different meanings and connotations across disciplines. As discussed in Chapter Two of this thesis, understanding nationality as it features in contemporary international laws,[156] and where it is treated mainly as a legal concept, requires one to appreciate its meaning as captured in various disciplines. From a legal perspective, nationality implies the existence of a legal relationship or bond between the individual or national and his or her state. Nationality provides people with a sense of belonging and identity; it entitles the individual to the protection of the state; and it provides a legal basis for the exercise of most civil, political, social, economic and other rights. Though the validity of considering nationality as a 'right to have right'[157] does not entirely pass the test of contemporary human rights principles, it places nationality in its practical position as a 'gateway' to other rights.

A person is considered as a national of a particular country when he or she is recognised by law as a member of that political community who enjoys the rights and assumes the duties of membership. Though this broad definition seems discernible in the works of contemporary authors, it does not mean, however, that the debates around the meaning of 'nationality' is settled and uncontroversial. Beyond its legal meaning, nationality gets its conceptual framework from philosophy, politics, history, sociology, literature, cultural studies and similar fields.

Political theorists define nationality as a political unit within the jurisdiction of a state, and thus as a purely political arrangement with a system of liberties, rights and obligations as well as a type of authority.[158] According to theorists such as Cohen,[159] Kymlicka and Norman,[160] and Carens,[161] the concept of nationality (which they refer to as citizenship) is composed of three main elements or dimensions. The first is citizenship as legal status, defined by civil, political and social rights. Here, the citizen is the legal person free to act according to the law and having the right to claim the law's protection. The second considers citizens specifically as political agents, actively participating in a society's political institutions. The third refers to citizenship as membership of a political community that furnishes a distinct source of

[156] For the purpose of this thesis, international law refers to declarations, treaties, conventions, charters, resolutions and other related normative standards as established by supra-national entities, such as the UN, and regional bodies, such as the African Union, European Union, and the Inter-American institutions. However, in cases where distinctions are made between normative standards set at the UN level and those set at regional level, the thesis may resort to treating them separately.

[157] H Arendt 'The Origins of Totalitarianism' (1951).

[158] Stanford Encyclopedia of Philosophy 'Citizenship' (2006) available at https://plato.stanford.edu/entries/citizenship/ (accessed 18 November 2018).

[159] J Cohen 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos' (1999) 14 *International Sociology* 245-268.

[160] W Kymlicka & W Norman 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 14 *University of Chicago Press* 352-381

[161] JH Carens 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *The Review of Politics* 252–273.

identity.[162]

From a political-theory point of view, conceptions of citizenship can be separated into liberal, communitarian and civic republican approaches.[163] The liberal conception of citizenship bases its premises on the assumptions embedded in the classical liberal theory which claims that human beings have rights by virtue of their humanity, which are universal and are guaranteed by the state. Citizenship is therefore seen as a legal-juridical status enjoyed equally by all rational, self-interested individuals, granted and protected by the state.[164] In contrast, the communitarian theory takes the view that an individual's sense of sense of identity is produced only through relations with others in the community of which he or she is part, centred on the notions of the socially embedded citizen, community belonging and the priority of the common good.[165]

Attempting to reconcile the liberal notion of self-interested individuals with the communitarian focus on community belonging and the common good, civic republican theory recognises the importance of community to individual identity, the obligation of citizens to participate in communal affairs, and the basic resources required to enable this participation.[166] At the core of this approach is membership in a political community with associated rights and duties in a polity or group which dominates and defines perceptions of social and political space and identity, called a 'nation-state'. In the modern nation-state, nationality has been advanced as the defining element of membership in a political community regulating social interaction.

The field of sociology is also increasingly engaging matters of nationality in the context of identity politics, or what theorists call the politics of difference.[167] Responding to new social movements and debates over multiculturalism, scholars working in cultural studies, feminist studies, sociology, anthropology, geography, political science and history have provided theories on and insights into the complex relations between individuals and the nation-state in the context of globalisation.

Regarding the origin of nationality, some theorists argue that the concept of nationality is a much older phenomenon that was transformed, but not created, by modern political and economic forces.[168] Theorists supporting this view trace the roots of nationality back to the classical debates around 'nationals' and 'subjects' as articulated by philosophers such as Hobbes and Aristotle.[169] Others consider nationality a relatively recent phenomenon associated with the development of the modern state.[170] This approach to nationality, which is

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[162] Stanford Encyclopedia of Philosophy (n 154 above).
[163] Stanford Encyclopedia of Philosophy (n 154 above).
[164] E Jones and J Gaventa 'Concepts of Citizenship: a review' (2002) *Institute of Development Studies* 3.
[165] Jones and Gaventa (n 164 above) 4.
[166] *Ibid.*
[167] E Darian-Smith 'The Constitution of Identity: New modalities of nationality, citizenship, belonging and being' (2015) *RegNet Research papers* 8.
[168] *Ibid.*
[169] Stanford Encyclopedia of Philosophy 'Citizenship' (n 158 above).
[170] Such as B Anderson 'Imagined communities: reflections on the origin and spread of nationalism' (1991); E

also referred as critical nation-based theory, argues that the modern concept of nationality developed only after the emergence of an international community of separate sovereign states following the Peace of Westphalia in 1648.[171] Before then, people were the subjects of local rulers or city entities, which in turn were often subject to superior religious, traditional or institutional authorities, such as popes, chiefs (in the African context) and emperors.

Theoretically, as reflected mostly in Euro-American literature, there are two scholarly approaches to the concept of nationality as a legal identity: the colonial/postcolonial approach and democratic liberal approach. As Darian-Smith writes, scholars in the former group 'tend to be loosely associated with postcolonial theories of law. These scholars are keen to explore legal identity as an expression of "civilisation" and "statehood" within more expansive global/transnational/international contexts'.[172] Interpreting law as a site of symbolic cultural consciousness and reference, scholars in this first group are acutely aware that legal identity is constituted in deeply historical contexts that include centuries of oppression and conflict between European and non-European peoples. In contrast, scholars in the latter group 'tend to be more restricted in their geopolitical and temporal reach, examining how people living within nation-states challenge, resist, or demand recognition of their legal identity as rights-bearing subjects/citizens'.[173] In both approaches, the concept of the nation-state is a common unit of analysis framing the meaning of nationality as a legal identity.

The central argument in the colonial and postcolonial approach to legal nationality is the decolonising process in the wake of World War II, in which the global community established a law that validates legal identity recognisable to other countries in the international community. According to this theory, 'only those societies who could claim such a legal identity could then argue for statehood, and in turn demand representation in the then newly formed United Nations'.[174] The application of this theory was particularly troubling in Africa, where the existence of precolonial systems of law, governance, and social and political institutions were disregarded as irrelevant factors for state formation and for defining nationality on the continent. As discussed in the section below, this failure to recognise a range of plural legal identities other than those constituted through established Western principles of state territorial sovereignty and citizenship forced many in Africa not only into a legal category that often has little meaning or relevance to their actual lives, but also into statelessness.

Basing its arguments on the principles of liberal democracy within the notion of nation-states, the democratic liberal theory examines 'how politics of identity and difference in society play out in law and policy and determines whether certain individuals and groups have legal

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Gellner 'Nations and Nationalism' (1983).

[171] I Shearer & B Opeskin 'Nationality and Statelessness' in B Opeskin, R Perruchoud & J Redpath-Cross (eds) *Foundations of International Migration Law* (2012) 2.

[172] E Darian-Smith 'The Constitution of Identity: New modalities of nationality, citizenship, belonging and being' in A Sarat & P Ewick (eds) *The Handbook of Law and Society* (2015) 355.

[173] *Ibid*. 356.

[174] *Ibid*. 357.

recognition and standing equal to others'.[175] In his scholarly contribution on how the concept of liberal democracy contributes to the contemporary conception of nationality, Varouxakis presents John Stuart Mill's contribution, where he writes: 'John Stuart Mill is arguably the most influential major liberal theorist to have engaged directly and thoroughly with the issues raised for liberalism and liberal politics by nationhood and nationalism.' [176] Varouxakis also refers Kymlicka's assertion on the post-World War II liberal theorists' neglect of nationality and national minorities, and writes that 'any attempt to deal with these issues today from a liberal perspective will have to refer back to nineteenth-century liberal thought, which produced rich debates around the problems involved in the relationship between liberal principles and nationality'.[177]

The liberal theory on nationality recognises the ways laws are used to exclude some from exercising their rights equally with others in a similar polity. In this regard, examining global movements, such as the feminist movement, helps to understand the role that liberal theory plays in tackling the *inclusion-exclusion* debate around matters of nationality. Explaining this issue from historical point view, Darian-Smith writes:

> In the early 1960s and the opening up of the labor force to women, feminist issues became prominent in mainstream society and were often confrontational. Within academic circles, feminist scholars were at the forefront in showing how state governments have consistently denied recognition to certain social, ethnic and religious minority groups – be these homosexual or indigenous – and so cut them out of the national polity on the grounds of non-qualification. According to this theory nationality is defined through the fight that peoples make for self and collective recognition of their legal identities, in line with universally accepted principles of equality and freedom, within a particular nation-state.[178]

The above-mentioned theoretical explanations play a key role in the contemporary understanding of nationality within the framework of contemporary international law, which views nationality primarily as a legal concept. The legal approach to nationality therefore entails that nationality can no longer be determined as a personal relationship of allegiance, but rather as a legal status embracing a set of mutual rights and obligations towards a political entity fulfilling certain requirements necessary for the existence of a sovereign state.

Theoretically, therefore, the legal approach to nationality contains two elements. First, nationality determines the scope of application of basic rights and obligations of states vis-à-vis other states and the international community, such as personal jurisdiction, the application of treaties and diplomatic protection. Secondly, in domestic law, nationality is a fundamental requirement for the exercise of rights and claims to protection[179] and correlative duties, such

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[175] *Ibid.*

[176] G Varouxakis 'Mill on Nationality' (2013) 2.

[177] *Ibid.*

[178] E Darian-Smith 'The Constitution of Identity: New modalities of nationality, citizenship, belonging and being' Sarat & Ewick (n 172 above) 357.

[179] Critics of the legal-status-to-nationality approach argue that legal status does not necessarily ensure the individual's participation in political processes, which is one of the elements that the concept of nationality

as military or civil service obligations, which may vary according to national law.[180] Further developments in international law which consolidate norms of civil and political rights, anti-discrimination protections, women's rights, and children's rights have provided more insights into the legal aspect of nationality in line with the growing human rights discourse. While detailed discussions of the development and elements of the right to nationality, both in international and African regional laws, are found in Chapter Two of this thesis, the section below examines the theoretical challenges directed at the discourse of 'nation-based' nationality, which informs contemporary international law.

1.2.3 Challenges to the nation-based theory of nationality

Whether we think of ourselves as living in a post-national moment or not, what is clear is that the idea of a person's legal subjectivity and identity being constituted solely through the geo-political boundaries of the nation-state is no longer a given.[181]

As explained in Section 1.2.2 above, nationality, as per the theory of liberal democracy, primarily takes the concept of the sovereign state as a determining factor in international relations and regards the state as the only protector of an individual's rights. The assertion on nationality as the only and exclusive legal bond between an individual and a home country is a notion under scrutiny, and critics are calling for alternative views. The growth of a globalised, interdependent world and international regimes, as well as cultural and religious diversity, is causing nationality to lose much of its delimiting function.[182] As Hailbronner writes, '[a]lthough there are as yet no indications for a "post-national" or "trans-national" nationality, there are clear indications that states increasingly recognise that there may well be more than just one membership of a political community'.[183]

Transnationalism is a process in which formations that have traditionally been perceived as restricted to well-defined political and geographical boundaries have transgressed national borders, producing new social formations.[184] The formulation of regional citizenship, such as the concept of 'union citizenship' referred in the Maastricht Treaty of 1992 as the objectives

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presupposes. Accordingly, critics view the nationality of an individual as a necessity for the political agency that enables him or her to actively participate in the political processes of a community; this view represents a second approach to nationality. The third approach, which considers the individual as a member of a political community, is closely related to the concept of identity. As Carnes notes, this approach relates to the 'psychosocial' dimension of nationality, which results in the existence of a community's collective identity; see Carens (n 161 above).

[180] K Hailbronner, Nationality in public international law and European law in R Bauböck, E Ersbøll, K Groenendijk et all Harald Waldrauch (eds) Acquisition and Loss of Nationality| Volume 1: Comparative Analyses: Policies and Trends in 15 European Countries (2006) 36.

[181] T Purvis & A Hunt 'Identity versus Citizenship: Transformations in the Discourses and Practices of Citizenship' (1999) 8 *SAGE Journals* 458.

[182] K Rubenstein 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 *Indiana Journal of Global Studies* 525-526.

[183] Hailbronner (n 180 above).

[184] N Khan 'The Fiction of Nationality' (2005) 2.

of the European Union, [185] or 'Community Citizen' as indicated in the Protocol adopted by ECOWAS in 1982,[186] indicates the changing dynamics in the concept of nationality.

Similarly, the state has ceased to be the only protector of an individual's rights. With the establishment of human rights mechanisms both at the global and regional levels, individuals have the right to interventions against states in cases of grave or serious rights violations. The legal approach to nationality, as discussed above, is facing major challenges – such as the need to acknowledge the international diversity of contemporary liberal democracies, and the pressure that globalisation brings on the territorial sovereign states -- hence requiring a rethinking of the conceptual framework of nationality.

Based on these facts, critics have called for a new, alternative framework for nationality, in line with its post-national, multicultural, cosmopolitan and global nature. Now, a more globalised approach to nationality is explained in the theory of 'critical global citizenship and cosmopolitanism'.[187] According to theories of global citizenship and cosmopolitanism, 'the true binding glue for diverse societies resides not only within nationalistic normative citizenship articulations but rather within a more global approach emphasising our shared human experiences, aspirations and responsibilities'.[188] While acknowledging the specificities of the individual sociopolitical environment, theorists supporting this view argue that determining one's membership as a national in a given society should be informed by global and holistic approaches that reflect the universality and interconnectedness of human experiences.[189]

Massive transnational movements, advancement in information and communications technologies, developments in global and regional financial integrations, and media flows have de-territorialised national spheres, as they challenge the very creation of the territorial-based nation state within which the global-context is operating. The globalisation theory, therefore, calls for a reconsideration of nationality from the perspective of migration, regionalisation, cultural multiplicity and hybridity, and new geographies of belonging.[190] As discussed in Chapter Five of this thesis, this approach has merits particularly in the context of migration and movements of people, where balance is required in responding to matters of nationality in a world of increasing diversity that also wishes to maintain an overarching sense of belonging and inclusion within the broader society.

Such facts entail changes to the ways that nationality is conceptualised in emerging socio-political contexts that include the mobilisation of global social movements, an expanding

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[185] Title 1 Article B & Part 2 Article 8 of the Treaty on European Union of 1992; L Jamieson 'Theorizing Identity, Nationality and Citizenship: Implications for European Citizenship Identity' (2000) 34 *Sociologia* 507-508

[186] ECOWAS Protocol a/p.3/5/82 of 1982 relating to the definition of community citizen.

[187] F Mansouri, A Johns & V Marotta 'Critical global citizenship contextualising citizenship and globalisation' (2017) 1 Journal of Citizenship and Globalisation Studies 2; SB Wiley 'Rethinking Nationality in the context of globalization' (2006)14 Communication Theory 82.

[188] Mansouri, Johns & Marotta (n 187 above) 2.

[189] *Ibid.*

[190] Wiley (n 187 above) 86-88.

international human rights regime, and mass migrations of people that make some people 'illegal' and 'stateless', and include millions of refugees fleeing wars, poverty, and various natural and man-made disasters.

It is the view of this thesis that these emerging challenges entail the need for adjusting the legal approach to nationality, which persistently and largely draws its inspiration from state-based and state-bound approaches. Failure to do so would make the legal and formal status a mechanism of inclusion and exclusion from the national polity and the rights and protections associated with access, beyond any form of legitimate check and balance. This can be seen from the responses of states to the politically contested issue of undocumented migrants, where liberal states use traditional conceptions of citizenship to categorise and regulate 'desirable' and 'undesirable' flows of human labour and capital in an era of globalisation.[191] Appreciating such changes in trends and the factors defining inclusion will help to address the major problem that this thesis deals with, namely statelessness among children.

[191] R Munck 'Globalisation, Governance and Migration: An Introduction' (2008) 29 *Third World Quarterly* 1233.

Chapter Two:
The Right to Nationality and Statelessness under International and African Regional Laws

2.1 Introduction

As discussed in Chapter one, the notion of nationality has been construed as a domestic matter in which states have the full power to determine who is a national and who is not. One can be accorded protection by a state only if one is a national of that country. It is also through recognition as a national of a state that individuals enjoy international protection and assume duties. Nationality has been understood as purely a domestic matter left for the determination of each state.[192] Understanding nationality as a status that ties a state and an individual together through duty and protection leads to its limited application, which requires individual citizens to commit themselves to serve the state while the state provides protection to its nationals.

The way nationality is perceived has, however, changed as international human rights have developed. The realm of contemporary international law presents a challenge to this understanding of nationality, as the responsibility of the state to provide protection goes beyond its nationals. In fact, having a nationality has become one of the human rights of individuals.[193] Although states retain the power to determine the contents of their nationality laws and to determine who belongs to their nation, their discretion has been restricted by human rights principles.

Despite the international recognition of the right to nationality, millions of individuals, including children, are affected by statelessness globally. Taking nationality and statelessness as one of the contemporary issues of significance to human rights discourse, this chapter provides a critical discussion of the legal responses to the right to nationality and statelessness prescribed under global and regional laws. In the course of describing the existing relevant normative frameworks, the chapter examines whether they can effectively and comprehensively address matters of nationality with a view to preventing statelessness among children in Africa

2.2 International laws on nationality and statelessness

2.2.1 Nationality as a subject of international law

Before dealing with how international law responds to the question of nationality matters, it is important to reflect on the role international law could play in regulating nationality. International law, in its creation and application, is based on the principle of sovereign

[192] S Forlati 'Nationality as a human right' in A Annoni & S Forlati (eds) *The Changing Role of Nationality Routledge Research in International Law* (2013) 18.
[193] S Forlati 'Nationality as a human right' in Annoni & Forlati (n 192 above) 20.

equality of states.[194] Historically, without a clear expression of 'consent to be bound', a state cannot be compelled to accept new obligations under international law, nor does such law interfere in the domestic affairs of another state.[195] Sovereignty, 'as the right to exercise therein to the exclusion of any other state',[196] bestows on states the right to 'determine the rules governing the attribution of nationality in accordance with their national interests'.[197]

Hence, as Hudson writes, 'in principle, questions of nationality fall within the domestic jurisdiction of each state'.[198] In part, states retain this authority because, in Blackman's words, 'nationality within a state is created as a function of domestic law. There is no such thing as *international nationality*.[199] Because domestic law creates nationality, its specific form and substance varies from state to state. Membership in one state carries a different set of rights and obligations, within a different legal framework, than does membership in another state.[200] Traditionally, for purposes of international law, these internal nationality categories were not considered legally relevant. International law governs the rights and duties of states; it is thus more concerned with the formal designation of state nationality for purposes of interstate relations than with its internal functions. As Weis puts it,

> [n]ationality in the sense of international law is a technical term denoting the allocation of individuals, termed nationals, to a specific State – the State of nationality – as members of that State, a relationship which confers upon the State of nationality...rights and duties in relation to other States.[201]

International instruments have also reflected this view. For example, article 1 of the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws (the 1930 Hague Convention) provides, inter alia, that '[i]t is for each State to determine under its own laws who are its nationals.' Article 2 of the same instrument adds that '[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'. International judicial authorities have also affirmed

[194] The concept of 'sovereign equality of States' was declared at the historic conference held in Moscow in October 1943 where the USA, UK, the Soviet Union, and China agreed that they recognised 'the necessity of establishing a general international organisation, based on the principle of sovereign equality of States'. See H Kelsen 'The Principle of sovereign equality of States as a basis for international organisation' (1944) 53 *Yale Law Journal* 207.

[195] S Besson 'Sovereignty, International Law and Democracy' (2011) 22 *The European Journal of International Law* 376-377; see also Van Waas (n 37 above) 36.

[196] G Van Calster 'International Law and Sovereignty in the age of globalization' in A Schwabach & A Cockfield (eds) *The role of international law and substitutions* (2003) 2.

[197] R Donner 'The Regulation of Nationality in International Law' (1987) 81 *The American Journal of International Law* 971.

[198] M Hudson 'Report on Nationality including Statelessness' (1952) UN International Law Commission, Special Rapporteur on Nationality including Statelessness available at https://digitallibrary.un.org/record/1299414 (accessed 18 November 2021).

[199] J Blackman' State successions and statelessness: The emerging right to an effective nationality under international law' (1998) 19 *Michigan Journal of International Law* 1151.

[200] Weis (n 151 above) 4-9.

[201] Weis (n 151 above) 59.

this view, most famously in the oft-quoted dictum from the Permanent Court of International Justice (PCIJ) in its advisory opinion concerning the *Tunis and Morocco Nationality Decrees*: '[I]n the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain [of domestic jurisdiction].'[202] However, with the development of international human rights law, it is now constructed that an *exclusive* domestic jurisdiction on matters of nationality is incompatible with the international legal system and hence rejected as a matter of conception and policy.[203]

If matters of nationality remain at the heart of the principle that state sovereignty falls within the exclusive prerogatives of each state, the question then follows: What are the instances that could require the intervention of international law in this highly guarded territory of states? To answer this question, one should look at and analyse the contemporary changes with regard to the principle of state sovereignty at the global level.

Though the principle of sovereignty is still the norm governing and regulating the relationship of states at the international level, it is evident that over the last decades the absolute nature of state sovereignty has been eroded, especially through internationalisation and universalisation of human rights.[204] By signing multilateral treaties, states voluntarily allow limitations on their internal affairs, which thus erodes their sovereignty. With the development of human rights and attributes of democracy, subjects of sovereignty started shifting from individual states to the people, at least in some aspects and areas, such as in situations where international law could facilitate mutually beneficial cooperation internationally (as in the case of international trade and environmental law), and where international law could be in a position to help those most vulnerable to abuse, oppression, and harm.

As in the case with other human rights issues, state sovereignty to regulate matters of nationality is not absolute but subject to standards and developments in international law. As Blackman writes,

> Nationality questions lie at the moving fault line between domestic state sovereignty and the evolving international legal system. Within the latter, nationality straddles an intersection of several substantive bodies of law related to diplomatic protection, state responsibility, and international human rights.[205]

Indeed, limitations on state discretion over nationality matters were discussed as early as the *Tunis and Morocco Nationality Decrees* case.[206] Although the PCIJ upheld the principle that nationality questions are reserved to states' domestic jurisdiction, it also made it clear that the

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[202] Advisory Opinion No. 4 Nationality Decrees Issued in Tunis and Morocco (7 February 1923) Permanent Court of International Justice, 4 available at: https://www.refworld.org/cases,PCIJ,44e5c9fc4.html (accessed 20 December 2021).

[203] Blackman (n 199 above) 1152.

[204] MP Ferreira-Snyman 'The Evolution of State Sovereignty: A Historical Overview' (2006) 12 *Journal of Legal history* (2006) 1.

[205] Blackman (n 199 above) 1151.

[206] Tunis and Morocco Nationality Decrees (n 202 above).

question was a relative one dependent on the development of international law:

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.[207]

The Court's approach was echoed by the 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law, which declares that 'each State may determine by its law who are its nationals, subject to the provisions of any special treaty to which the State may be a party; but under international law the power of a State to confer its nationality is not unlimited'.[208]

Introducing the concept of *genuine connection*, an additional substantive limitation, one taking the form of non-recognition by other states, was also elaborated by the ICJ in its *Nottebohm* decision. The Court held that '[a] state cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the state'.[209] Although the law of diplomatic protection has been the context in which restrictions on state discretion over nationality legislation have emerged, and although the *Nottebohm* case gave impetus to the principle of 'real and effective nationality',[210] the law of human rights has fueled the rapid development toward positive obligations on states with respect to nationality.

The existence of limitations on state discretion over nationality issues was also acknowledged in the 1930 Hague Convention. As mentioned, although article 1 reaffirmed that '[i]t is for each state to determine under its own law who are its nationals', it immediately qualified such discretion with an additional clause that requires consistency with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[211] Indeed, it is worth noting that article 1 of the 1930 Convention does not specify the limitations that could be considered to restrain states' discretion in nationality matters.

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[207] In that decision, the Court acknowledged that at the time of the consideration of the case in the 1920s, international relations and international law did not impose particular constraints on state sovereignty with respect to determining nationality. Rather, at that time, 'the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States'; *Tunis and Morocco Nationality Decrees* (n 202 above) paras 38 & 39.

[208] Article 2 Draft Conventions and Comments Prepared by the Research in International Law of the Harvard Law School on the Law of Nationality (1929).

[209] *Liechtenstein v Guatemala* ICJ (6 April 1955) (1955) ICJ reports 4 para 23.

[210] According to the principle of 'real and effective nationality', as prescribed in the *Nottebohm* case, for nationality acquired through naturalisation to be recognised in the international arena, it should be granted on the basis of a genuine connection between the individual and the state in question, one which can be measured by the existence of stronger factual ties and social facts of attachment that make nationality real and effective; see *Liechtenstein v Guatemala* (n 209 above).

[211] Convention on Certain Questions Relating to the Conflict of Nationality Law of the League of Nations (1930).

The legal approach to nationality has become clearer with the steps that the international community took to restore global order after the Second World War. The proliferation of human rights norms in international and regional instruments has also developed substantive limitations on state sovereignty over nationality regulation that give meaning to the Decision of the PCIJ. In particular, as this chapter demonstrates, developments in international human rights law, beginning with article 15 of the UDHR, have significantly narrowed states' discretion over nationality matters, such that states must comply with international human rights obligations in their laws and the practices related to citizenship. Hence, although nationality matters form part of the *domaine réservé* and fall within the domestic jurisdiction of states, their application is limited by international law.

However, it is also important to note that alongside the increasing trend of nationals, through the growing international human rights regime, gaining the right to exert influence over states' affairs, the vested interest of the states to regulate their own membership is also growing. This results in an unresolved tension between the unfettered freedom of states to rule on their internal matters and the growing trend of individuals' or peoples' autonomy in a democratic world. Hence, dealing with nationality matters in international law requires a prior understanding and appreciation of the sensitivities of the issue, both from an academic and practical point of view.

Therefore, this thesis argues that placing constraints on states under international law on matters of nationality can be justified only if it serves to uphold and protect clear and justified rights of individuals within the framework of facilitating mutually beneficial cooperation internationally and avoiding abuse, oppression, and harm. For instance, limitations on state sovereignty with regard to nationality matters can be considered legitimate if the state concerned is adhering to the universal anti-discrimination norm,[212] the best interests of the child (with regard to the nationality of the child),[213] and the principle of preventing statelessness. As the Human Rights Council in its 2009 report to the Secretary General, on 'Human Rights and Arbitrary Deprivation of Nationality', states:

> While recognizing the right of each state to determine by law who its nationals are, the resolution urged states to refrain from enacting or maintaining

[212] International human rights law establishes what has come to be classified as a 'peremptory norm' of non-discrimination. The norm, explicitly restated in most of the international human rights treaties, requires that all those who are nationals of a state enjoy the same rights and that discrimination in access to nationality is not permitted on grounds of sex, religion, ethnicity, gender and any other similar grounds. It is important to note that the main governing principle when it comes of the nationality of the child is the best interests of the child. There are instances where discrimination can be permitted in nationality laws. Some countries discriminate between citizens and non-citizens when it comes to applications of certain rights, for instance the right to participation in domestic political processes; these forms of discrimination seem to be justified when it comes to adults. This thesis argues, however, that a different approach should be adopted when it comes to the nationality of the child and that discrimination should not be permitted under any grounds when it comes to conferring and exercising the fruits of nationality by a child. The ultimate criteria should be the best interests of the child; B Manby (n 68 above) 15.

[213] Chapters Three and Four discuss the fact that the principle of the best interests of the child is considered one of the justifications for limiting states' power on nationality matters.

> discriminatory nationality legislation and to reform nationality laws that discriminate against women. Such actions would be consistent with states' obligations under international law, including article 2 of the UDHR, which provide that everyone is entitled to the rights and freedoms set forth in the Declaration without distinction on the basis of sex.[214]

For the purpose of this thesis, what is central to the discussion of the limitation of states' sovereignty on matters of nationality is its implication for statelessness. The existence of different principles and approaches to the attribution of nationality, combined with the basic autonomy of states to regulate the conferral and withdrawal of their nationality, opens the door to both the 'deliberate and inadvertent creation of statelessness'.[215] The inherent mobility of people, and the fact that they are constantly crossing borders, puts the compatibility of these divergent yet coexisting doctrines under added pressure, while the policies that states choose may leave some individuals entirely without the nationality of any state.[216] Moreover, unless limits are placed on the freedom of states to determine who is worthy of citizenship, certain persons may be discriminatorily singled out and rendered stateless. Hence, international law has a role to play in addressing the question of nationality matters with a view to preventing cases of statelessness.

2.2.2 Nationality as a human right

Preventing statelessness in general and among children in particular requires taking a proper look at the meaning and contents of the right to nationality. Major questions that need to be addressed from the international human rights law perspective include: Is there a recognised right to a nationality, and if so, what does its content include? As defined in the forgoing part of this thesis,[217] nationality refers to the legal relationship or 'legal bond' between the national and his or her state, one based on social facts of attachment and giving rise to rights and duties on the part of both sides of the relationship.[218]

In line with this approach, the ICJ in the *Nottebohm* case indicated that '[n]ationality serves above all to determine the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the state in question grants to or imposes on its nationals'.[219] This perspective entails that possessing the nationality of a particular state grants entitlements and access to a range of rights, privileges and services, both while in the country and abroad. Besides, it also presupposes that nationals could be required to assume duties, 'including the

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[214] Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General 'Human rights and arbitrary deprivation of nationality Report' of the Secretary-General (2009).

[215] I Brownlie 'Principles of public international law' (2003) 18-23; see also Van Waas (n 37 above) 36.

[216] *Ibid.*

[217] See the discussion in Section 1.3 of this thesis.

[218] A Edwards 'The meaning of nationality in international law in an era of human rights in Nationality and Statelessness under international law' in Edwards & Van Waas (n 67 above) 11.

[219] *Liechtenstein v Guatemala* ICJ (n 209 above) para 4.

obligation to defend the state against enemies, to pay taxes or in some instances to vote'.[220] This understanding of nationality as an enabling right serves for protection of the right at the domestic level. International law, however, projects a different aspect of nationality that goes beyond the individual rights of the national vis-à-vis his or her state of nationality. As Edwards writes,

> From an international law perspective, the bonds of nationality create duties upon states vis-à-vis other states, such as the duty to readmit one's own national from abroad. The bond of nationality also grants particular rights to the state of nationality, such as the right of the state to exercise "diplomatic protection" on behalf of its own citizens, as well as to some extent shared practices on rules relating to nationality acquisition.[221]

Hence, in discussing the protection accorded to the rights to nationality and its elements under international and regional laws, the subsequent paragraphs adopt the notion of nationality as not only an enabling right at the domestic level but also as a defining status in regulating trans-national relations as they apply to individuals.

2.2.3 The right to nationality under international and regional laws

A number of international and regional human rights instruments include the right to a nationality in their provisions. The UDHR recognises the right to a nationality for everyone where it also further prescribes the prohibition of arbitrary deprivation of nationality.[222] Following the UDHR, other international human rights instruments introduced provisions relating to the right to a nationality. These instruments include the 1966 International Covenant on Civil and Political Rights (ICCPR);[223] the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD);[224] the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[225] the 1989 Convention on the Rights of the Child (CRC);[226] the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Convention on all Migrant Workers);[227] and the 2006 Convention on the Rights of Persons with Disabilities (CRPD).[228]

As it is not a human rights instrument, the 1961 Convention on Reduction of Statelessness does not contain the right to a nationality, although paragraph 1 of its article 8 prohibits the deprivation of nationality. Hence, states may not deprive anyone of his or her nationality if such deprivation would render him or her stateless, of course save for a few exceptions. As

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[220] A Edwards 'The meaning of nationality in international law in an era of human rights in Nationality and Statelessness under international law' in Edwards & Van Waas (n 67 above) 13.
[221] *Ibid.*
[222] Article 15 of UDHR.
[223] Articles 24 & 26 of ICCPR.
[224] Article 5 of CERD.
[225] Article 9 of CEDAW.
[226] Articles 7 & 8(1) of CRC.
[227] Article 29 of Convention on all Migrant Workers.
[228] Article 18 of CRPD.

Ganczer writes, '[T]he draft Convention had envisaged a general prohibition of deprivation, but during the negotiations, states pressed the inclusion of several exceptions into the final text, which substantially weakened the prohibition.'[229] However, there are still procedural guarantees that made it to the final text of the Convention regulating the applications of the exceptions, including the right to a fair hearing by a court or other independent body.[230]

The legal basis of the right to nationality is also reinforced at regional level, as is reflected in the Inter-American, European and African regional instruments and the jurisprudence of their monitoring mechanisms. In this regard, one may take note of article 20 of the 1969 American Convention on Human Rights, which not only refers to the right to a nationality but also includes a key safeguard to prevent children from becoming stateless at birth.[231] The European Convention on Nationality (ECN)[232] is another regional instrument which was born out of the perceived need to create a single text that consolidates all the developments in domestic and international law regarding nationality. The ECN is regarded as one of the most progressive instruments by far, as it provides strong protection for the realisation of the right to nationality, with the ultimate goal being to prevent statelessness. For instance, it prescribes principles that enable married persons of different nationalities and their children to acquire multiple nationalities; it also covers questions relating to the acquisition, retention, loss and recovery of nationality, procedural rights, and nationality in the context of state succession, military obligations and cooperation among States Parties.[233]

At the African level, what is regarded as the 'mother' human rights instrument, the African Charter on Human and Peoples' Rights (ACHPR or the Banjul Charter),[234] unfortunately does not contain a specific provision on the right to a nationality. Yet the Commission which is established to monitor its implementation, the African Commission on Human and Peoples' Rights, has through its jurisprudence dealt with human rights violations relating to the denial of a person's nationality. Issues covered in the various Communications brought before the Commission include the notorious attempts to prevent former President Kenneth Kaunda of Zambia[235] and former Prime Minister Alassane Ouattara of Côte d'Ivoire[236] from running for office again; mass expulsions of alleged foreigners,[237] whether migrants or refugees, in which nationals have also been caught up;[238] and provisions on land ownership

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[229] M Ganczer 'The Right to a Nationality as a Human Right' in *Hungarian Yearbook of International Law and European Law* (2014)16.

[230] Article 8 of the 1961 Convention.

[231] Organization of American States (OAS), American Convention on Human Rights, Pact of San Jose of 22 November 1969.

[232] Council of Europe, European Convention on Nationality of 6 November 1997.

[233] Articles 6-12 of ECN.

[234] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter) of 27 June 1981.

[235] *John K. Modise v Botswan,* 2000) AHRLR 30 (ACHPR 2000).

[236] Communication No. 246/02, *Mouvement ivoirien des droits humains (MIDH) v Côte d'Ivoire*, 5th Extraordinary Session of the African Commission on Human and Peoples' Rights, 21-29 July 2008.

[237] *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999).

[238] Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Republic of Guinea (2004) AHRL 57 (ACHPR 2004).

that discriminate against non-nationals.[239] The Commission has drawn on many articles of the Banjul Charter, including those relating to due process, the right to family life and non-discrimination, in finding states to be in violation of their obligations in these cases. Most significantly, it has found that the wording of article 5 of the Charter[240] applies specifically to attempts at denationalising individuals and rendering them stateless.

Another relevant instrument at the African level is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which contains a provision on nationality. Article 6(g) of the Protocol states that a woman shall have the right to retain her nationality or to acquire the nationality of her husband. However, the Protocol faces criticism on matters of transfer of nationality, as it provides an exception to the equal rights of men and women in cases where 'this is contrary to a provision in national legislation or is contrary to national security interests'.[241]

In relation to the right to nationality of the child, the ACRWC's provisions are similar to those of the CRC.[242] The Charter requires State Parties

> to ensure that their Constitutional legislation recognises the principles according to which a child shall acquire the nationality of the state in the territory of which he/she has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.[243]

2.2.4 Normative gaps in international and regional laws

Article 15 of the UDHR provides that everyone has 'the right to a nationality' and no one shall be arbitrarily deprived of that nationality, nor denied the right to change one's nationality. This article does not provide a corresponding obligation on states to grant nationality. The protection provided through article 24(3) of the ICCPR limits its application to children, stating that they have the right to acquire a nationality. Again, no corresponding obligation to grant nationality to every child born in the territory of a particular state is included, nor is protection against arbitrary deprivation of nationality.[244]

The right to nationality in the context of ensuring conferral of nationality and avoidance of arbitrary deprivation of nationality has also been discussed in various soft laws.[245] According

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[239] Communication 292/2004, Institute for Human Rights and Development in Africa v Angola (2008) AHRLR 43.

[240] Article 5 of the Banjul Charter reads: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.'

[241] Article 6 of Maputo Protocol.

[242] See Chapter 3 for detailed discussion of the relevant provisions of the CRC and ACRWC.

[243] Article 6 of ACRWC.

[244] However, the right to acquire a nationality under article 24(3) of the ICCPR is not devoid of obligations, as the Human Rights Committee declares that 'states are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality'; Human Rights Committee, General Comment No. 17, para 8.

[245] General Assembly Resolutions 67/149 of 20 December 2017; Executive Committee (ExCom) Conclusions No. 106 (LVI)-2010 and No. 107 (LVII) 2007.

to the UN Secretary-General's report on human rights and arbitrary deprivation of nationality, the right to nationality implies (i) the right of each individual to acquire, change and retain nationality, and (ii) that one's nationality cannot be arbitrarily removed.[246] Characterising nationality rights only in terms of these two of their components means that international laws and practices tend to appreciate the right to nationality as a procedural right devoid of the substantive rights otherwise associated with it. Existing laws at international level, including soft laws, do not delve into the question of whether any substantive rights are associated with the possession of nationality and applicable to all nationals, regardless of their state of nationality, as a matter of international law. As Edwards states, '[T]he right to a nationality under international law has thus been crafted and could be classified primarily as a procedural right, covering rights and rules relating to acquisition and deprivation of nationality.'[247]

This approach of considering nationality only from the 'procedural rights' perspective, coupled with gaps in the existing legal framework at international level, hinders the effective realisation of the aspired right to a nationality. The right to nationality in international law is complemented by few principles for assigning responsibility to a particular state to grant nationality to specific individuals. As Ganczer writes,

> This clearly manifests itself in the fact that its regulation on the international level reflects the interests of states, and the wording of relevant documents is typically vague and lacking in order to enable states to retain the regulation of nationality as far as possible within their respective domestic spheres.[248]

Countries follow various modalities in conferring nationality to individuals. Some states grant nationality based principally on the basis of birth in their territory, thereby applying the principle of *jus soli*. Others grant it based on descent: an individual inherits the citizenship of his or her parents, which reflects the principle of *jus sanguinis*. Many states apply a combination of these two approaches.[249]

Naturalisation procedures are even more diverse when it comes to acquiring citizenship after birth. International law has not historically expressed a preference for one principle for granting citizenship over another, except in cases where the mode of acquisition of nationality results in statelessness.[250] In such cases, few international laws take a clear stance in preferring acquisition of nationality at birth for a particular group of people who would otherwise be stateless. For example, article 7 of the CRC, article 6 of the ACRWC, and article 20 of the American Convention on Human Rights require states to confer nationality

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[246] Report of the Secretary General to the GA 2009

[247] A Edwards 'The meaning of nationality in international law in an era of human rights in Nationality and Statelessness under international law' in Edwards & Van Waas (n 67 above) 16.

[248] Ganczer (n 229 above) 15.

[249] A Edwards 'The meaning of nationality in international law in an era of human rights in Nationality and Statelessness under international law' in Edwards & Van Waas (n 67 above) 16-17; see also Manby (n 55 above) 41-42.

[250] Manby (n 55 above) 41-42.

to children born in their territory who would otherwise be stateless, which endorses the approach based on the *jus soli* principle. The ECN goes further, requiring State Parties to provide for naturalisation of 'persons lawfully and habitually resident on their territories'.[251]

As mentioned, the right of every person to a nationality has been part of international human rights law since the 1948 UDHR. However, the question of which particular state has the obligation to recognise the nationality of any child or adult remains unclear. Though international human rights law evidenced a stride in putting some limits on state discretion,[252] in most part of the substantive part of the right to nationality, the basic principle of international law remains the rule established by the Hague Convention of 1930, that it is for each state to determine who are its nationals. To date, there is no clear and general prescription in nationality regime in international law that recognises birth in a territory as a compulsory and sufficient basis for the attribution of nationality.

Moreover, the other safeguarding principle that forms part of the procedural right to nationality – that is, the principle of prohibiting the arbitrary deprivation of nationality – could be problematic in terms of how it is expressed in the existing international norms. The word 'arbitrary', which is central to the procedural safeguard of the right to nationality, is not defined in all of the international norms that have been established to address matters of nationality in particular or human rights in general. Indeed, a growing body of jurisprudence by human rights monitoring mechanisms prescribes that the threshold for arbitrariness can be lowered when it comes to children's rights. As explained in Chapter five, this thesis takes the view that every deprivation of nationality that results in statelessness needs to be considered arbitrary. Furthermore, the right to 'change nationality' also needs more elaboration under international law, as it should be interpreted to mean that the former state responsible for nationality can withdraw its nationality only upon a request by a person who has acquired another nationality. In the absence of such elaboration, the right to change one's nationality could easily become illusory and fail to provide effective protection against statelessness.

As mentioned, when one looks at the text and application of international frameworks on the right to nationality, it is evident that the substantive aspect of the right to nationality is rather neglected. International law, beyond prescribing general principles of acquisition of nationality and prohibiting the arbitrary deprivation of nationality, should spell out the implications of having the nationality of a particular country and identify human rights which are associated with one's nationality or the absence of it. To date, international and regional laws fail to provide adequate answers, beyond provision of general principles of limitations of rights, to questions such as: Which rights are nationals entitled to? Which rights are enjoyed exclusively by nationals? How can a state legitimately limit the enjoyment of rights as protected under international human rights norms by non-nationals or stateless people?

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[251] Article 6(3) of ECN.

[252] For instance, in the case of children of unknown parents found in a country ('foundlings'); the protection, less widely accepted but established by both the 1961 Convention and the ACRWC, that a child who is otherwise stateless shall acquire the nationality of the state where he or she is born; and the prohibition of gender discrimination in transmission of nationality to children, as prescribed by CEDAW.

Although international human rights law affirms the premise of the UDHR that human rights apply to all individuals regardless of citizenship or national origin,[253] the legal relationship between an individual and a state remains an essential prerequisite for the effective enjoyment and protection of various protected rights. Although states are in principle bound by international law to protect the rights of all individuals within their jurisdiction,[254] those who are not citizens of the state in which they live often face substantial obstacles in asserting and vindicating their rights. As Adjami and Harrington write,

> [T]he simple fact of being a non-citizen means that one's right to residence within the state is not absolutely guaranteed, and the possibility of expulsion is sufficient to induce many to accept limitations on, and violations of, their rights without protest.[255]

Of course, this should not lead one to the conclusion that international law does not address the issue of legally justified limitations on the exercise of some rights by non-citizens. For instance, some political rights, such as participation in political processes through voting and serving as a public official, are reserved for citizens of the state concerned.[256] The range of economic, social and cultural rights provided by international human rights law can also be variously restricted to nationals.[257] As Edwards puts it, 'distinctions between nationals and non-nationals are also at times legally permitted where they serve a legitimate State objective and are proportional to the achievement of the objective'.[258]

The fact that international law fails to address the substantive aspects of nationality rights adequately leaves discretionary room for countries to decide arbitrarily on which rights are reserved for nationals to the exclusion of non-nationals, including stateless persons. Some countries continue to recognise different categories of citizenship and limit rights depending on how nationality was acquired.[259] In her work, *The Struggle for Citizenship in Africa: African Arguments*,[260] Manby discusses the challenges that non-citizens are facing in the

[253] See, for example, General Recommendation 30 of the Committee on the Elimination of Racial Discrimination on the rights of non-citizens. The Committee on CERD affirms that, although article 1, para. 2 of the CERD 'provides for the possibility of differentiating between citizens and non-citizens', this article 'should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights'.

[254] Under general principles of treaty interpretation, and in terms of article 29 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force on 27 January 1980), 'a treaty is binding upon each party in respect of its entire territory'. Thus, human rights treaties should be applied to every individual in a state's territory without any distinction based upon the individual's nationality.

[255] M Adjami and J Harrington 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' *Refugee Survey Quarterly* (2008) 93.

[256] Article 25 of ICCPR.

[257] Article 2(3) of ICESCR.

[258] A Edwards 'The meaning of nationality in international law in an era of human rights in Nationality and Statelessness under international law' in Edwards & Van Waas (n 67 above) 38.

[259] The UNHCR Handbook on Protection of Stateless persons under the 1954 Convention Relating to the Status of Stateless Person (2014), available at https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf (accessed 15 November 2020).

[260] B Manby *The Struggle for Citizenship in Africa* (2009).

many African countries where they are subjected to violations of their human rights, mainly because of the arbitrary decisions that governments tend to take in regard to non-citizens. Such violations range from abuse of immigration laws and arbitrarily deporting individuals under the guise of their being 'non-citizens', to silencing dissent and criticism for political purposes. Governments tend to overlook the fact that due-process protections apply equally to non-citizens as to citizens; any deportee, for instance, should have the right to challenge his or her deportation. Manby states that

> when non-citizens are long-term residents – and especially when their lack of citizenship is due to deficiencies in the systems for naturalisation – use of immigration law against them has disturbing similarities to the attempts to denationalise those whose citizenship the government states is in doubt.[261]

Where substantive nationality rights are not defined properly in international law, the situation of stateless people is worsened, given that they are usually politically, socially and culturally marginalised. Hence, the fact that international human rights law articulates the basic rights that all persons are entitled to enjoy, regardless of nationality, is not sufficient, as some rights are still linked to nationality. This suggests that more needs to be done, at an international-law level, in identifying and listing the substantive rights which are legally and practically linked with nationality rights. This thesis argues that a tailor made approach that responds better to children and their rights should be taken, and, in later chapters, it provides suggestions in regard to the distinction between national and non-national children.

2.3 Statelessness under international and regional laws

2.3.1 Statelessness in international law

In response to statelessness as a human rights problem and the challenges it could result in, various international and regional instruments have been established. As mentioned, the first attempt to address statelessness was made, though indirectly, through the 1930 Hague Convention. As the first attempt by states to agree on rules regarding questions of nationality, the Convention includes principles to resolve some of the conflicts of laws and so in turn addresses statelessness. It regulates a range of issues that frequently cause statelessness, including technical matters such as the issuance of expatriation permits,[262] matters related to marriage and divorce,[263] matters related to the effect of naturalisation on dependent children,[264] the birth of a child to unknown or stateless parents,[265] the legitimisation of children born out of wedlock,[266] and the adoption of children.[267] Most of these provisions

[261] This is the case, for instance, in Zambia, Tanzania and Sierra Leone, where the laws of these countries were drafted or rewritten to arbitrarily deny the rights of those referred to as 'non-nationals'; see Manby (260 above).
[262] Article 7 of 1930 Hague Convention.
[263] Articles 8-11 of 1930 Hague Convention.
[264] Article 13 of 1930 Hague Convention.
[265] Articles 14-15 of 1930 Hague Convention.
[266] Article 16 of 1930 Hague Convention.
[267] Article 17 of 1930 Hague Convention.

stipulate that if the national laws of a state provide for the automatic loss of nationality upon, for example, expatriation or marriage, such loss would be deemed conditional on the acquisition of an alternative nationality. In this regard, the 1930 Hague Convention is useful in harmonising a great deal of conflicting nationality legislation, and its provisions are echoed today in the nationality acts of many countries.[268]

As discussed above, though, the Convention deliberately chose to advocate for the principle that it is for the municipal law of individual states to confer nationality to individuals;[269] at the same time, it recognises the need for states to commit to a number of principles and limit their discretion to some extent.[270] However, the provisions, taken as a whole, do not prohibit the practice of denationalisation or the deprivation of nationality, which were major causes of statelessness in the late 19th century and following the First World War. Nor does the Convention relate directly to situations involving state succession.[271] Substantively, the 1930 Hague Convention was not 'rigorous enough to seriously impact on the existence of statelessness, nor has it ever attracted many State Parties'.[272]

In the decades that followed, international law developed at a rapid pace in the areas of state sovereignty and nationality matters, which resulted in the current position that international law 'favors human rights over claims of state sovereignty'.[273] This shift led to conventions in line with the general consensus on prohibiting statelessness and seeking to resolve challenges associated with it, with the 1954 Convention relating to the Status of Stateless Persons being one of them. The Convention, developed from the Protocol on stateless persons that had been drafted as an addendum to the 1951 Refugee Convention, is the primary international instrument that aims to regulate and improve the status of stateless persons and to ensure they are accorded their fundamental rights and freedoms without discrimination.

Despite the introduction of the 1954 Convention, the goal of eliminating statelessness remained unattained under international law, and so the United Nations Economic and Social Council (ECOSOC) requested that the International Law commission (ILC) prepare a draft convention for the elimination of statelessness.[274] The ILC drafted two for consideration, both addressing the problem of statelessness resulting from conflict of laws. The first was on the elimination of future statelessness, while the second sought to reduce the incidence of

[268] Blackman (n 199 above) 1177.

[269] The Convention's approach in this regard is clearly stated in article 1, which declares: 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.' Moreover, article 2 of the same Convention states that '[a]ny question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that state'.

[270] Article 2 of 1930 Convention.

[271] Blackman (n 199 above) 1177.

[272] Van Waas (n 67 above) 40; as of April 2022, the number of State Parties stood at 20.

[273] UNHCR, Nationality and Statelessness: A Handbook for Parliamentarians (n 39 above) 9.

[274] *Ibid.* 12.

statelessness in the future.[275]

When government representatives convened in 1959 to consider which draft should proceed, it was agreed that the draft Convention on elimination of statelessness sounded 'too radical', and representatives thus opted to debate the draft Convention on Reduction of Future Statelessness, which led to the adoption of the 1961 Convention on the Reduction of Statelessness. As stated in the Information and Accession package, the 1961 Convention may be seen as consolidating the principles of equality, non-discrimination, protection of ethnic minorities, rights of children, territorial integrity, the right to a nationality and the avoidance of statelessness. [276] In seeking to reduce the incidence of statelessness, the 1961 Convention requires that signatory states adopt nationality legislation that reflects prescribed standards relating to the acquisition or loss of nationality.

The Convention aims at addressing the creation of statelessness in three scenarios: first, the creation of statelessness at birth where the child fails to acquire the nationality of any state; secondly, the creation of statelessness later in life where a person loses, renounces or is deprived of his or her nationality without gaining another; and thirdly, the creation of statelessness in the specific circumstance of state succession.[277] Though the Convention includes provisions that address statelessness, it applies to limited instances of statelessness as discussed in the following sections and chapters of this thesis.

2.3.1.1 What constitutes 'statelessness' under international law?

The prevention of statelessness among children through the application of international law requires an understanding of the elements of statelessness, including the situations covered under its definition. As mentioned in Chapter One, the 1954 Convention, as one of the major international instruments in the field of statelessness, defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'.[278] A first reading of this provision gives the impression that the Convention offers a clear and straightforward definition of what a stateless person is, but, as is argued in this thesis, that is not the case. In fact, as discussed in forthcoming sections, some of the key challenges facing the global response to statelessness stem from the problematic nature of the definition of statelessness as provided under the 1954 Convention. As Van Waas writes, '[I]t appears that the ongoing contention and debate surrounding the meaning of statelessness – in spite of the existence of a formal, internationally acknowledged definition – may be jeopardising the implementation of norms that address the prevention of statelessness'.[279]

The need for a clear understanding of the terms and expressions in article 1(1) of the 1954

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[275] *Ibid.*

[276] UNHCR, Information and Accession Package: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (1999) 7 available at http://www.refworld.org/pdfid/3ae6b3350.pdf (accessed 01 May 2015).

[277] *Ibid.*

[278] Article 1(1) of the 1954 Statelessness Convention.

[279] Van Waas (n 37 above) 20.

Convention becomes even more important in view of the fact that the definition above is now considered part of international customary law.[280] The following are the major elements of the definition of 'statelessness' as provided under the 1954 Convention: 'not considered as a national', 'any state', and 'under the operation of its laws'.

2.3.1.2 What does 'not considered as a national' constitute?

From the outset, it is important to note that the focus of article 1(1) of the 1954 Convention is 'on the existence (or absence) of a formal bond of nationality, without pausing to consider the quality or effectiveness of nationality'.[281] No matter how slender the distinction may seem, there is a difference between being recognised as a national but not being treated as such, on the one hand, and, on the other, not being recognised as a national at all. The former is concerned with the rights attached to nationality, whereas the latter is concerned with the right to nationality itself.[282] As is lucidly explained in the summary of conclusions of the expert meeting concerning the concept of stateless persons under international law, a person is considered a 'national' when 'the State in question regards holders of a particular status as persons over whom it has jurisdiction on the basis of a link of nationality'.[283] The definition clearly excludes those who have a nationality that is not effective,[284] commonly known as de facto stateless, and refers to those who do not have nationality at all, also known as *de jure* stateless. The choice made by the international community to refer to *de jure* statelessness instead of de facto relates to the drafting history of the 1954 Convention. Van Waas writes:

> The fact that the instrument started life as a Protocol to the Convention relating to the Status of Refugees had a particular impact. The line of thought was that, together the Refugee Convention and Statelessness Protocol would offer protection to both categories of 'unprotected' person – *de facto* and *de jure.* Indeed, when the Refugee Convention was adopted in 1951 (without the accompanying Statelessness Protocol), the international community did establish a protection regime for those lacking protection de facto.[285]

The problem of excluding those without an 'effective' nationality from the definition of statelessness should have been rectified when Member States realised that the instrument was being established as a stand-alone rather than as a protocol to the 1951 Refugee Convention.

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[280] The International Law Commission has observed that the definition of a stateless person contained in article 1(1) is now part of customary international law; see UNHCR 'Commemorating the Refugee and Statelessness Conventions: a compilation of summary conclusions from UNHCR's experts meeting' (2012) available at https://www.refworld.org/pdfid/4f461d372.pdf (accessed 15 November 2016).

[281] Van Waas (n 37 above) 20.

[282] UNHCR 'Summary of Conclusions of the Expert Meeting the Concept of Stateless Persons under International Law' (2010) available at https://www.refworld.org/docid/4ca1ae002.html (accessed 15 November 2016).

[283] *Ibid.*

[284] Lack of effective use of ones' nationality may include, at a minimum, prohibition on the right to enter and reside in the state of nationality and to return to it from abroad, as well as the right of the state to exercise diplomatic protection.

[285] Van Waas (n 37 above) 21.

Records of the negotiation show that some Member States were in favour of expanding the definition of statelessness in the 1954 Convention to have a broader scope and include de facto stateless persons, recognising the fact that there could be instances where some individuals would find themselves qualifying for protection neither as 'refugees' nor as '*de jure* stateless'.[286]

With a view to accommodating the views of these Member States, a compromise was made, which led to the establishment of the non-binding recommendations through the Final Act of the 1954 Convention relating to the Status of Statelessness Persons (the Final Action of the 1954 Convention), which recognises the status of persons who could not exercise protection as provided under article 1(1) of the 1954 Convention. Article 1 of the Final Act of the 1954 Convention declares that

> the Conference recommends that each Contracting State, when it recognises as valid the reason for which a person has renounced the protection of the State of which he is national, consider sympathetically the possibility of according to the person the treatment which the Convention accords to stateless person.[287]

Following the text adopted in the Final Act of the 1954 Convention, the UNHCR defines de facto stateless persons as 'persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.[288] According to the UNHCR's definition, a person who falls under this definition is a person outside the country of his or her nationality who is unable, or, for valid reasons, unwilling, to avail him- or herself of the protection of that country.[289] Protection in this sense refers to the right of diplomatic protection exercised by a state of nationality to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the state of nationality.[290]

In the wake of the UNHCR's explanation of the matter, attempts have been made by scholars and researchers to produce evidence and present scenarios on how individuals become stateless in fact. With regard to children, for instance, some take the position that what may lead to de facto statelessness is the inability of children to prove who their parents are or where they were born, because their births were never registered; similarly, this may happen

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[286] C Batchelor 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 172.

[287] Article 1 of the Final Act of the 1954 Convention

[288] UNHCR Expert Meeting, The Concept of Stateless Persons under International Law Summary Conclusions (n 282 above).

[289] However, it is important to note that, from 2012 onwards, the UNHCR seems to have departed from focusing on the definition of de facto statelessness, this by simply providing a broader definition on statelessness, which in effect leaves the much-argued cases of 'stateless in fact' irrelevant; see UNHCR 'Guidelines on Statelessness No. 1 on the definition of Stateless Person in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons' (2012) available at https://www.refworld.org/docid/4f4371b82.html (accessed 15 November 2016).

[290] UNHCR Expert Meeting, The Concept of Stateless Persons under International Law Summary Conclusions (n 282 above).

when there is an inability to confirm the identities of victims of migrant smuggling and human trafficking, because their documents were taken from them or destroyed.[291] Others define de facto stateless persons as 'those who might have legal claim to the benefits of nationality but are not, for a variety of reasons, able to enjoy these benefits'.[292]

Despite the assertion of a dichotomy between *de jure* and de facto statelessness, this thesis argues that such classification hardly exists in international law as we know it today. As mentioned, the 1954 Convention recognises statelessness in clear terms as a status that results from the absence of any nationality at all rather than of 'an effective nationality'. The various scenarios that are widely considered to be encapsulated within the definition of de facto statelessness do not in fact warrant the conclusion on the existence of the concept, at least from an international-law perspective. For instance, cases where children fail to prove who their parents are or where they were born are covered under provisions on foundlings. Children of unknown parents, and children who would otherwise be stateless, will be discussed in Chapter Three. The current development of the international human rights regime also covers cases where a person is deprived of the enjoyment of his or her rights attached to nationality where it constitutes a violation of the person's rights.[293] Similarly, cases where a person's nationality cannot be established or is contested by one or more states raise questions, at least in principle, about the effectiveness of procedures and mechanisms in place to establish nationality – rather than about the existence of nationality itself.

From the discussion above, it can be noted that the element of 'recognition or non-recognition as a national' when defining stateless persons relates to *status* (the possession or absence of a nationality), without considering the quality and attributes of such status.

2.3.1.3 What does 'under operation of its laws' entail?

A joint reading of all the elements of the definition, in particular considering the meaning of the phrase 'under operation of its laws', provides a clearer understanding of who a stateless person is. As explained in the various guidelines the UNHCR has adopted since 2012, the phrase 'under operation of its law' elucidates that determination of statelessness encompasses

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[291] M Mark 'The Spirit of Geneva-Traditional and New Actors in the field of Statelessness' (2007) 26 *Refugee Survey Quarterly*, 257.

[292] Van Waas and de Chickera list some of the factors. These include those who 'are unable to obtain proof of their nationality, residency or other means of qualifying for citizenship and may be excluded from the formal state as a result; those who possess a legally meritorious claim for citizenship but are precluded from asserting it because a practical considerations such as cost, circumstance of civil disorder, or fear of persecution; those who might, like the undocumented migrant, be out of the territory of her state of membership and lack protection because they are unable for some reason to avail themselves of protection of the state in which she is residing; and those whose irregular migration status renders them de facto statelessness in the sense that despite having a nationality, they cannot turn to the state in which they live in for protection or assistance'; see L Van Waas and A de Chickera 'Unpacking Statelessness' in T Bloom *et al.* (eds) *Understanding Statelessness* (2017) 58.

[293] As Van Waas and de Chickera write, '[T]o contend that the term statelessness and the international statelessness regime must also cover those who have a nationality but also cannot enjoy its benefits, is to ignore the advances of international human rights law which obliges states to protect human rights regardless of the status of the holder'; see Van Waas and de Chickera (n 292 above) 59.

'a mixed question of law and fact'.[294]

From the outset, the reference to 'law' in the article should be construed broadly. As Salmond explains in his seminal text on jurisprudence, sources of law in the common law system include case law and statutes, as well as customary law and 'conventional law', or law by agreement.[295] Hence, 'law' should be understood to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law, and, where appropriate, customary practices.[296] From a child-rights perspective, 'law' should include not only 'nationality legislation', but so too norms and policies established to regulate children's rights issues in a given country, such as child-rights acts, family laws, civil registration laws and legislation regulating matters of refugees and disablement.

Hence, determining statelessness requires that reference be made to the internal laws of each of the states in which an individual could have acquired a nationality. Such an examination of laws may include the laws of the states concerned on attribution, transfer, deprivation, and withdrawal of nationality. Provisions determining who automatically acquires nationality at birth, the conditions for foreigners to acquire nationality when certain conditions or links have been established, and the implications of the effect of change in status of nationalities of parents on their children should also be examined. The requirement 'under operation of its laws' therefore presupposes a comprehensive and careful analysis of legislation, policies, case laws and, when relevant, the practices of a given country with which the individual has relevant links.

However, as examination of statelessness encompasses 'a mixed question of law and fact', an assessment of the laws of the relevant states may not be sufficient in determining statelessness. As van Waas and Checkera write, '[A] person who meets all the requirements to be recognised as a national of a state may still be stateless if, in practice, the competent authorities of the state do not recognise him [her] as such.'[297] Therefore, 'operation of law' also requires examination of the actions of the tribunals and bodies that determine the applicability of law in particular cases. A given statute is certainly a source of law for determining nationality, but the same could also apply to an administrative procedure for issuing a birth certificate, or a judicial interpretation of a statute.

The UNHCR speaks of 'the importance not only of reading another state's internal laws in assessing whether an individual might be stateless, but also of undertaking dialogue with the state concerned to determine how the laws are interpreted and how they are applied'.[298] The phrase 'operation of law' therefore must be understood within the context of examination of

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[294] UNHCR Guidelines on Statelessness No. 1 (n 289 above).

[295] 'The Salmond Lecture' (2007) available at http://www.austlii.edu.au/nz/journals/VUWLawRw/2007/36.html (accessed 20 December 2020).

[296] Van Waas (n 37 above) 26.

[297] Such an understanding of statelessness covers most, if not all, of the cases which traditionally fall under the concept of de facto statelessness; Van Waas and de Chickera (n 292 above) 60.

[298] The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation (2003) available at: https://www.refworld.org/docid/415c3cfb4.html (accessed 20 December 2020).

the laws and their practical implementation in states where an apparent link exists in order to determine whether there is a legal bond of nationality.

2.3.1.4 What does 'any state' constitute?

Two major questions arise when interpreting the expression 'any state' in the definition of statelessness under article 1(1) of the 1954 Convention. The first question is related to a frequently debated issue in international law: What makes an entity a state? The second question relates specifically to the concept of statelessness: Which state's nationality should be ruled out in determining one's statelessness?'

In answering the question, 'What makes an entity a state?', the Montevideo Convention on the Rights and Duties of States (the Montevideo Convention) would be the common starting-point in discussions of the criteria of statehood.[299] According to the Montevideo Convention, an entity to be considered as a state under international law should possess the following qualifications: permanent population; defined territory; government; and capacity to enter into relations with other states.[300] Within a few years of the conclusion of the Montevideo Convention, jurists from around the world adopted its framing of the criteria of statehood.[301] Similarly, in its first report, the Committee on Recognition and Non-recognition in International Law, a body established by the Executive Council of the International Law Association (ILA), noted that:

> As one looks into the responses presented by the national reporters, one may see that even in cases where there was no express mention of the Montevideo Convention, there was substantial overlap between the criteria used by different countries and the Montevideo formula.[302]

However, in the course of more research and emerging situations, international law scholars, and even the Committee on Recognition and Non-Recognition, have realised that discussion of the criteria of statehood, which often begin with article I of the Montevideo Convention, do not actually end there. According to the Committee on Recognition and Non-Recognition, among the four criteria, the capacity to enter into foreign relations is '[t]he most criticized of the four elements of the Montevideo formula'.[303] Vidmar writes of 'placing too much

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[299] Convention on the Rights and Duties of States of 26 December 1933 (the Montevideo Convention).

[300] Article 1 of Montevideo Convention.

[301] Fourth Final Report of the International Law Association Sydney Conference on recognition/non-recognition in international law (2018) available at http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Recognition.pdf (accessed 20 December 2020).

[302] The Committee on Recognition and Non-recognition in International Law was established by the Executive Council of the International Law Association (ILA) in May 2009 with the mandate of examining whether contemporary issues of secession, break-up of states and the creation of new states have changed international law and policy with respect to recognition. The body was dissolved in 2018 as it was deemed to have accomplished its mandate; see its resolution at http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_3_2018_RecognitionNon-Recognition.pdf (accessed 20 December 2020).

[303] B Roth 'Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective

emphasis on the capacity to enter into foreign relations as that is itself a corollary of a sovereign and independent government'.[304] According to critiques of the Montevideo Convention and its criteria on statehood, the capacity to enter into foreign relations is a 'consequence not a criterion' of statehood.[305]

In the light this observation, one may note that international law currently seems to take the position that 'the ongoing relevance of the Montevideo criteria is best understood not as a single bright-line rule of what makes a State but as a core set of attributes'.[306] Hence, international law has seen questions emerge around the sufficiency of the criteria of statehood prescribed in the Montevideo Convention. The major such issues include the extent to which the criteria in the Convention are based on the principle of effectiveness, and the need to consider additional criteria beyond article 1 of the Convention that may weigh in an assessment of whether an aspirant entity has achieved statehood.[307] Discussions around these questions, therefore, led the Committee on Recognition and Non-Recognition to include, with some caveats, additional criteria of statehood: effectiveness of the entity in question; right of self-determination; and the consent of the state which previously exercised control over the territory in question.[308]

Hence, in defining a 'state' as mentioned in the 1954 Convention, it would be important to note that the meaning and development of 'statehood' and its criteria in international law should be taken into consideration. As the UNHCR puts it, 'the meaning of "state" should be based on the criteria generally considered necessary for a state to exist in international law … coupled with other considerations that have subsequently emerged'. [309] This leads to another issue in the context of statelessness: statelessness in unrecognised states under international law.

The second segment of the question in defining 'any state' relates to identification of the 'states' in regard to which nationality should be ruled out in determining one's statelessness. Identifying such 'states' is crucial in statelessness or nationality determination procedures. However, the exercise seems to be rather difficult, particularly because no elaborated

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Control Doctrine' (2010) 14 *Melbourne Journal of International Law* 7.

[304] J Vidmar 'Democratic Statehood and International Law the Emergence of New States in Post-Cold War Practice (2013) 41; see also Fourth Final Report of the International Law Association Sydney Conference on recognition/non-recognition in international law (2018) available at http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Recognition.pdf (accessed 20 December 2020).

[305] Fourth Final Report of the International Law Association Sydney Conference on recognition/non-recognition in international law (n 304 above).

[306] Fourth Final Report of the International Law Association Sydney Conference on recognition/non-recognition in international law (n 304 above).

[307] J Crawford 'The Creation of States' (2006) 97; see also Fourth Final Report of the International Law Association Sydney Conference on recognition/non-recognition in international law (n 304 above).

[308] The First Report of International Law Association Committee on Recognition/Non-Recognition in International Law (Sofia Conference Report) (2012) available at ttp://www.ila-hq.org/index.php/committees (Accessed 20 December 2020).

[309] UNHCR Expert Meeting on the Concept of Stateless Persons under International Law Summary Conclusions' (n 282 above).

provisions exist in the 1954 Convention. As it appears in article 1(1) of the 1954 Convention, proving statelessness is like establishing a negative. The individual must demonstrate something that is not there. A person may fail to acquire a nationality at birth or later in life and become stateless. As discussed in the following chapters, someone may become stateless in a migratory context, and some stateless populations in a non-migratory context remain in their own country and may be referred to as *in situ* populations. Regardless of the manner in which a person becomes stateless, the 1954 Convention's definition would encompass all those who do not have the nationality of 'any state' with reference to relevant laws.

The question then would be whether determining the phrase 'a person is not considered as a national by any state' requires proving lack of recognition as a national by all of the world's states. Nationality, almost in all instances, is granted based on certain factual links between a person and a state: links through family, through territory, through marriage or habitual residence. Hence, to determine whether a person is stateless, it is usually sufficient to look at whether they have the nationality of any of the places with which they have such links. Relevant reference points could include any state in which the applicant previously held nationality; the state of birth; the place(s) of previous habitual residence; states in which a parent held nationality; and states in which a spouse or child are nationals.[310]

In this regard, the meaning of 'any state' under the definition of statelessness should be construed narrowly, as it refers to 'the states with which a person enjoys a relevant link, in particular by birth on the territory, descent, marriage, or habitual residence'.[311]

2.3.2 Statelessness under African regional human rights laws

The ACHPR, as mentioned, has no provision specifically on the right to nationality and prevention of statelessness. This absence raised the need to formulate a regional instrument that responds to the particular challenges on nationality and statelessness on the continent. Hence, the ACHPR took the initiative to develop a Protocol on nationality rights and prevention of statelessness in Africa. Through a collective effort by the AU, the ACHPR, the ACERWC, the UN High Commissioner for Refugees, the Open Society Initiative, African civil society organisations, and other partners, a draft on the Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Rights to Nationality and the Eradication of Statelessness in Africa has been produced (the draft Protocol). The draft Protocol was prepared following the adoption by the African Commission of two resolutions on the right to a nationality. Resolution 234, adopted at the 53rd Ordinary Session held in April 2013 in Banjul, The Gambia, assigned the task of carrying out an in-depth study on issues relating to the right to nationality to the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa. The Special Rapporteur then met with representatives of the African Union Commission Department of Political Affairs

[310] The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation (n 298 above).
[311] UNHCR Guidelines on Statelessness No. 1 (n 289 above).

and of UNHCR in Addis Ababa in May 2013 and agreed to a roadmap for the implementation of the resolution. Resolution 277, adopted at the 55th Ordinary Session held in May 2014 in Luanda, Angola, at which the final version of the study on *The Right to Nationality in Africa* was presented, assigned to the Special Rapporteur the task of drafting a Protocol to the African Charter on the right to a nationality and the eradication of statelessness; see the explanatory memorandum on the draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.[312] The Draft Protocol, among other things, seeks to provide legal solutions for the resolution of the practical problems linked to the recognition and the exercise of the right to a nationality; to eradicate statelessness; and, above all, to identify the principles that should govern relations between individuals and states in regard to these issues.[313]

If adopted by the AU Policy Organs, the draft Protocol will add its own values in terms of the prevention of statelessness in general and among children in particular.[314] It contains specific provisions that are relevant in preventing statelessness among children as well as nomadic and cross-border communities.[315] It also introduces principles of attribution of nationality at birth and alternative forms of proof of nationality.[316] With regard to the determination of statelessness, two important additions are, first, its approach to the concept of 'appropriate connection' and, secondly, its definition of a 'stateless' person.

In determining the status of one's nationality or statelessness, the draft Protocol applies the requirement of 'an appropriate connection' as opposed to a relevant or genuine link. An appropriate connection is defined as follows:

> A connection by personal or family life to a State, including a connection by one or more of the following attributes: birth in the relevant State, descent from or adoption or kafala (fostering) by a national of the State, habitual residence in the State, marriage to a national of the State, birth of a person's parent, child or spouse in the State's territory, the State's being the location of the person's family life, or, in the context of succession of States, a legal bond to a territorial unit of a predecessor State which has become territory of the successor State.[317]

The 'appropriate connection' that can form the basis for the grant or recognition of nationality derives, as a term, from the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States. The term is used throughout the Draft Articles and discussed in particular in the commentary provided by the ILC, especially at paragraphs 9

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[312] Document available from the author.

[313] *Ibid.*

[314] Although the first draft of the instrument encompassed more progressive provisions, as the negotiations unfolded Member States decided to remove some of these provisions. For instance, on naturalisation, the first draft of the Protocol introduced the duty to 'facilitate acquisition' – that is, to make acquisition significantly easier – but this was removed from the later draft

[315] Article 8 of draft Protocol, document available from the author.

[316] Articles 5, 12 & 13 of draft Protocol.

[317] Article 1 of draft Protocol.

and 10 of the commentary on Article 11, as follows:

> The Commission chooses to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression 'appropriate connection', which should be interpreted in a broader sense than the notion of 'genuine link'. The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.

The draft Protocol defines a 'stateless person' as **'**a person who is not considered as a national by any State under the operation of its law, including a person whose nationality cannot be established'.[318] This definition expands the meaning of a 'stateless person' provided in the 1954 Convention by including 'a person who is unable to establish a nationality'. The addition takes account of the specific situations of statelessness that arise in Africa. As discussed above, the addition is in line with the clarification provided by the UNHCR in its Guidelines on Statelessness No. 1, where it says:

> Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law … The reference to 'law' in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.[319]

To take the prevention of statelessness among children as a focus, the draft Protocol has a number of provisions that could play a significant role in the eradication statelessness in Africa. For instance, as envisaged in article 5 of the draft Protocol, children should be accorded nationality as of the moment of birth, or, in some cases, retrospectively from that moment. The article provides for the minimum categories of people who must be attributed nationality from birth. Accordingly, State Parties have to confer nationality automatically to the following group of children from birth: a child one of whose parents had the nationality of that state at the time of his or her birth; to a child born abroad if either of the child's parents has the state's nationality and was born in its territory; a child who would otherwise be stateless. Moreover, a child born in the territory of the state of one parent also born there and a child born in the territory of the state of parents who are stateless or of unknown nationality shall also be attributed nationality at birth.[320]

Article 5(2) requires states to recognise nationality from birth retroactively, automatically or otherwise for some groups of people, including a child of unknown parents found in the territory of the state, who shall be considered to have been born within that territory of parents possessing the nationality of that state; a person born in the territory of the state who

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[318] *Ibid*.

[319] UNHCR Guidelines on Statelessness No. 1 (n 289 above) paras 16 & 17.

[320] Article 5(1) & (2) of draft Protocol.

has remained habitually resident there during the period of his or her childhood; and a child adopted by a national.

Additional safeguards are also prescribed in article 6 of the draft Protocol, which provides for acquisition of nationality through naturalisation on the basis of long-term residence in a state. In particular, article 6 requires states to facilitate the acquisition of nationality by different categories of children if they are not entitled to nationality of origin. These categories include a child of a person who has or who acquires its nationality; a child born in the territory of the state to a non-national parent who is habitually resident there; a person who was habitually resident in its territory as a child and who remains so resident at majority; and a child in the care of a national of the state.

Furthermore, the draft Protocol, in article 10, provides for more specific safeguards that play a great role in preventing statelessness among children. Under the title 'Nationality and Children's Rights', article 10 prescribes that a State Party adopt legislative and other measures to ensure that every child is attributed a nationality at birth and is registered immediately upon birth. Drawing on the CRC and ACRWC, the draft Protocol puts conditions on the considerations of the principles on the best interests of the child and consideration of the views of the child in all actions concerning the nationality of a child undertaken by any person or authority.[321]

In addition to the ACHPR and its draft Protocol, more specific protection against statelessness among children is provided under the ACRWC. The elements and principles in the Charter that relate to the prevention of statelessness are discussed in Chapter Three, but for immediate purposes it is important to highlight their major features. Article 6 recognises three interlinked rights and imposes an obligation on State Parties to take legislative measures to prevent statelessness among children. Article 6(1) establishes the right to a name; article 6(2) provides for the right to birth registration; and the right to a nationality is prescribed under article 6(3). Article 6(4) imposes an obligation on State Parties to ensure that their legislation recognises the principles according to which a child shall acquire the nationality of the state in the territory of which he or she has been born if, at the time of the child's birth, he or she is not granted nationality by any of other state in accordance with its laws.

With a view of spelling out the obligations of State Parties in implementing the obligations under the article, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) – the mechanism established by the Charter to monitor its implementation – adopted a General Comment on article 6.[322] It did so for two reasons. The first is related to observations that the Committee has made on State Party Reports on the implementation of the right to birth registration. The Committee notes that the rights included in article 6 are among the rights that consistently appear not to be implemented by States Parties. Despite the impressive ratification of international and regional child rights instruments by African Union Member States, implementation of protections relating to nationality rights and birth

[321] Chapter Three discusses the role of the cardinal principles of child rights in preventing statelessness.
[322] ACERWC General Comment No. 2 (n 142 above) paras 1 & 2.

registration remain major challenges. This is evident from the Committee's concluding observations and recommendations pursuant to State Party reports.[323]

The second reason for the General Comment traces back to the gravity of the problem of unregistered births in Africa, as recorded by various reports and studies. The ACERWC took note that millions of children in Africa go unregistered every year. In 2013, just before the ACERWC developed the General Comment, UNICEF revealed that 230 million children under the age of 5 had not had their births registered, and that the lowest rates of birth registration globally were in South Asia and Sub-Saharan Africa.[324] In this state of affairs, the lack of an effective, well-functioning birth registration system leaves children in a precarious position when it comes to claiming nationality and exposes them to the risk of statelessness. Even though the right to birth registration does not confer nationality by itself, birth registration serves, in various jurisdictions, as a proof of the nationality of the parents or the place of birth.

The ACERWC's approach to statelessness among children is also in line with the obligation of State Parties envisaged in article 6(4) of the ACRWC. To give effect to the rights in article 6, the Committee prescribes that States Parties have to keep in mind their overall obligation to respect, protect, promote and fulfill children's rights in accordance with their obligations stemming from article 1 of the ACRWC, which requires states 'to undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter'.[325] Article 6(4) strengthens the overarching provision on nationality and harmonises the Charter with the principle established by the 1961 Convention that a child who would otherwise be stateless shall have the nationality of the state in which he or she is born.

Africa's 'take' on the prevention of statelessness among children can also be inferred from the decision of the ACERWC in its communication on the situation of children of Nubian descendants in Kenya.[326] The Committee found the Government of Kenya in violation of the right to non-discrimination, nationality, health and health services, protection against statelessness, and education of Nubian children living in Kenya. As discussed in Chapters Three and Four, the ACERWC in its decision urges Kenya to take all necessary legislative, administrative and other measures to ensure that children of Nubian decent in Kenya, who are otherwise stateless, acquire Kenyan nationality and proof of such nationality at birth.[327]

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[323] ACERWC Concluding Observations and Recommendations available at https://www.acerwc.africa/concluding-observations/ (accessed 5 June 2021).

[324] One in three children do not officially exist, UNICEF reports (2013) available at https://news.un.org/en/story/2013/12/457572 (accessed 15 March 2019).

[325] Article 1 of ACRWC.

[326] Communication No. Com/002/2009 Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian Descent in Kenya v Kenya, ACERWC (2011).

[327] *Ibid.*

2.3.3 Initiatives around statelessness at sub-regional level

Apart from African-continental human rights instruments, various standards, action plans and declarations issued by sub-regional blocs also play a role in addressing statelessness within their respective territories. As mentioned in Chapter One, as part of the #IBelong campaign, which aims to end statelessness globally by 2024, sub-regional blocs such as ECOWAS, the EAC, and countries in the Great Lakes Region have initiated instruments that furnish useful principles to heed in preventing statelessness, including among children.

In 2015, ECOWAS Member States in collaboration with the UNHCR and International Organization for Migration (IOM), organised a Ministerial Conference, the first of its kind, in Abidjan. The Conference, among other things, aimed to develop recommendations for the identification of stateless populations, devise solutions for stateless populations using a rights-based approach, and foster strategies to prevent and reduce statelessness by using a collaborative approach building on partnerships among ECOWAS states.[328] The consultation resulted in the establishment of the Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness,[329] and, subsequently, the legally binding Banjul Plan of Action[330] adopted in May 2017.

Through these instruments, ECOWAS Member States committed to undertake measures to prevent and reduce statelessness by reforming legislative and institutional regimes related to nationality in order to include appropriate safeguards against statelessness. In particular, they committed to ensuring that 'every child acquires a nationality at birth and that all foundlings are considered nationals of the state in which they are found'.[331] In the same vein, in 2017, Member States of the International Conference of the Great Lakes Region signed a Declaration on the Eradication of Statelessness[332] and a Plan of Action[333] which urges those States, inter alia, to remove discriminatory provisions in nationality matters and ensure that women and men have equal rights to acquire, change and retain their nationality and confer their nationality on their children and spouses. In December 2018, Member States of the Economic and Monetary Community of Central Africa, endorsed the N'Djamena Initiative on the Eradication of Statelessness in Central Africa,[334] under which Member States also commit

[328] UNHCR 'Fight against statelessness in West Africa' available at https://data2.unhcr.org/fr/news/15737 (accessed 6 June 2019).

[329] Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness of 25 February 2015 (2015) available at http://www.refworld.org/docid/54f588df4.html (accessed 6 June 2019).

[330] Economic Community of West African States (ECOWAS) Plan of Action on Eradication of Statelessness, 2017-2024 (2017) available at http://www.refworld.org/docid/5915c88a4.html (accessed 6 June 2019).

[331] Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness of 25 February 2015 (2015) para 2.

[332] Declaration of International Conference on the Great Lakes Region (ICGLR) Member States on the Eradication of Statelessness of 16 October 2017 (2017) CIRGL/CIMR/DEC/15/10/2017 available at http://www.refworld.org/docid/59e9cb8c4.html (accessed 6 June 2019).

[333] Action Plan of the International Conference on the Great Lakes Region (ICGLR) on the Eradication of Statelessness 2017-2019 available at: https://www.refworld.org/docid/5a7c16aa4.html (accessed 17 November 2020).

[334] N'Djamena Initiative on the Eradication of Statelessness in Central Africa, 12 December 2018 available at

to addressing statelessness in general and among children in particular.

These initiatives at sub-regional levels are, in fact, producing encouraging results in addressing statelessness. For instance, the UNHCR's report on the implementation of Abidjan Declaration indicates that, by 2020, five years after its adoption, there is tangible progress in ensuring that everyone in the region has a nationality and benefits from the rights of citizenship. Twelve countries have now ratified both UN statelessness conventions; nine ECOWAS states have put in place National Action Plans to resolve and prevent statelessness; and birth registration campaigns have taken place in Mali, Niger, Burkina Faso and Côte d'Ivoire. In line with the Abidjan Declaration commitments, eight countries have launched studies on statelessness or included questions to collect data on statelessness in upcoming population censuses.[335] These are all positive developments.

However, these regional initiatives are not yielding the best possible results in preventing statelessness among children. Despite the positive strides, millions are still estimated to be stateless or at risk of statelessness across West Africa. As discussed in Chapter One, though the actual figure remains unknown, only Côte d'Ivoire reported numbers on its stateless population in 2019, which was estimated at 692,000, of which most are children.[336]

The persistent nature of the problem shows that there is a need to revisit the rules of engagement for better results; this is the subject of this thesis, which argues that preventing statelessness among children requires a child-rights-based approach to nationality systems, where children are at the centre of the responses. More discussion on the role of child protection mechanism in preventing statelessness and shaping the discourse on the right to nationality will be found in the upcoming chapters.

2.4 Conclusion

The response of international law to the problems of statelessness is open to criticism for its insufficiency in addressing the problem in a holistic manner. Particularly in Africa, there is no instrument in force which provides detailed standards, definitions and principles on matters of statelessness. Although the ACERWC and the ACHPR produced guidance as part of their protection and promotion mandates, the perception of Member States of the finality and binding nature of their recommendations is affecting implementation on the ground. At the international level, to the extent that the enjoyment of the right to nationality entails avoiding statelessness, the international legal definition of 'statelessness' is too narrow to accommodate the practical extent of the crisis of statelessness, one that endangers the

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https://www.refworld.org/docid/5c2f3f8b4.html (accessed 20 November 2020).

[335] OCHA 'Five years since the adoption of the Abidjan Declaration on the Eradication of Statelessness by the Economic Community of West African States (ECOWAS)' (2020) available at https://reliefweb.int/report/world/five-years-abidjan-declaration-west-africa-leads-reduction-statelessness-africa (accessed 18 December 2021).

https://reliefweb.int/report/world/five-years-abidjan-declaration-west-africa-leads-reduction-statelessness-africa

[336] *Ibid.*

aspirations enshrined in international law. The definition of a stateless person in article 1 of the 1954 Convention is also a purely technical definition that ignores the power of states to politically manipulate citizenship in law and practice.

Moreover, as indicated in the preamble to the 1954 Convention, stateless persons are to be regarded as distinct from refugees, who merit protection under the 1951 Convention relating to the Status of Refugees. While the 1954 Convention makes clear that its provisions only apply to *de jure* stateless persons, its Final Act recommends that contracting states provide safeguards for de facto stateless individuals as well. The 1954 Convention's Final Act recommends that protections of the treaty extend to both *de jure* and de facto stateless persons who, technically, still hold a nationality but do not receive any of the benefits generally associated with nationality, notably national protection.

But the practical reality of displacement over the last half century has revealed that not all de facto stateless persons have crossed borders and qualify for refugee status. Today's landscape suggests that *de jure* statelessness is overshadowed by an even greater crisis of de facto statelessness. Yet the circumstances that fall within the 'grey zone of de facto statelessness remain largely unexplored' under international law.

Hence, greater definitional clarity is necessary to obtain a clearer practical grasp on the scope of global statelessness today. To that end, principles and case laws should be developed to elaborate the circumstances under which a state's failure to safeguard the rights of individuals renders them without national protection and effectively makes them stateless persons in need of international protection. In other words, a better understanding of what constitutes effective citizenship is necessary to promote the promise in article 15 of the UDHR and other relevant international human rights laws.

Chapter Three:
The Right to Nationality and Prevention of Statelessness among Children: A Quest for a Child-Rights Approach

3.1 Introduction

Movements advancing children's rights arose late in the 19th century when theorists and practitioners challenged the traditional view that children are the property of their parents and hence lacking in agency. These movements played a significant role in changing the image of children before the law. In human rights terms, the change from welfare-based to rights-based protection has informed the contemporary understanding of child rights. The rights-based approach to child protection reached the level of international law, which led to a striking change in the discourse. As mentioned in Chapter One, this thesis, as much as it deals with nationality and statelessness, also presents arguments on matters of children's rights. The present chapter aims to examine the main principles that inform children's rights and the way in which they relate to the child's right to nationality and to the prevention of statelessness in children. The central argument is that gaps in the right to nationality, and resultant statelessness among children, are evident in a lack of functioning child protection systems, which is largely the result of the misconceptions society still has about children. This problem is evident in states' normative responses. Providing a historical and theoretical account of children's rights, the chapter presents arguments on how the child-rights approach to legal responses at the international and African-continental level should shape nationality matters and serve to prevent statelessness among children.

3.2 Children as rights-holders

Understanding children's rights requires an understanding of the notion of 'children' and which specific group of society this refers to. Various disciplines, ranging from sociology, psychology, and medicine to law, have their analyses of children and childhood. This thesis does not attempt to engage with the contested and multidisciplinary terrain regarding childhood's beginning and end. However, defining 'children' from a legal perspective is necessary, as it sets the context to better understand the notion of children as rights-holders. At the international level, article 1 of the CRC provides a working definition of the child: '[f]or the purposes of the present Convention; a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'. Looking at the wording of the Convention, which reads 'unless under the law applicable to the child, majority is attained earlier', one can see that the CRC does not presuppose that every person below 18 years is a child. As Reynaert, Desmet and Lembrechts write, 'It, therefore, seems more appropriate to talk about "children and young people" when referring to the persons who come within the scope of the CRC.'[337] At a regional level, the

[337] D Reynaert, E Desmet, & S Lembrechts 'Introduction A critical approach to children's rights' in W Vandenhole, E Desmet, and D Reynaert et al. (eds) *Routledge International Handbook of Children's Rights Studies* (2015) 2.

ACRWC provides a clearer definition where it states that a child is any person below the age of 18.[338] In presenting its arguments, this thesis aligns itself with the definition prescribed under the ACRWC.

As in the case with the very definition of 'children', the notion of 'children's rights' is also subject to debate. There are movements, theories and schools of thought around the meaning, content and application of children's rights. The discourse around children as rights-holders emerged in the 1970s and early 1980s when many advocated the notion that children are autonomous individuals whose rights should be acknowledged and respected.[339] Discussing the pre-children's rights era and how children used to be considered weak, needing just protection and guidance, with no rights attached to them, Freeman writes that children in this era 'were subjected to a special sort of treatment, a sort of quarantine before they were allowed to join adult society'.[340] There was 'recognition that children have interests and rights, that need to be considered distinctly and separately from those of adults, and particularly their parents'.[341]

Looking at the previous eras since the introduction of classical liberalism, one can note the emergence of two principal schools of thought with respect to the concept of children's rights: they are conventionally regarded as the child-liberationist or self-determination model,[342] and the child-protectionist or nurturance model.[343] Different bodies of scholarship have sought to strike a balance between the paternalistic approach and the view that children are not different from adults. For instance, drawing on the interpretation and application of 'the best interests principle', which suggests greater recognition of children's agency, albeit in a limited *liberal paternalist* form,[344] Eekelaar considers the principle of best interests as the benchmark according to which decisions concerning children should be made, regardless of whether the child is competent or not. According to Eekelaar, 'even the competent child

[338] Article 2 of the ACRWC.

[339] HT Andrews and P Gelsomino 'The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View' in R Abella and CL Heureux-Dubé (eds) *Family Law: Dimensions of Justice* (1983) 24.

[340] M Freeman *The rights and wrongs of children* (1983) 8.

[341] HT Andrews and P Gelsomino 'The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View' in R Abella and CL Heureux-Dubé (n 339 above).

[342] Child liberationists view the child as an autonomous being that needs to be accorded all rights on an equal footing with adults. As pioneers of the liberationist theory, Holt and Farson subscribe to the view that self-determination is the centre of children's liberation. They argue that children have, and hence should be accorded, absolute autonomy to decide for themselves what is best for them. See J Holt *Escape from Childhood (1974);* R Farson *Birth rights (1978);* M Freeman 'Taking children's rights more seriously' in P Alston et al. (eds) *Children rights and the law* (1992) 52-71.

[343] At the centre of the protectionist school of thought is the welfare of the child, a notion which emanates from recognising the limitations in the physical and mental capabilities of children. Child protectionists, such as Goldstein, Freud and Solnit, argue that 'children are born as blank slates, slates that are gradually filled in during the process of the physical and mental development of the child'. See P Aries *Centuries of Childhood: A Social History of Family Life* Trans R. Baldick (1965) 4; C Breen *Age Discrimination and Children's Rights* (2006) 3.

[344] K Hanson, N Peleg Waiting for Children's Rights Theory (2019) 28 *The International Journal of Children's Rights* 15.

might make a decision that would compromise his or her own best interests'.[345] Understanding the elements of these schools of thought and their sphere of influence on contemporary legal tradition is crucial in locating children in nationality and statelessness discourse.

Beyond the legal approach to rights, children's rights may be included and apply in the wider societal context, where 'rights are not only about rules, but also about structures, relationships and processes'.[346] In the context of the general theory of human rights, children's rights can be discussed in relation to what Dembour calls the four schools of thought, namely, the natural, deliberative, protest and discourse school of thoughts.[347] Vandenhole, Turkelli and Lembrechts, in their well-researched and comprehensive commentary on the CRC, summarise Dembour's views on these schools of thought as follows:

> The natural school of thought views rights as inherent that one possesses simply by being a human being … the deliberative school, on the other hand focuses on the social adoption of human rights norms as the point of existence of those rights. It is only society embrace human rights norms legally and socially that they become meaningful … The protest school of thought focuses on the necessity to continuously fight for human rights and to demand rights on behalf of individuals and groups experiencing injustice in the form of poverty, marginalisation or oppression … The discourse school questions the idea of human rights as a panacea to injustice, points to the limitations of human rights while recognising the importance that human rights language has acquired and some of the benefits accrued thanks to that language. For the discourse school, the legitimate claims surrounding emancipation and redress for injustice may be advanced more appropriately by other means.[348]

Considering children as rights-holders therefore traces its reasoning to one or more of the above-mentioned schools of thought. Presenting the justification and context of child-rights norms, the preambles of both the ACRWC and the CRC provide guidance on which of these schools of thought influence the formulation of children's rights at regional and international level, including the right to nationality. In line with the naturalist view of human rights, the ACRWC in its preamble states that 'everyone is entitled to all the rights and freedoms recognised and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth and other status'.[349] Similarly, the CRC also adopts a naturalist view of children's rights, as is evident in its preamble, which refers to 'recognition of the inherent

[345] J Eekelaar 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 162.
[346] D Reynaert, E Desmet, & S Lembrechts 'Introduction A critical approach to children's rights' in W Vandenhole, E Desmet, and D Reynaert et al. (n 337 above) 6.
[347] MB Dembour 'What are human rights? Four schools of thought' (2010) 32 *Human Rights Quarterly* 4.
[348] W Vandenhole, GE Turkelli & S Lembrechts *Children's' Rights: A Commentary on the Rights of the Child and its Protocols* (2019) 14-15.
[349] Preamble of the ACRWC.

dignity and of the equal and inalienable rights of all members of the human family'.[350]

However, this should not lead to the conclusion that naturalist views on human rights provide a complete explanation and justification as to the source of children's rights. The references in the preamble of the ACRWC to the notion that the 'child occupies a unique and privileged position in the African society' and to 'the virtues of their cultural heritage, historical background and the values of African civilisation which should inspire and characterize their reflection on the concept of the rights and welfare of the child' are in line with the notion of rights in the deliberative schools of thought. As Vandenhole, Turkelli and Lembrechts write, '[t]he idea of legal and social recognition as an important driver in making rights meaningful that is put forth by the deliberative school is also a part to the push to have children's rights codified into international law'.[351] In line with the notion of the protest school of thought, the preamble of the ACRWC also draws inspiration from the fact that

> the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional, developmental circumstances, natural disaster, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care.

Conceptualising children's rights as empowerment and liberation also demonstrates traces of the protest school of thought in informing children's rights.[352]

The above-mentioned theories have their own merits, yet an exclusive application of one over the other may lead to unintended and contradictory results. This thesis argues that realising children's rights to their fullest requires doing away with an either-or approach and instead adopting a hybrid model. There is a general acknowledgment, on the one hand, that children should have the right to make decisions on matters that affect them, yet, on the other, that they need protection. This can be inferred from the manner that rights and freedoms are crafted in contemporary child-rights instruments, particularly at the transnational level. Looking at the provisions of the CRC and ACRWC, one can see how both schools of thought inform the content of the provisions. Provisions which support the protectionists' view include the right to adequate health care,[353] the right to education,[354] the right to an adequate standard of living,[355] the right to adequate nutrition,[356] protection against harmful practices,[357] and the right to be free from sexual or physical abuse.[358] Similarly, there are provisions which are in line with the liberationists' view, as these are intended to promote the agency and autonomy of the child. Such provisions include the right to participation,[359] freedom of

[350] Preamble of the CRC.
[351] Vandenhole, Turkelli & Lembrechts (n 348 above) 15.
[352] KH Federle 'Rights Flow Downhill' (1994) 2 *International Journal of Children's Rights* 344.
[353] Article 14 of the ACRWC; article 24 of the CRC.
[354] Article 11 of the ACRWC; article 29 of the CRC.
[355] Article 27 of the CRC.
[356] Article 14(2) (C) of the ACRWC.
[357] Article 21 of the ACRWC.
[358] Article 16 of the ACRWC; article 34 of the CRC.
[359] Article 4(92) & 7 of the ACRWC; article 12 of the CRC.

association,[360] protection of privacy,[361] and freedom of thought, religion and conscience.[362]

With regard to the right to 'a' nationality, one may note that both the CRC and ACRWC seem to adopt the approach of protectionism by prescribing the duty of states to respect the right to nationality of the child, the prohibition of (arbitrary) deprivation of nationality and the prohibition of discrimination. Article 7 of the CRC and article 6 of the ACRWC, paying attention to the avoidance of statelessness in children, set out states' obligation to register every child born on their territory immediately after birth and to ensure that every child acquires a nationality. Moreover, in accordance with article 8 of the CRC, states are under an obligation to ensure the protection of a child's right to preserve his or her identity, nationality, name and family relationships. Not only should these be protected, but where children have not obtained an identity or have had any aspect of their identity taken away from them, the state must make efforts to remedy this.

However, the full implementation of the rights as prescribed in the above provisions should be read together with the remaining provisions of the instruments, particularly in line with the requirement of the best interests of the child and the right to participation of the child. As this chapter argues, in interpreting the content of the rights protected under the CRC and ACRWC, including the right to nationality of the child, the general or guiding principles that inform the implementation of all rights in the instruments should be taken into consideration. These principles are non-discrimination,[363] the best interests of the child,[364] the right to life, survival and development,[365] and the right to participation or respect for the views of the child.[366] All of these general principles are relevant to the protection of children's right to a nationality and to tackling the problem of statelessness among children. The principle of non-discrimination has particularly strong influence in informing the interpretation of states' obligations under the right to nationality of the child. This principle, although it imposes duties of protection, it also confers on children the right to take part in matters concerning them and in decisions that have an impact on their lives, and hence has a child-liberation element.

3.3 Intranational child-rights instruments

Notwithstanding theoretical disputes and, in some instances, vagueness regarding children's rights, it is widely accepted that children are entitled to human rights just as any other human beings are – this is prescribed in several international and regional documents. The discussion below shows how child rights form part of the international and regional human rights system. Though the discussion focuses on the major instruments, there are indeed various instruments established at the global and regional level to address particular aspects of

[360] Article 8 of the ACRWC; article 15 of the CRC.
[361] Article 10 of the ACRWC; article 16 of the CRC.
[362] Article 9 of the ACRWC; article 14 of the CRC.
[363] Article 3 of the ACRWC; article 2 of the CRC.
[364] Article 4 of the ACRWC; article 3 of the CRC.
[365] Article 5 of the ACRWC; article 6 of the CRC.
[366] Article 4(2) & 7 of the ACRWC; article 12 of the CRC.

children's rights.[367] There are also specific child-rights provisions in various international and regional treaties.[368]

The first attempt to address child rights at an international level came with the enactment of the Declaration of the Rights of the Child in 1924.[369] The Declaration played an important role in setting the process of the eventual recognition of child rights in motion.[370] The Declaration, though it played its own role in the codification of children's rights in the global dominion, has been criticised for having a limited scope, and remains an aspirational document with no binding effect on states. This limited scope can be inferred from the fact that it focuses more on welfare rights.[371] No mention is made of the right to nationality. More than three decades later, in 1959, the UN Declaration on the Rights of the Child was proclaimed.[372] A number of the principles in the 1959 Declaration repeat those found in that of 1924. However, while the 1959 Declaration remains an aspirational document, it comprises progressive provisions, such the principle of non-discrimination.[373] More importantly, the 1959 Declaration is the first international human rights document to refer to the principle of the 'best interests of the child'.[374] Directly relevant to the issues that this thesis deals with, the Declaration contains a principle regarding the rights to nationality. Its terminology differs from that of the CRC and the ACRWC in that it prescribes that 'the child shall be entitled *from his birth* (emphasis added) … to a nationality'.[375] Of course the 1959 Declaration may be said to have been succeeded by the CRC, so its continued relevance is in question.

It was only with the adoption of the CRC in 1989[376] that, for the first time, international law acknowledged children as individuals fully entitled to human rights, without neglecting their particular need for protection.[377] The adoption of the Convention is a revolutionary development in the recognition of child rights, as it is the only human rights treaty that has

[367] Instruments of such kind include the Minimum Age Convention of 1973; Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography of 2000; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996; Hague Convention on the Protection of Children in Intercountry Adoption of 1993; and Hague Convention on the Civil Aspects of International Child Abduction of 1980.

[368] For instance, see article 25(2) of UDHR; article 10 of ICSECR; articles 14(1), 10(3), 23(1), and 18(4)) of the ICCPR; articles 5, 10 & 16 of CEDAW.

[369] The Geneva Declaration of the Rights of the Child of 1924, adopted September 26 1924, League of Nations.

[370] Vandenhole, Turkelli & Lembrechts (n 348 above) 2.

[371] Preamble of the 1924 Declaration.

[372] The UN Declaration on the Rights of the Child of 1959, General Assembly resolution 1386 (XIV) of 20 November 1959.

[373] Principle I of the 1959 Declaration.

[374] Principle 2 of the 1959 Declaration.

[375] Principle 3 of the 1959 Declaration.

[376] The CRC was adopted by the UN General Assembly on 20 November 1989 and came into force on 2 September 1990.

[377] S Detrick 'The United Nations Convention on the Rights of the Child: A Guide to *Travaux Preparatoires*' (1992) 27.

achieved almost universal ratification.[378] Comprised of 42 provisions which detail the rights of the child that apply regardless of race, nationality or sex, the CRC has been praised for its important role in placing the child in its natural position as a human being. The CRC includes three Optional Protocols: two were adopted on 25 May 2000,[379] and one in 2011.[380]

In order to monitor implementation of the provisions of the CRC, the Convention established the UN Committee on the Rights of the Child (the CRC Committee).[381] The Committee has identified four cardinal principles that are imperative for the implementation of the CRC.[382] In line with articles 43 and 44 of the Convention and the Optional Protocols, the CRC Committee has the mandate to interpret the provisions of the Convention in the form of General Comments, receive and consider State Party reports, and consider Communications on alleged child-rights violations.

Most of the Committee's mechanisms are yet to be utilised to advance the right to nationality and prevention of statelessness. For instance, between 1992 and 2021, the CRC Committee held 24 days of General Discussions, but none of them focused on the right to nationality or statelessness.[383] Similarly, the Committee is yet to adopt a General Comment focusing on matters of nationality and statelessness[384] and receive a Communication concerning violations of article 7 of the CRC.[385] It is only through the State Party-reporting mechanism, particularly through its Concluding Observations and Recommendations, that the CRC Committee plays a significant role in interpreting the elements of the right to *a* nationality and statelessness among children. The Institute of Statelessness and Inclusion (ISI) has documented this trajectory of the CRC Committee's engagement in matters of nationality and statelessness, finding that between 1993 and mid-2018, the Committee made 139 recommendations relevant to the right to acquire a nationality.[386] The recommendations focus

[378] The CRC has been ratified by 195 countries, with the United States of America the only state that has failed to ratify it.

[379] Optional Protocol on the Involvement of Children in Armed Conflict of 2000 and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography of 2000, adopted on 25 May 2000 by General Assembly Resolution A/RES/54/263.

[380] The Optional Protocol on Communications Procedure of 2011, adopted on 19 December 2011 by General Assembly Resolution A/RES/66/168.

[381] Article 43 of the CRC sets out the election process of members for the Committee of the Rights of the Child. The Committee is composed of 18 experts of high moral standing and recognised competence in the field of child rights who serve for a term of four years.

[382] The principles are the best interests of the child, non-discrimination, the right to participation, and the right to survival and development. The reason why this thesis examines the various cardinal principles which have been identified by the Committee on the Rights of the Child is to highlight how their application is important in realising the right to nationality of the child and thus preventing statelessness in children. Detailed discussion of these principles is available in section 3.5 of this thesis.

[383] Days of General Discussion, available at https://www.ohchr.org/en/treaty-bodies/crc/days-general-discussion (accessed 12 June 2022).

[384] As of June 2022, the CRC Committee has developed 26 General Comments; see https://www.ohchr.org/en/treaty-bodies/crc/general-comments (accessed 12 June 2022).

[385] Individual Communications, available at https://www.ohchr.org/en/treaty-bodies/crc/individual-communications (accessed 12 June 2022).

[386] Statelessness and Human Rights: The Convention on the Rights of the Child, available at

on three issues: gender discrimination in nationality laws; granting nationality to stateless children born in a territory; and the registration of all births to help protect the right to nationality.[387]

As regards recent Concluding Observations, one notes the CRC Committee's engagement in emerging challenges to the rights to nationality, such as the link between national security measures and statelessness. For instance, in its 2022 Concluding Observation to the Netherlands, the Committee required that the State Party should

> [e]nsure that no child, including those between 16 and 17 years of age, is deprived of his or her nationality for actions that are considered to constitute a threat to national security, and also consider children's best interests when such withdrawals of nationality are imposed on parents.[388]

3.4 African regional child-rights instruments

Systematic human rights protection in Africa[389] has been neglected for a long time. Even the landmark legal and political document, the Charter of the Organization of African Unity (OAU),[390] made only a subtle reference to the protection of human rights.[391] Of course, human rights, as evidenced by the struggle for the decolonisation of Africa and the right to self-determination and independence, were on the agenda of the time. Since its establishment, the OAU was preoccupied with the struggle against colonisation and apartheid and the quest for self-determination.[392]

However, although the OAU contributed significantly to decolonisation, systematic engagement with human rights was not its primary concern. This can be inferred from its position on non-interference in the internal affairs of member states. Such a relegation of human rights to secondary status calls for strengthening the system with a view to developing a holistic, comprehensive and integrated approach to ensure that all human rights are respected. It took decades for the organisation to consider human rights as its main agenda and reach the point where it is today, and it was only after the 1970s, particularly with the adoption of the African Charter on Human and Peoples' Rights (the African Charter),[393] that

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https://files.institutesi.org/statelessness-and-CRC.pdf (accessed 12 June 2022).

[387] As above.

[388] CRC/C/NLD/CO/5-6 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fNLD%2fCO%2f5-6&Lang=en (accessed 12 June 2022).

[389] Systematic human rights protection refers to the existence of structured and integrated human rights norms and monitoring bodies and mechanisms at the regional level.

[390] Charter of the Organization of African Unity, adopted by the AU Assembly on 25 May 1963 entered into force on 13 September 1963.

[391] F Ouguregouz *The African Charter on Human and Peoples' Rights: A Comprehensive agenda for human* dignity *and sustainable democracy in Africa* (2003)2.

[392] Under article 3(e) of the OAU charter, freedom from colonialism is a human right.

[393] The African Charter was adopted by the Assembly of Heads of States and Governments of the OAU in 1981 and entered into force five years later in 1986. It covers a wider range of rights than other regional human rights instruments, such as the European and the Inter-American Human Rights Systems. The Charter is designed to

the situation slowly began to change.[394]

Though the African Charter is the main constituent of the African human rights system, there are other treaties that supplement the normative framework of human rights in Africa.[395] Among such treaties that enunciate the African regional human rights system is the ACRWC. As this is the instrument most relevant to this thesis, the paragraphs below discuss it and its monitoring organ in detail.

As Sloth-Nielsen, citing Murray, writes, the notion of the protection of children and fulfilment of their rights did not begin with the adoption of the ACRWC.[396] The first attempt to establish a continental instrument was made in 1979 when the heads of state and governments adopted the Declaration on the Rights and Welfare of the Child.[397] Furthermore, OAU/AU organs have adopted a number of declarations and resolutions concerning children, primarily in relation to child labour[398] and children affected by armed conflict.[399] However, the most notable development with regard to Africa's approach on children's rights is the ACRWC, which was adopted in 1990 shortly after the adoption of the CRC and came into

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reflect the history, values, traditions, and development of Africa. It establishes as its monitoring organ the African Commission on Human and Peoples' Rights (the Banjul Commission), which is responsible for enforcing the African Charter. As of June 2022, the African Charter has been ratified by 54 African states. See R Murray, *The African Commission on Humans and Peoples' Rights and International Law* (2000) 10; F Viljoen, *International human rights law in Africa* (2007) 237 & the African Commission documents available at http://www.achpr.org/instruments/ (accessed 18 June 2022).

[394] R Murray, *The African Commission on Humans and Peoples' Rights and International Law* (2000) 10.

[395] D Oluwa 'The regional system of protection of human rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 14.

[396] J Sloth-Nielsen 'Children's Rights and the Law in African Context: An Introduction' in J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 3.

[397] Declaration on the Rights and Welfare of the Child, adopted by the OAU Assembly of Heads of State and Government Sixteenth Ordinary Session Monrovia, Liberia 17-20 July 1979.

[398] With regard to child labour, the OAU worked closely with the International Labour Organization's International Program on the Elimination of Child Labour (ILO-IPEC), as well as the OAU Labour and Social Affairs Commission.

[399] Lloyd gives an account of what was done during the years between 1990 and 1999 while awaiting the entry into force of the ACRWC. She states that 'a Special Committee on Children in Situations of Armed Conflict was established in 1997. The task of this committee was to follow up on the recommendations of the Conference on Children in Situations of Armed Conflict, held in June 1997 in Addis Ababa, Ethiopia. The Special Committee was composed of five OAU member states: Burkina Faso, South Africa, Togo, Uganda, and Zimbabwe. Working in co-operation with various CSOs, such as Save the Children and the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), the Special Committee was created on the understanding that when the ACRWC entered into force and the ACERWC was established, it would cease to exist. During its five years of operation, the Special Committee actively lobbied OAU member states to ratify the ACRWC, as well as lobbying the OAU to ensure there was no discrimination on the basis of age within the OAU. The Special Committee also produced English and French versions of the ACRWC, as well as child-friendly versions for general distribution, produced a handbook and databank and identified good practice in culture. The Special Committee also importantly identified challenges hindering the effective provision of services to children in Africa'; see A Llyod 'The African Regional System for the Protection of Children's Rights' in J Sloth-Nielsen J Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (2008) 34.

force in 1999. As of November 2022, the ACRWC has been ratified by 50 African countries.[400] Though the adoption of this Charter was influenced by its predecessor child-rights instruments, such as the CRC and the 1924 and the 1959 Declarations,[401] it has peculiarities of its own in advancing the protection of children in Africa. As Lloyd writes, 'the ACRWC is crafted in [such] a manner [that] it can be able to address issues specific to … African children'.[402] Kamie also rightly notes that it is the 'desire to incorporate the universalist outlook of the CRC in African context which mainly necessitated the adoption of the ACRWC'.[403] Discussing the reason for the adoption of this instrument, Viljoen identifies the unjustified exclusion of most of the African states in the negotiation process of the CRC as the major political driver.[404] From a legal perspective, omissions in the CRC, such as the situation of children living under apartheid, factors disadvantaging the female child, the socio-economic conditions of African children, and a compulsory minimum age for military service, necessitated the adoption of this regional instrument.[405]

Composed of 48 articles and divided into four principal sections, the ACRWC acknowledges the critical situation facing most children in Africa due to their unique socio-economic, cultural, traditional and developmental circumstances, as well as to natural disasters, armed conflicts, exploitation and hunger; furthermore, it recognises that, on account of their physical and mental immaturity, children need special safeguards and care.[406] The four pillars of the CRC, namely, the principles of non-discrimination, the best interests of the child, survival and development, and participation, are incorporated with the same status into the ACRWC.[407] Overall, the Charter consists of provisions which are articulated in an innovative, progressive manner for the advancement of children's rights in Africa.[408]

To monitor the implementation of this instrument, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) was established in accordance with article 32 of the ACRWC. The Committee comprises 11 independent experts who are elected by the

[400] The countries that have not yet ratified it are Somalia, Tunisia, Morocco, Sahrawi Arab Democratic Republic, and South Sudan.

[401] At the time that these documents were promulgated, the majority of African states were still under colonial rule. The principles in these documents were arguably not intended to benefit children who found themselves under colonial rule; see T Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-Legal perspective* (2009) 130.

[402] A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) *The International Journal of Children's Rights* 180.

[403] Kaime (n 401 above) 132.

[404] F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (ed) *Child Law in South Africa* (2009) 335.

[405] M Gose *The African Charter on the Rights and Welfare of the Child* (2002)23.

[406] Preamble of the ACRWC.

[407] J Sloth-Nielsen & B Mezmur 'A Dutiful Child: The Implications of Article 31 of the ACRWC' (2008) 52 *Journal of African Law* 166.

[408] A Lloyd The African Regional System for Protection of Children's Rights' in J Sloth-Nielsen (ed) Children's *rights in Africa: A legal perspective* (2008) 33; see also Gose (n 405 above) 17-18; BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-Sum Game?'(2008) 23 *South Africa Public Law*.

Executive Council and endorsed by the Assembly of the African Union.[409] Each member is elected for a term of five years, renewable once.[410]

Against the backdrop of the above discussion, the sections below examine how the right to nationality and the prevention of statelessness among children are reflected in the two major child-rights instruments, namely the CRC and ACRWC. Such discussion, however, can be presented in a nuanced manner when it is considered in line with 'general states obligations' and the four cardinal principles as prescribed in both instruments. Hence, the following section discusses the role and application of general states' obligations and the four cardinal principles in relation to the right to nationality of the child.

3.5 General obligations of State Parties

Both the ACRWC and CRC place an obligation on State Parties to undertake legislative and other measures to ensure the effective implementation of the rights contained within them.[411] Broadly speaking, the obligations require State Parties to undertake all appropriate legal, policy, budgetary, administrative, and other measures for the implementation of the rights recognised in the respective instruments.

Article 1(1) of the ACRWC provides the overarching implementation obligation, with cross-cutting implications for the Charter as a whole:

> Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

Similarly, article 4 of the CRC states:

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

Both instruments provide the obligations that State Parties shall undertake to give effect to and implement the rights and protections prescribed in the provisions. Referring to them as 'general measures of implementation', the ACERWC and CRC Committee have both adopted general comments that expound on and provide guidance on the meaning and applications of the above-mentioned provisions. The State Party obligation to implement children's rights, which is enshrined in article 4 of the CRC, has been explained in the CRC

[409] Article 33 of the ACRWC.
[410] Amendment 1: The Assembly of Heads of State and Government of the African Union in its Decision Assembly/AU/Dec.548 (XXIV) approved the amendment of article 37 (1) of the ACRWC.
[411] Article 1 of the ACRWC; article 4 of the CRC.

Committee's General Comment No. 5 (General Measures of Implementation of the CRC)[412] and General Comment No. 19 (Public Budgeting for the Realization of Children's Rights (Article 4 CRC)).[413] The ACERWC, for its part, developed a General Comment 5 on article 1 on a relatively similar matter. [414] The General Comments provide a range of general measures of implementation that states are required to undertake for the fulfilment of their obligations under the CRC and ACRWC. Such measures, according to both Committees, may include: establishment of national mechanisms for coordination implementation; law reform and judicial enforcement of the rights of children; awareness-raising, training and education; resource allocation and making children visible in budgets; participation of civil society; international cooperation; and ratification and application of relevant international standards.

Though both instruments provide provisions that are similar in nature, the text of article 4 of the CRC differs from that of article 1 of the ACRWC. Hence, it is necessary to elucidate the nature, scope and differences between the implementation requirements of the CRC and ACRWC. Understanding their differences will help one identify better protection approaches, which will then be used as a tool to measure the adequacy of African laws on nationality matters in preventing statelessness among children, as discussed in the upcoming sections and chapters.

One of the divergences between the two instruments relates to their approach to states' obligations towards socio-economic rights. The CRC makes distinct reference to economic, social, and cultural rights, requiring State Parties to undertake such measures to the maximum extent of their available resources. Contrary to the CRC, the ACRWC makes no distinction between different rights as regards the implementation obligation. Article 1(1) simply refers to the 'provisions of this Charter' without any qualification. This shows that the ACRWC endorses the interdependence, indivisibility and mutually reinforcing nature of all rights, and regards the enjoyment of economic, social and cultural rights as inextricably intertwined with the enjoyment of civil and political rights. Hence, according to the ACRWC, the core and universally accepted obligation to respect, protect, promote and fulfil children's rights applies equally in respect of the implementation of the ACRWC as a whole.

It is worth mentioning, though, that the CRC Committee, in its General Comment, provides guidance on the difficulty of classifying the rights included in the Convention into civil and political, on one hand, and economic social, and cultural, on the other.[415] There are also rights

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[412] CRC Committee, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

[413] CRC Committee, General Comment No. 19 (2016): Public Budgeting for the Realization of Children's Rights, CRC/C/GC/19, 20 July 2016.

[414] ACERWC, General Comment No. 5 (2018) on General Measures of Implementation and Systems Strengthening. In explaining the rationale for developing this General Comment, in the presence of a similar General Comment by the CRC Committee, the ACERWC states that 'the text of Article 4 CRC differs from the text of article 1 of the ACRWC, which led to the conclusion that the interpretation of article 1 from a regional perspective, and in the context of its express wording and placement within the Charter as a whole, would be beneficial. It is [therefore] necessary to elucidate the differences, where appropriate, between the implementation requirements of the CRC and ACRWC'; ACERWC General Comment No. 5, para 1.2.

[415] An example of such rights is the right of parents or other persons legally responsible for the child to provide

in the CRC that are not included in either in the ICCPR or the ICESCR.[416] Hence, the CRC Committee suggests that a different approach should be adopted by looking at the uniqueness of the Convention, which not only combines both sets of rights in one instrument, but also adds new ones.[417] Hence, many of the rights in the CRC cannot be identified simply as only civil, political, economic, social or cultural. Instead it encapsulates different aspects of both sets of rights, thereby reflecting their indivisibility.[418] Moreover, as part of states' general obligations, the ACRWC requires them to 'recognise' the rights, freedoms and duties enshrined in the Charter. As the ACERWC states, 'recognising' implies a level of formal recognition of the rights, by law or in Constitutions.[419]

In observing their obligations, the ACRWC also requires State Parties to 'undertake necessary steps in accordance with Constitutional processes',[420] a requirement missing from the CRC. Beyond encouraging State Parties to harmonise their constitutional rights and protections with the ACRWC, such a requirement is crucial, especially in countries where the constitution establishes a federal form of government. As the ACERWC prescribes, State Parties adopting a federal system need to institute overarching coordination mechanisms which will ensure equal implementation of the rights contained in the ACRWC across all parts of a territory without discrimination.[421] It is the responsibility of any State Party to ensure that children in one region are not awarded less protection of their rights than in another, and to ensure full implementation of the Charter throughout the territories under its jurisdiction. Further, as part of their general obligations under article 1 of the ACRWC, State Parties must ensure that their constitutional law-making processes and constitutional litigation take into consideration the duties and obligations regarding children's rights in accordance with the Charter.[422]

In view of the above, this thesis takes the view that with regard to states' obligations, the ACRWC presents a better form of protection of the rights and freedoms of children than the CRC, which is in line with its broader understanding of international human rights. Hence, in discussing the general obligations of states in giving effect to and implementing the right to nationality as protected under international and regional human rights instruments, this thesis is guided by the elements under article 1(1) of the ACRWC. Moreover, the arguments in this thesis are also guided by the 'more conducive environment' clause as prescribed in article 1(2) of the ACRWC and Article 42 of the CRC; hence nothing in these treaties affect any provisions that are more conductive to the realization of the rights and welfare of the child

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appropriate direction and guidance to the child; CRC Committee General Comment No. 5, para 44.

[416] For example, the right to rest and leisure (article 31 of the CRC), the right to be protected against abduction and sale (article 35 of the CRC), the right to protection from all forms of exploitation (article 36 of the CRC), and the right to integration and social recovery (article 39of the CRC); see also CRC Committee General Comment No. 5, para 44.

[417] CRC Committee, General Comment 5, para 40.

[418] *Ibid.*

[419] ACERWC, General Comment No. 5 (2018) 5.2.

[420] Article 1(1) of the ACRWC.

[421] ACERWC, General Comment No. 5 (2018) 5.2.

[422] *Ibid.*

contained in the law of a State Party or in any other international Convention or agreement in force in that State.

3.6 General principles

As mentioned above, the CRC Committee has identified four rights as the major 'General Principles' of the CRC.[423] The General Principles were introduced by the Committee in the Guidelines for Initial Reports in 1991.[424] The terminology, 'general principles', was coined by the four members of the CRC Committee who were tasked with the drafting of the general guidelines for state party reports.[425] The drafters suggested the following paragraphs as they consist of what they referred as 'general principles':

> Relevant information, including the principal legislative, judicial, administrative or other measures in force or foreseen, factors and difficulties encountered and progress achieved in implementing the provisions of the Convention, and implementation priorities and specific goals for the future should be provided in respect of: (a) Non-discrimination (art. 2); (b) Best interests of the child (art. 3); (c) The right to life, survival and development (art. 6); (d) Respect for the views of the child (art. 12). In addition, States parties are encouraged to provide relevant information on the application of these principles in the implementation of articles listed elsewhere in these guidelines.[426]

At this juncture one might ask why they are they called *general principles*. Explaining the aim of the General Principles, Hammarberg, a member of the drafting group, said that 'by introducing these Principles the Committee did not want to give priority to one right or another'.[427] Instead, the three rights included in the list of 'general principles' are 'those rights which ... applied in all areas; for example, applied in education, health and other fields'.[428] Pais, who was a member of the Committee between 1991 and 1997 and participated in the discussions leading to the adoption of the 'general principles', writes that the four general principles of the Convention aim to ensure 'a common philosophical approach to the spectrum of areas addressed by the Convention'; according to her, the general principles were identified by the Committee as 'underlying and fundamental values that are

[423] Section 3.2 of this thesis.

[424] CRC General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by State Parties under article 44 (1)(a) of the Convention, adopted by 22 Session, 15 October 1991, para 13. These same principles were adapted by the ACERWC; see ACERWC Guidelines for Initial Reports of State Parties Pursuant to the Provision of Article 43 of the African Charter on the Rights and Welfare of the Child, Cmttee/ACRWC/2 II. Rev2, Sec 11.

[425] This drafting group consisted of the following Committee members: Mrs Santos Pais, Mrs Belembaogo, Mr Hammarberg and Mr Kolosov; K Hanson & L Lundy "Does exactly what it says on the tin? A critical analysis and alternative conceptualisation of the so-called "general principles" of the Convention on the Rights of the Child'(2017) 25 *The International Journal of Children's Rights*, 292.

[426] Hanson & Lundy (n 425 above) 293.

[427] *Ibid*.

[428] Committee on the Rights of the Child (1991c), summary records of the first session, UN Documents: CRC/C/1991/SR.1 to CRC/C/1991/SR.27; see also Hanson & Lundy (n 425 above) 293-294.

relevant to the realization of all children's rights'.[429]

Some take a different position and argue that the purpose of the general principles established by the CRC Committee 'stands in sharp contrast with the often very elevated functions that have been ascribed to the general principles in later comments and writings'.[430] Authors such as Hanson and Lundy state that the main challenge is that the CRC does not mention any of the other general principles, nor posit the idea that there is a set of general principles that guides its interpretation and implementation. Furthermore, they argue that

> a review of the Committee's use of the four general principles in its two main functions – monitoring states parties' progress through periodic review and advising on the meaning of the Convention through the publication of General Comments – indicates a lack of clarity and consistency in the formulation and application of the general principles.[431]

A similar gap exists with the application of the general principles by the ACERWC. Although the revised guidelines of the ACERWC in relation to consideration of periodic State Party reports clearly state that 'State Parties should further provide relevant information on the application of these [general] principles in the implementation of the other provisions of the Charter', when one looks at the concluding observations and recommendations of the ACERWC, one learns that the Committee, at least in most cases, deals with the principles separately as they appear in the respective provisions'.[432] With regard to the other mandates of the ACERWC, such as issuing General Comments and making decisions on Communications, the trend seems inconsistent.[433]

However, the confusion around the nature of the general principles emanates not from the nature of the principles per se but the failure of monitoring organs of the treaties, such as the CRC Committee and ACERWC, to apply the principles consistently and comprehensively. The fact that neither body is consistent in its application of the principles should not result in the conclusion that the principles themselves are inherently problematic. Moreover, even if the texts of neither the CRC nor ACRWC clearly mention the general principles, note should be made of the authoritative role that the monitoring bodies have been granted to interpret the respective instruments. In fact, looking at the reports submitted by State Parties to the monitoring bodies, one sees that the four principles have been used widely by State Parties and embraced by NGOs and child-rights scholars, which shows that governments and stakeholders are content with the principles. It is therefore the position of this thesis that although the monitoring bodies, in accordance with their guidelines, need to improve their work in relation to consistent applications of the general principles, the identified principles

[429] Hanson & Lundy (n 425 above) 294.
[430] Hanson & Lundy (n 425 above) 303.
[431] *Ibid.*
[432] ACERWC Concluding Observations, available at https://www.acerwc.africa/concluding-observations/ (accessed 23 June 2022).
[433] ACERWC General Comments, available at https://www.acerwc.africa/general-comments/ (accessed 23 June 2022).

can effectively play an intersecting role in the context of all provisions, both in the CRC and ACRWC.

Against the backdrop of this discussion, this thesis applies the elements of the provisions on general state obligations and the general principles in presenting its arguments on the right to nationality of the child and prevention of statelessness.

3.7 Substantive elements of the child's right to a nationality

In the light of the development of international human rights norms, norms which have increasingly asserted limits to state discretion in nationality matters, various instruments have been established to protect the right to nationality and prevent statelessness. The ICCPR, as one of the major international instruments providing protection specifically to children's rights to a nationality, states that '[e]very child has the right to acquire a nationality'.[434] In the same vein, the CRC[435] and ACRWC[436] provide similar protection for the child's right to acquire a nationality.[437] Moreover, in accordance with article 8 of the CRC,

> states parties undertake to respect the right of the child to preserve his or her identity, including nationality [...] without unlawful interference … [W]here the child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Alongside the above-mentioned global and regional treaties, numerous other international instruments also recognise the right of every child to a nationality and provide for the avoidance of statelessness among children. Central among these is the 1961 Convention.[438] The right of every child to a nationality has also been recognised and elaborated through the decisions of regional human rights organs and treaty bodies.[439] Moreover, in 2014, the ACERWC adopted a General Comment on children's right to a name and nationality under article 6 of the African Charter, outlining how this right is to be interpreted and implemented in Africa. At the UN level, further guidance can be found in the content of norms relating to children's right to a nationality and the avoidance of statelessness among children in a number of resolutions adopted by the UN Human Rights Council and reports issued by the

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[434] Article 24(3) of the ICCPR.

[435] Article 7(1) of the CRC.

[436] Article 6(2) of the ACRWC.

[437] In providing for the right to nationality of the child, both the CRC and ACRWC pay particular attention to the avoidance of statelessness. However, it is important to note that the right of the child to acquire a nationality does not relate only to cases which may result in statelessness.

[438] Articles 1-4 of the 1961 Convention.

[439] See article 20 of the American Convention on Human Rights; article 6 of the European Convention on Nationality; article 7 of the Covenant on the Rights of the Child in Islam. See also Inter-American Court of Human Rights, *Yean and Bosico v Dominican Republic* (n 435 above); ACERWC, *Open Society Justice Initiative on behalf of children of Nubian Descents v Kenya* (n 326 above); the European Court of Human Rights, *Genovese v Malta*, 53124/09 (2011); the European Court of Human Rights, *Mennesson v France* 65192/11 (2014).

UN Secretary-General,[440] as well as in guidelines issued by the UNHCR on the interpretation of the relevant provisions of the 1961 statelessness convention.[441]

Referring to the above-mentioned instruments, standards and jurisprudence, and on the basis of their relevance to the scope of this thesis, the sections below discuss the nature and scope of the right to a nationality of the child and the special protections provided to children who would otherwise be stateless.

3.7.1 The right of a child to 'acquire a nationality'

Understanding the elements of the right to nationality of the child requires careful examination of the choice of the phrases adopted both by the CRC and ACRWC. Both instruments follow the wording of article 24(3) of the ICCPR, namely 'the right to *acquire a* nationality', and not that of Principle 3 of the 1959 UN Declaration on the Rights of the Child, which instead prescribes 'the child shall be entitled from his birth … to a nationality'.[442] Explaining the reason for the shift from the *right to nationality* to the *right to acquire a nationality*, Doek writes that 'the drafters of the ICCPR felt that a State could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless the circumstances'.[443] This can be inferred from the terminology of the initial proposal for the CRC, which includes *the right to a nationality from birth*.[444] However, the proposal was not accepted by some representatives, as it was argued that it could infringe on the sovereignty of states. It was therefore proposed that the wording of the ICCPR be followed, and, as a result, agreement was reached on the phrase 'the right to acquire a nationality'.[445] Hence, the CRC, and subsequently the ACRWC, adopted the formulation *the right to acquire a nationality* instead of *the right to a nationality*.

The separate readings of the provisions on *the right to acquire a nationality* as prescribed in the CRC, the ACRWC as well as the ICCPR entail that states do not have an unconditional obligation to grant nationality to every child born in their territory. Such a formulation of the protection results in challenges to the effective implementation of the provisions, as the protection does not entail a right to a certain nationality, nor does it prescribe which nationality is to be acquired. Neither of the instruments specify the point at which nationality should be acquired, as they do not guarantee that nationality shall be acquired at birth, and

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[440] For instance, UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28; UN Human Rights Council, *The right to a nationality: women and children*, 16 July 2012, A/HRC/RES/20/; UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28.

[441] UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, available at: http://www.refworld.org/docid/50d460c72.html (accessed 15 April 2019).

[442] Principle 3 of the 1959 UN Declaration.

[443] JE Doek 'The CRC and the Right to Acquire and to Preserve a Nationality' (2006) 25 *Refugee Survey Quarterly* 26.

[444] J Stein 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016)24 *International Journal of Children's Rights* 603.

[445] Stein (n 444 above) 604.

nor do they indicate which nationality a child may have a right to. This leaves major questions unanswered as to which state should assume the obligation to attribute nationality to the child and when. This calls for an interpretation of what constitutes 'the right to acquire a nationality'.

3.7.1.1 The question of 'when' to grant nationality to a child

As mentioned above, the general principles should inform the interpretation and implementation of all rights protected under the CRC and ACRWC.[446] Hence, in interpreting the nature and elements of *the right of the child to acquire a nationality*, it is necessary to consult the requirements under the principles of the best interests of the child, non-discrimination, the right to participation, and the right to life, survival and development.

Applying the general principles in addressing the question, 'When should a child acquire the nationality of a given country?' requires a child-rights-based and purposive reading of the provisions of the above-mentioned instruments. Explaining the purpose of the protection prescribed under article 24 (3) of the ICCPR, which also informs the provisions of the CRC and ACRWC, the Human Rights Committee in its General Comment No. 17 states:

> Special attention should also be paid, in the context of the protection to be granted to the children, to the right of every child to acquire a nationality, as provided for in article 24, paragraph 3. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.[447]

This passage in the General Comment provides the reader with relevant guidance, though not in detail, on the substance of states' obligation with regard to the attribution of nationality to a child. From the outset, it is important to understand that the General Comment does not address the question of 'where' the child is born. Regardless of the place of birth, the General Comment highlights that there could be instances that a given state could assume an obligation to grant nationality to a child 'when he/she is born'; hence the text answers the question of 'when'.

The most important segment of the text is that 'it does not *necessarily* make it an obligation for states to give their nationality to every child born in their territory'. Clearly, the above-mentioned instruments do not prescribe that states are under the unqualified obligation to give their nationality to every child when he or she is born. However, states could be required to adopt 'every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born'. The questions which may need further discussion would then be: In what instances that states are required to take an

[446] See the discussion in section 3.5 of this thesis.
[447] Human Rights Committee, General Comment No. 17, HRI/GEN/1/Rev.8 (1989) para. 8.

appropriate measure to ensure that every child has a nationality when he is born? What constitutes an appropriate measure? Answering these questions requires a purposive reading of the additional rights and protections provided in the same provisions, as well as of the general principles in the child-rights discourse.

When applying a purposive reading of the rights provided in similar provisions, the right of the child to birth registration which must be done from birth sheds some light on interpreting the scope of its related right to acquire a nationality. The fact that both the CRC and ACRWC provide for the child's right to recognition starting from birth, specifically through birth registration, entails that all children, including the very youngest, are respected as persons in their own right and are entitled to services from early childhood. In line with this argument, the CRC Committee states that '[c]omprehensive services for early childhood begin at birth'.[448] There could be instances where failure to grant nationality to a child by a given state may impact negatively on a child's sense of personal identity and he or she may be denied entitlements to basic health, education and social welfare. As a first step in ensuring the right to survival, development and access to quality services for all children, the CRC Committee recommends that State Parties take all necessary measures to ensure that all children are registered at birth.[449]

Even if the CRC Committee in its Comment does not specifically mention acquisition of nationality at birth, this thesis takes the position that, considering the primary role that nationality plays in promoting children's development and well-being, there could be instances where having a nationality may form part of the measures that the CRC Committee underlines as *essential* for the purposes of implementing child rights in early childhood.

Applications of the four general principles could also provide guidance on how the phrase 'to acquire nationality' should be construed. As discussed in the previous chapter,[450] nationality is a right for all, including children, and is of fundamental importance to well-being and the ability to lead a dignified life. In many jurisdictions, nationality acts as an 'enabling' or 'gateway' right, one without which it is in most cases – unjustifiably – impossible to exercise many other rights. Hence, denying a child the nationality of a given country may have a significant impact on all other rights, including his or her access to education, health care, free movement and family life within the territory of that country. Frequently, it may affect interests related to the child's right to life, survival and development. Ensuring the right of a child to the nationality of a particular state, depending on the child's link with that state, may be central to the protection and fulfilment of the other rights of the child.

In this regard, it is the view of this thesis that states' discretion, which comes with the phrase 'to acquire a nationality', must be applied in a manner that passes the test of the best interests of the child. If a decision not to attribute nationality from birth results in less protection and limited access to other protected rights, because the child's status is both stateless and non-

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[448] CRC Committee, General Comment No. 7: Implementing Child Rights in Early Childhood, CRC/C/GC/7/REV.1 (2005) para 25.

[449] As above.

[450] See the discussion in Chapter one of this thesis.

national, such a decision would not be in line with the state's obligations under the principle of the best interests of the child. Attaching unqualified discretion to states to attribute nationality to a child whenever they wish, through strict application of the 'right to acquire a nationality', disregards the problems that a child could face due to lack of a given nationality, and contradicts the principle of the best interests of the child.

Moreover, states may also be required to attribute nationality from birth in instances where their obligation under the principle of non-discrimination so requires. States are under the obligation to take measures to ensure that no discrimination with regard to the acquisition of nationality should be admissible under their internal laws. In line with this argument, the above-mentioned General Comment by the Human Rights Committee makes specific reference to no discrimination between children born in wedlock and those born out of wedlock, born to stateless parents, or based on the nationality status of one or both of the parents.[451] Attribution of nationality from birth may not apply to all children under the state's jurisdiction, but there should not be unjustified exclusion of any group of children on discriminatory grounds. The principle of equality may then create an appropriate instance where states are required to take measures in granting nationality to a child starting from birth. In addition, the prohibition on statelessness implicates human rights. All persons have a right to be recognised as persons before the law. Hence, considerations of their right and dignity dictate that all children should have a nationality. When looking at trends in international and regional case law, a more important role for international and regional bodies in respect of nationality matters can be seen. The Inter-American Court of Human Rights, for example in *Yean and Bosico Children v the Dominican Republic*, provides clear guidance that the authority of states is limited by the obligation to provide individuals with equal and effective protection of the law.[452]

In line with this argument, the ACERWC urges states to 'adopt provisions giving children born in their territory the right to acquire nationality after a period of residence that does not require the child to wait until majority before nationality can be confirmed'.[453] The assertion that '[s]tates are not obliged to grant nationality to every child born in its territory' is only partially true. Similarly, in the *Nubian Children* case, the ACERWC reiterates that, although article 6(3)of the ACRWC does not contain the right to a nationality, it should be interpreted as strongly suggesting that children should have a nationality beginning from birth wherever possible.[454] Such articulation by the ACERWC suggests that states should adopt legal and other measures to ensure that nationality is acquired by a child at birth, not only on the basis of descent from a citizen without restrictions (such as limitation of transmission of nationality to one generation only for children born abroad), but also on the basis of birth in the territory of the state.

In seeking to answer the question of 'when' in view of the scope of the phrase 'the right to

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[451] Human Rights Committee, General Comment No. 17 (n 447 above).
[452] *Yean and Bosico v Dominican Republic* (n 439 above) para 140.
[453] ACERWC General Comment No. 2 (n 142 above) para 92.
[454] *Open Society Justice Initiative on behalf of children of Nubian Descents v Kenya* (n 326 above) para 42.

acquire a nationality', the discussion above warrants the following conclusion. States' discretion not to grant nationality from birth to all children under their jurisdiction remains valid as long as such lack of nationality – and not necessarily statelessness – does not result in violations of the rights of the child, which would be measured against the requirements under the principles of the best interests of the child, non-discrimination, the right to life, survival and development.

3.7.1.2 The question of 'which' state assumes the obligation to grant nationality to the child

Another element which needs clarification in unpacking the scope and nature of *the right to acquire a nationality* relates to identification of the state that assumes the obligation to ensure the right in question. As discussed above, the Human Rights Committee provides that 'States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born'.[455] The question remains: Which states should assume such responsibility? The exercise of identifying the right state as a duty-bearer would be particularly difficult in cases where the child happens to have links with more than one jurisdiction. For instance, if he or she is born in a territory of a particular state from parents who came from another state, the state concerned might decide that 'the child rightly deserves the nationality of his or her parents; instances of this nature lead to the problem of which state must ensure the child's nationality'.[456]

In an attempt to address this gap in international law, arguments have been made that the obligation to ensure *a* nationality does not oblige a state to grant its nationality to a child born in the state. For instance, De Groot and Doek have argued that the provisions in the ICCPR regarding the child's right to a nationality do not require the birth state to extend its nationality to a child born on its territory.[457] In identifying the countries, a range of options could be looked at, including the state of birth of the child and other states with which a child has a relevant or appropriate (as mentioned in the draft Protocol to the African Charter) link. This could be established by looking at various factors, particularly of parentage or residence. Questions that need more investigation include: Where does the primary obligation of granting nationality fall? What would be the role of the country or countries with which the child has a relevant or appropriate link in granting nationality to the child?

Approaching the above-mentioned questions from the general principles of how treaties are applied may help in providing guidance. Worster writes that human rights treaties are generally applicable to a state's territory under its jurisdiction,[458] a view affirmed by the

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[455] General Comment No. 17 (n 447 above) para 8.

[456] WT Worster 'The obligation to grant nationality to stateless children under treaty law' (2019) 24 *Tilburg Law Review* 207.

[457] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above)146; see also Doek (n 443 above) 26.

[458] Worster (n 456 above) 208.

Human Rights Committee.[459] Similarly, according to Batchelor,

> Naturally, when states become party to treaties, they take on obligations for their own internal structure and in relation to persons subject to their jurisdiction; thus … State Parties have made the commitment to ensure the rights of children under their jurisdiction.[460]

When a child is born in a state, provided no other state exercised jurisdiction over the child's nationality *jus sanguinis*, then the child should hold the right to *a* nationality in regard to only one state, the state of birth. Such an approach is in line with the principle of the UDHR and the Human Rights Council's interpretation of the right to a nationality. The general principle established in article 15 of the UDHR is that everyone has the right to a nationality. The Human Rights Council, in its 2009 report, *Human Rights and Arbitrary Deprivation of Nationality*, also states that the right to a nationality includes the right to acquire, change and retain a nationality.[461] As discussed above,[462] both the CRC and ACRWC provide that children should have the right from birth to, among other things, acquire a nationality. Supporting this line of argument, the CRC Committee, in its General Comment No. 11, reiterates that State Parties are obliged to ensure that all children are registered immediately after birth and that they acquire a nationality.[463] The ACERWC, in the *Children of Nubian Descent* case, concludes that the birth state bears the primary responsibility for ensuring the right to a nationality, meaning that it must grant its nationality unless it can effectively secure another nationality.[464]

This approach provides a solution to the problem so long as it does not make the assumption that the process of exercising jurisdiction over the child's nationality by another state is an easily determined fact.[465] There could be instances where the country where the child is born may assert that another state has the obligation to attribute nationality, and if this assertion is not complied with by the other state, a situation called *undetermined nationality* may arise.[466] In cases where there is an irreconcilable disagreement between states over who bears the responsibility to grant nationality, the principle of the best interests of the child requires the assignation of such a responsibility to the birth state.

This issue is addressed by the ACERWC, which notes that a speculative determination that

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[459] UN Human Rights Committee, General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para 11.

[460] C Batchelor 'Statelessness and The Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 168-169.

[461] Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Human rights and arbitrary deprivation of nationality, (2009) para 2.

[462] See section 1 of 3.6.1 of this thesis.

[463] UN Committee on the Rights of the Child (CRC), *General Comment No. 11: Indigenous children and their rights under the Convention [on the Rights of the Child]*, CRC/C/GC/11 (2009) para 41.

[464] *Open Society Justice Initiative on behalf of children of Nubian Descents v Kenya* (n 326 above) para 51.

[465] Worster (n 456 above) 208.

[466] Worster (n 456 above) 208.

the child should acquire nationality from another state on the basis of that state's nationality laws is not sufficient to discharge the obligation to ensure nationality.[467] In addition to the territoriality approach, as the ACERWC makes clear, ensuring the right to a nationality for all children requires states to adopt legal provisions that provide nationality to children born on their territory, not only where the child is otherwise stateless, but also in other cases where the child has a strong connection to that state.[468] If the territorial state cannot secure a nationality for the child, in order for the child to have a nationality it must extend its own nationality to that child. Refusal to grant nationality would amount to an arbitrary denial of nationality.[469] On this basis, the UNHCR Executive Committee encourages states to avoid arbitrary denial of nationality as well as deprivation of nationality.[470]

Reading the protection of the right to nationality under article 7 of the CRC with *the right to identity,* as prescribed under article 8 of the instrument, could also shed some light when answering the question as to which state should grant nationality to the child. Article 8(1) reads: *'State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'.* Article 8 is unique in international law in that it explicitly addresses the right to preserve one's identity. Though elaborating on the concept of 'identity' goes beyond the scope of this thesis, article 8 needs to be discussed because it mentions *nationality* as an element of the child's identity.

A first reading of article 8 may suggest that the protection it accords to *nationality* overlaps with that of article 7. However, looking at the *travaux préparatoires* of the CRC, one can understand why the drafters of the CRC opted to have a separate protection under article 8.[471] As Stewart writes, '[A]rticle 8 is needed to encompass borderline or unusual conditions of identity, such as the impacts of adoptions on children's identity, cases of state-imposed custody, and imposed nationalities.'[472] This can be inferred from the obligation under paragraph 1 of article 8, which requires State Parties 'to respect …', which implies that a State Party should refrain from taking measures that can affect the realisation of the child's right to preserve her or his identity, including nationality.

The right to national identity, as referred to in article 8, requires an implicit recognition of *genuine* versus *state-sanctioned* identity and the child's interest in preserving his or her genuine identity.[473] The state's obligation under article 8(1) of the CRC is generally not

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[467] *Open Society Justice Initiative on behalf of children of Nubian Descents v Kenya* (n 326 above) para 51.
[468] *Open Society Justice Initiative on behalf of children of Nubian Descents v Kenya* (n 326 above) para 51.
[469] WT Worster 'The obligation to grant nationality to stateless children under customary international law' 27 (2019) *Michigan State International Law Review* 486.
[470] UNHCR, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII) (2006), available at https://www.unhcr.org/excom/exconc/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html **(**accessed 18 June 2022).
[471] Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1986/39 (1986), available at https://digitallibrary.un.org/record/121490?ln=en (accessed 18 June 2022).
[472] GA Stewart 'Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child' 26 (1992) *Family Law Quarterly* 224.
[473] Stewart (n 472 above) 232.

strong: the article requires that State Parties 'undertake to respect …' where interference is allowed as long as it is not unlawful. What constitutes unlawful interference to a child's national identity should therefore be measured against the general child-rights principles, namely the best interests of the child.

Given the history of the article, the protection under article 8 applies primarily to children subjected to enforced disappearances, children whose fathers, mothers or legal guardians have been subjected to enforced disappearance, or children born during the captivity of a mother subjected to enforced disappearance.[474] In cases where a child is illegally deprived of some or all elements of her or his identity, paragraph 2 of article 8 requires State Parties to provide appropriate assistance and protection with a view to speedily re-establishing the child's identity. Guidance on what constitutes *appropriate assistance and protection* can be found in article 25 of the International Convention for the Protection of all Persons from Enforced Disappearance (the Convention on Enforced Disappearance). [475] For instance, the Convention places a strong obligation on State Parties to take the necessary measures to prevent and punish under their criminal laws, 'the falsification, concealment or destruction of documents attesting to the true identity of the children'.

In preserving and re-establishing the child's identity, the Convention interestingly mentions two of the general principles – the best interests of the child and the right to participation – as primary considerations for State Parties to adhere to.[476] Such protections under article 8 of the CRC can apply in various scenarios where the national identity of the child might be endangered due to state or family interference, which would make their right to nationality uncertain. In this regard, the protection under the article demands states to respect the views of the child as to whether he or she wants to maintain the identity acquired as a result of the change in circumstance. In such cases, the child's right should be protected by the dual nationality mechanism, whereby a child keeps two nationalities until the age of majority, at which point he or she must choose one or the other. [477] If the process of determining the national identity of the child results in uncertainty and doubt, states are bound to respect the child's right to preserve her or his identity. This would entail that the child is provided with the nationality of the country of birth.

On the basis of the foregoing discussion, this thesis argues that there is no clear obligation under international and regional laws that requires states to adopt a universal *jus soli* principle to grant nationality to all children born on their territory. If the child becomes otherwise stateless, however, there could be instances where the best interests of the child requires states to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality when he or she is born.

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[474] Vandenhole, Turkelli & Lembrechts (n 348 above) 108.

[475] International Convention for the Protection of all Persons from Enforced Disappearance, adopted by the UN General Assembly on 23 December 2010.

[476] Article 25(5) of the Convention on Enforced Disappearance.

[477] Stewart (n 472 above) 233.

3.8 Safeguards against statelessness among children under international and regional laws

3.8.1 The case of children who would otherwise be stateless

As discussed in the previous chapters,[478] statelessness in children creates situations of severe disadvantage and vulnerability. Even though human rights should be enjoyed by all persons, regardless of whether they have a nationality or not,[479] in the contemporary world nationality often operates as a legal or practical gateway to the enjoyment of other rights. Hence, statelessness has a detrimental impact on children, often obstructing their enjoyment of other rights. It undermines the enjoyment of childhood and the child's opportunity to develop to his or her full potential.

For this reason, a number of widely ratified human rights instruments contain complementary provisions and principles related to the protection of children against statelessness. These instruments not only affirm the right of every child to acquire a nationality; they also go on to require states to ensure that children are not left stateless. The CRC requires states, in implementing the rights under article 7(1), to ensure that children are not left stateless.[480] The ACRWC, in a more elaborate fashion, requires states to take robust action in

> ensuring that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.[481]

Providing the most detailed set of international standards relevant to statelessness in children, the 1961 Convention also sets out three principal obligations for contracting parties that, if universally implemented and despite its gaps, could contribute meaningfully to addressing statelessness. The 1961 Convention, under article 1, requires the contracting states to grant nationality to all children born on their territory who would otherwise be stateless, either automatically or upon application, subject to certain permissible conditions. Moreover, articles 1(4) and 4 require states to confer nationality on children born abroad to one of their nationals when those children would otherwise be stateless. Article 2 grants nationality to children found abandoned on a state's territory.

Looking at the provisions in the CRC and ACRWC, one can learn that both instruments contain provisions which aim primarily at preventing statelessness in children. This means that the general obligations of states to grant nationality to children relate to the fact that

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[478] See the discussions in Chapter One and Chapter two of this thesis.

[479] The Human Rights Committee states that 'the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'; General Comment No. 15 on the position of aliens under the Covenant (1986) para 11; see also Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligations imposed on States Parties to the Covenant (2004) para 10.

[480] Article 7(2) of the CRC.

[481] Article 6(4) of the ACRWC.

states have the specific obligation of ensuring nationality to all children who would otherwise be stateless and that they have a right to a nationality in the state in which they are born. According to the ACERWC, which is also in line with the UNHCR Guidelines, states, in ensuring every child's right to acquire a nationality, must accept that a child is not a national of another state if the authorities of that state indicate that he or she is not a national. A state can refuse to recognise a person as a national either by explicitly stating that he or she is not a national, or by failing to respond to inquiries to confirm that the child is a national.[482]

On the basis of the norms and jurisprudence established at the international and regional levels for children who would otherwise be stateless, the sections below examine the various scenarios and categories of children who should benefit from such protection.

3.8.1.1 Otherwise stateless even temporarily

One issue that law reforms in nationality matters should consider addressing is the case of children who are left stateless or in limbo with regard to their national identity. There are cases where nationality legislation, in some instances influenced by the gaps in intranational law, allows temporary statelessness in children. These cases of temporary statelessness occur for two main reasons.

One is that nationality determination procedures may require time, hence a child may be compelled to wait for completion of the process, which in some instances may take as long as the attainment of majority. Recognising this challenge, the UNHCR recommends that children who would otherwise be stateless should be automatically granted nationality at birth.[483] Although it is understandable that the assessment requires time, this thesis argues that the required waiting time should not be so long as to contravene the principle of the best interests of the child. States need to ensure that they implement a time limit that does not create unjustifiable delay and so lead the child into statelessness. In addition, it is important that the procedure is non-discretionary and not subject to conditions such as *legal residence* or the *good conduct* of the parent(s) or the child.

The second scenario that in which children may be left stateless on a temporary basis relates to the practice of labelling children as being of *unknown* or *undetermined* nationality, rather than identifying them as *otherwise stateless*. This precludes them from benefiting from the operation of the relevant safeguard. Leaving children in limbo without any recognised status contravenes the protections accorded by the CRC and ACRWC, which protect the right of every child to acquire a nationality. It is clearly not in children's best interests for them to languish in uncertainty with regard to their nationality throughout their childhood. Hence, it is argued that states need to determine whether a child would otherwise be stateless as

[482] ACERWC, General Comment No. 2 on article 6 (2016) para 100.

[483] UNHCR, Action 2 of the Global Action Plan to End Statelessness by 2024, available at https://www.unhcr.org/ceu/wp-content/uploads/sites/17/2016/12/End-Statelessness-GlobalActionPlan-2019-Final-web.pdf (accessed 07 February 2017).

quickly as possible, so as to be in line with child-rights principles.[484]

Applying a child-rights-based approach to statelessness requires that states ensure that children are not made to wait for tomorrow's actions or solutions regarding their national identity. Childhood is finite: it lasts until the age of 18, but the violations and the challenges children face from lack of a nationality have no limit.

3.8.1.2 Otherwise stateless children who are born in a territory

Children born in a territory become stateless for different reasons, the principal one being discriminatory provisions. For instance, when nationality laws discriminate based on gender and do not permit parents to confer their nationality equally to their children, children born on the territory of that state can be left stateless. Contrary to the principle of equality and non-discrimination, some nationality laws[485] restrict mothers from transmitting their nationality to their child on an equal base with fathers, due to discriminatory provisions in nationality laws. Such gender inequality can lead to statelessness if nationality can be acquired only by paternal descent. Marital status can also add layers of discrimination in nationality matters for children born in a territory, as fathers may not confer their nationality when their child is born out of wedlock.

Article 1 of the 1961 Convention refers to persons born in a territory who cannot acquire the state's nationality, or the nationality of another state, and would thus be 'otherwise stateless'. Article 1 prescribes that '[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless'. The 1961 Convention places the primary responsibility to prevent statelessness among children on the state of birth. However, a State Party to the Convention also has obligations to children of its nationals born outside its territory. Article 4 of the Convention requires a state to recognise the nationality of a child born outside its territory to a parent who has its nationality if the child would otherwise be stateless.[486]

According to the 1961 Convention, a child born in a territory who would otherwise be stateless shall be granted nationality either automatically at birth or upon application. In relation to the automatic acquisition of nationality, states are allowed to specify an age limit and conditions that have to be met in order to be eligible for acquisition of their nationality. Otherwise stateless children born on the territory of states that do not prove automatic acquisition of nationality in such circumstances may require fulfillment of one or more of the

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[484] The 1961 Convention sets five years as the appropriate timeframe for the child to stay in the status of *undetermined nationality*: articles 1 and 4 of the 1961 Convention. This thesis, however, presents a different argument on this provision of the Convention as it is not in line with child rights principles. See the discussion in section 4.1.1 of the thesis.

[485] Chapter Four of the thesis discussed countries that have such laws.

[486] 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, available at https://www.unhcr.org/protection/statelessness/5465c9ff9/guidelines-statelessness-nr-4-ensuring-childs-right-acquire-nationality.html (accessed 5 March 2017).

following exhaustively listed conditions, pursuant to article 1(2) of the 1961 Convention: the application is lodged during a period, fixed by a Contracting State, beginning not later than the age of 18 and ending not earlier than the age of 21; the person concerned has habitually resided in the territory of the country for a period, fixed by the state, not exceeding five years immediately preceding the lodging of the application or ten years in all; the person concerned has not been convicted of an offence against national security and has not been sentenced to imprisonment for a period of five years or more on a criminal charge; and the person has always been stateless.

It should be noted that article 1 of the 1961 Convention focuses only on the child's statelessness. As the UNHCR guidelines on statelessness explain, the test is whether a child is stateless because he or she has acquired neither the nationality of his or her parents nor that of the state of his or her birth; it is not an inquiry into whether a child's parents are stateless.[487] It is also important to note that, though none of the international and regional instruments compel states to grant their nationality to any particular person, they have an obligation to reduce statelessness, primarily by ensuring the grant of nationality to children born in the territory who would otherwise be stateless.

3.8.1.3 Customary international law on otherwise stateless children born in a territory

Customary international law emanates from practices which consist of the two elements: state practice and *opinio juris*.[488] State practice involves the widespread and consistent acts of legally relevant actors, while *opinio juris* is the subjective element when states act in this way because they are compelled to do so.[489] The precise types of practice by states could include patterns of treaties or other international agreements on the topic, decisions of domestic and international courts, domestic legislation, the conclusions of the International Law Commission (ILC), public acts, and statements on policies and claims on the law and

[487] UNHCR, Guidelines on Statelessness No. 4 (n 486 above) para 18.

[488] Statute of the International Court of Justice article 38, 26 June 1945, 59 Stat. 1055, 33 UNT.S. 993; Statute of the Permanent Court of Justice, 16 December 1920. However, the Permanent Court of International Justice and ICJ have both asserted that some rules of customary international law can be sustained without rigid application of the two-element rule; see the Decision of the ICJ in Delimitation of the Maritime Boundary in the Gulf of Maine Area Canada v U.S, ICJ (20 January 1984) 246, para 111, where the Court held that 'a limited set of norms for ensuring the coexistence and vital cooperation of the members of the international community' exists without the rigorous need to establish state practice and *opinio juris*; in the *Burkina Faso v Mali* Frontier Dispute, the ICJ held that *uti possidetis* was customary international law because 'it is logically connected with the phenomenon of the obtaining of independence'. See *Burkina Faso v Mali*, ICJ (22 December 1986) ICJ 554, para 20. In the Nicaragua case, the Court found that common article 3 of the Geneva Conventions was customary international law because it is in alignment with 'elementary considerations of humanity'; see Military and Paramilitary Activities in and Against Nicaragua *v U.S* ICJ (27 June 1986) 14, paras. 215, 218.

[489] *Nicaragua v U.S* ICJ (27 June 1986) 14, para 207: For a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive* necessitates. Either the states taking such action or other states in a position to react to it must have behaved in such a way that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.

teachings of publicists.[490] The usual approach is to examine a sample of state practices with *opinio juris* and, through inductive and deductive steps, reach a conclusion on the state of custom.[491]

There is no intention in this thesis to make an extensive argument on the right to a nationality on the basis of customary international law. Suffice to mention that, with regard to stateless children born on the territory, there is ample evidence in the writing of public international law scholars, court decisions, and the opinion of treaty bodies and mechanisms that the right to nationality has secured the status of customary international law and prohibited the creation of statelessness – thus, a person who is not otherwise a national of any state must be considered a national of the state in which he or she was born.[492] As discussed in chapter two of this thesis, the ICJ has confirmed that birth in a territory is one of the more important connections underlying the genuine link test for nationality.[493]

Granting nationality to stateless children born in a state's territory prohibits statelessness so long as no other factors, such as discriminatory provisions, come into play. Such an approach has been supported by scholars of public international law, who concluded that general (customary) international law has secured the right to a nationality and prohibited the creation of statelessness, and that a person who is not otherwise a national of any state must be considered a national of the state in which he was born.[494] Similarly, the Human Rights Committee notes that birth in a territory is one of the most important factors, and so states are required to adopt every appropriate measure, both internally and in cooperation with other states, to ensure that every child has a nationality when he or she is born.[495] The Economic and Social Council,[496] and the Human Rights Council,[497] have all stated that, in looking for a link to a state that should give rise to a nationality, birth in the state is just as relevant as the nationality of the parent.

[490] Worster (n 469 above) 3.
[491] Worster (n 469 above) 2.
[492] Worster (n 469 above) 7.
[493] See the discussion in section 2.1.1 of this thesis; See also *Liechtenstein v Guatemala* ICJ (6 April 1955) (1955) ICJ reports 4 para 23.
[494] Worster (n 469 above) 7.
[495] Human Rights Committee General Comment No. 17 on article 24: Rights of the Child (1989) para 8.
[496] Economic and Social Council, Resolution18 (III) (Oct. 3, 1946); Economic and Social Council, Drafting Committee on an International Bill of Human Rights, Report on its First Session, UN Doc. E/CN.4/21 (1947); UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, United Nations (1949) Lake Success - *New York*, 1 August 1949, E/1112; E/1112/Add.1 Supra note 54; Econ. & Soc. Council, Ad Hoc Committee on Statelessness and Related Problems, Summary Records of the second and third meetings, UN Doc. E/AC.32/SR.2 & 3 (Jan. 26, 1950); Econ. & Soc. Council, Ad Hoc Committee on Statelessness and Related Problems, Report, UN Doc. E/1618, UN Doc. E/AC.32/5 (Jan. 16, Feb. 16, 1950).
[497] Human Rights Council Resolution 32/5 Human rights and arbitrary deprivation of nationality (2016); Human Rights Council Resolution 26/14 Human rights and arbitrary deprivation of nationality (2014); Human Rights Council Resolution 20/5 Human rights and arbitrary deprivation of nationality (2012).

3.8.1.4 Otherwise stateless children born abroad

As a general rule, children born in a territory and who would otherwise be stateless should automatically acquire nationality at birth; however, this does not happen all the time. States may adopt a position that being born in a territory is not the sole factor which leads to attribution of nationality. States may subject acquisition of nationality to various factors, such as requiring the parents of the child to fulfil certain requirements; acquisition of nationality may even be dependent on a state's discretionary power, leaving some children at risk of becoming stateless. From a purely legal perspective, unless nationality laws of states adopt an unrestricted *jus soli* approach which grants nationality to all children born in their territory who would otherwise be stateless, situations of statelessness may arise among children.[498]

When children are born in a country different from that where their parent(s) hold citizenship, statelessness may occur due to a number of reasons. The main causes of statelessness in cases where children are born aboard relate to matters of conflict between nationality laws. For instance, if parents give birth to a child in a *jus sanguinis* country, and the laws of the parents' state of origin does not allow conferral of nationality, the child may find him- or herself at risk of becoming stateless. More scenarios can be envisaged where discriminatory provisions would create cases of statelessness among children born abroad. In situations where the child born in a foreign land is from parents of mixed nationality – the father is subject to meet additional requirements and the mother from a state that prohibits women from transmitting their nationality – statelessness is bound to happen.

In this light, it is important that parents can equally confer their nationality on their children born abroad. Implementation of article 9(2) of CEDAW, which prescribes the principle of equality between men and women regarding conferral of nationality, would be an important legal measure. Article 4 of the 1961 Convention focuses on the prevention of statelessness among children born abroad. The main rule pursuant to this article is that the country of the parents has to grant its nationality to the child of its nationals born abroad. Article 4 gives Contracting States the possibility of either granting their nationality automatically at birth, or requiring an application subject to the exhaustive conditions listed in article 4(2). In the context of migration, pursuant to Article 4(1) of the 1961 Convention, if the child's parents did not possess the same nationality at the time of his or her birth, the question as to whether the nationality of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such a Contracting State.

This thesis takes the view that article 4 of the 1961 Convention should be read together with other provisions that deal specifically with children's rights. A separate application of the provisions under article 4 of the 1961 Convention may not pass the test of the best-interests-of-the-child principle in preventing statelessness. In this regard, making a joint reading of article 6 of the ACRWC and article 7 of the CRC, and in view of article 4 of the ACRWC

[498] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 144-168.

and article 3 of the CRC, one may note that it would be in a child's best interests not to be left stateless for an extended period of time; hence, he or she should acquire a nationality at birth, or as soon as possible after birth. This entails that ensuring the right of a child to acquire a nationality is not only the responsibility of a child's state of birth but of all countries with which a child has a relevant or appropriate link, for instance through parentage or residence.

3.8.1.5 Birth registration as a crucial component of safeguards against statelessness

When births are registered, documentation is issued which contains at a minimum the child's name, date and place of birth, and the parents' names. This information thus generally provides proof of a child's entitlement to nationality, either based on descent or place of birth. In some cases, birth registration documents may be required for children to apply for nationality at majority.[499] As such, the establishment of proper regulations and procedures for birth registration can be considered a crucial component of safeguards against statelessness. Although birth registration is unfortunately not mentioned explicitly in the 1961 Convention as a safeguard against statelessness, it is an obligation under a range of international and regional human rights treaties, including the ICCPR,[500] CRC,[501] UN Convention on Migrant Workers' Rights,[502] UN Convention on the Rights of Persons with Disabilities,[503] ACRWC,[504] and Protocol to the African Charter on Human and Peoples' Rights on Persons with Disabilities.[505] These instruments require states to ensure registration immediately after birth and without discrimination of any kind, irrespective of the child's legal status or that of the parents.[506] Recognising the role that birth registration plays as a safeguard against statelessness, the UN General Assembly notes that birth registration provides an official record of a child's legal identity and is crucial to preventing and reducing statelessness, and welcomes pledges by states to ensure the birth registration of all children.[507]

Duly recognising the fact that birth registration does not confer nationality on a child on its own, it should be considered one of the safeguards against statelessness, and the role of

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[499] The South African Citizenship Act, for instance, provides for citizenship on a *jus soli* basis for any child who does not have the citizenship of any other country or the right to any other citizenship, as well as a the general right for a child born in the country of non-national parents to be able to apply for citizenship at majority; however, these rights are dependent on the child's birth being registered; see South Africa Citizenship Act 88 of 1995, as amended in 2010, sections 2(2)(a) and 4(3).

[500] Article 24(2) of the ICCPR.

[501] Article 7(1) of the CRC.

[502] Article 29 of UN Convention on Migrant Workers' Rights.

[503] Article 18(2) of Convention on the Rights of Persons with Disabilities.

[504] Article 6 (2) of the ACRWC.

[505] Article 28(4)(d) of the ACRWC and the Protocol to the African Charter on Human and Peoples' Rights on Persons with Disabilities.

[506] This view is also supported by the Human Rights Committee; see Human Rights Committee, General Comment 17 on Article 24 (1989) paras 7–8.

[507] Resolution adopted by the General Assembly on the report of the Third Committee, UNGA Res. 67/149 (20 December 2012) para. 23.

documentation to realise the right to nationality should be crafted in domestic laws accordingly. In the African context, the fact that the ACRWC provides for the right to nationality along with the right to birth registration in one provision speaks volumes about the role the latter plays in preventing statelessness. Recognising this link, the ACERWC, in its General Comment on article 6 of the ACRWC, underlines the importance of immediate, free and universal birth registration and certification as an obligation of State Parties under the Charter.[508] Birth registration certificates may prove nationality or serve as a background document to obtain a document that proves the nationality of a person. In many African countries, however, there is lack of a systematised way of recording birth. As a result, birth registration is below 50 per cent, and birth certification is even lower in these countries. In addition to lack of systematised birth-recording systems, the lack of budgetary allocation, lack of facilities, and inaccessible civil registry offices contribute to the low birth registration rate in the continent. Another factor is the existence of laws that hinder the birth registration of children.

The ACERWC's decision in the *Children of Nubian Descent* case also clearly illustrates the correlation between birth registration and the right to nationality. Furthermore, in its General Comment on article 24 of the ICCPR, the Human Rights Committee notes that the protection of the right to acquire a nationality should be interpreted as being closely linked to the provision concerning the right to special measures of protection. It is designed to promote recognition of the child's legal personality/identity.[509]

3.9 Conclusion

As has been discussed in this chapter, the right to a nationality and the prevention of statelessness form part of the corpus of international and African regional instruments. With respect to the right to nationality, international law, in line with states' sovereign authority in nationality matters, adopts the approach that states are not compelled to confer nationality on all children born on their territory. However, with the advancement in international human rights norms, considerations such as limitations on arbitrary deprivation of nationality and prevention of statelessness are introduced as balancing factors. Despite the development, the success of international law in matters of nationality is only partial when it comes to effectively preventing statelessness among children.

The central argument of this chapter, therefore, is about ensuring the right to nationality and prevention of statelessness among children. A child-rights-based approach to the matter is required. The gaps in protection under the nationality provisions in the general human rights instruments and the provisions in the 1961 Convention can be addressed through a purposive reading and holistic application of child-rights principles. Statelessness, at all times, contravenes the best interests of the child. Hence, the chapter argues, the elements of the right to a nationality as provided in contemporary international and African regional laws should be interpreted and applied in a manner that avoids statelessness among children. Looking at

[508] ACERWC General Comment on article 6 (2014) para 12.
[509] Human Rights Committee, General Comment No. 17, HRI/GEN/1/Rev.8 (1989) para 7.

the elements of the right to a nationality and prevention of statelessness through a child-rights lens, the following chapter examines the practices in various African countries and presents arguments on the defining factors in measuring states' compliance with the norms and principles discussed in the previous chapters.

Chapter Four:
Preventing Statelessness among Children: Examining African Domestic Norms through a Child-Rights Lens

4. Introduction

As discussed in the previous chapters, statelessness among children may occur for various reasons, affecting different groups of children. The reasons can range from the lack of an effective, universal and accessible birth registration system to discriminatory provisions, conflict of laws, and gaps in nationality legislation. In some countries the risk of statelessness is high due to legislative ambiguities in nationality legislation. Preventing statelessness requires states, inter alia, to have laws and policies that comprehensively respond to these causes of statelessness among children.

Against this backdrop, the current chapter presents an analysis of some African laws on the right to nationality, and examines whether states have put adequate and comprehensive laws and enforcement mechanisms in place to enable them to prevent statelessness among children in their territories. The arguments, when measuring the appropriateness and adequacy of the laws, are guided by child-rights principles. The chapter analyses factors which could lead children to statelessness and presents arguments on areas of legislative choices and factors affecting the enforcement of the laws.

The chapter also examines the domestic status and enforcement of international laws adopted by the respective African countries, with a focus on factors affecting judicial enforcement of the right to a nationality. In this regard, the chapter covers legislative responses concerning attribution and acquisition of nationality and the prevention of statelessness among children, including the case of children who would otherwise be stateless, and laws on loss, deprivation or renunciation of nationality as well as on the prevention of statelessness among children.

4.1 Mapping trends in legal responses to nationality and statelessness

Countries regulate matters of nationality through various corpora of laws. Some countries include provisions governing nationality under their constitutions, and others, almost all, through specific legislation. With regard to constitutional protection, only a few countries make direct reference to the right to a nationality; they include Angola,[510] Ethiopia,[511]

[510] Article 9 of the 2010 Constitution of Angola; the Constitution contains provisions regarding the acquisition, loss or re-acquisition of nationality. It also prescribes that a newborn child found in Angolan territory shall be presumed an Angolan citizen by origin. See art 9(3).

[511] Article 36 of the 1994 FDRE Constitution; the Constitution, on the rights of children, states that every child has the right to a name and nationality. It also establishes general principles relating to nationality, including that men and women have equal rights to transmit nationality to their children, and that no Ethiopian national shall be deprived of his or her Ethiopian nationality against his or her will.

Burundi,[512] Kenya,[513] Malawi,[514] Ghana,[515] Rwanda[516] and South Africa.[517]

In most cases constitutions simply provide general rules on principles of the right to nationality and empower the legislature to adopt legislation, or provide broad guidance on principles such as non-discrimination and the rights of the child.[518] A number of countries have established the right to a nationality in laws rather than through the constitution.[519] Some countries, such as Botswana,[520] Kenya,[521] South Sudan,[522] Lesotho[523] and Tanzania[524] also provide for every child to have the right to a nationality in specific legislation relating to children's rights. It is important to note that not all constitutions include specific provisions regarding children's right to a nationality. There are also cases where the constitution and nationality legislation are not in agreement. For instance, in Burundi the 2005 Constitution and the Revised Nationality Code have conflicting provisions, as article 4 of the Nationality Code does not allow a Burundian woman married to a foreigner to transmit her nationality to her husband or children. Such a provision contradicts not only the Constitution, but also other international instruments that Burundi is a party to. Therefore, the Committee on the Elimination of Discrimination against Women has urged Burundi to revise its laws accordingly.[525]

Promulgating the rights to a nationality as part of the constitution, whether in nationality codes or specific acts on children's rights, is an important move towards preventing statelessness among children. However, the implementation of the right to nationality as it

[512] Article 12 of the 2005 Constitution of Burundi; the Constitution prescribes that nationality is acquired, conserved, and lost according to the conditions determined by law. Children born of Burundian men or women have the same rights in regard to the law of nationality. Furthermore, article 34 prohibits arbitrary deprivation of nationality.

[513] Articles 12-18 of the 2010 Constitution of Kenya. This is one of the constitutions with a dedicated chapter and detailed provisions on citizenship. See Chapter 3 of the Constitution.

[514] Articles 23-27 of the 1994 Constitution of Malawi comprise detailed provisions regarding acquisition and loss of nationality and the principle of equality between men and women in nationality matters.

[515] Article 6 of the 1992 Constitution of Ghana contains provisions regarding acquisition of nationality, including rules on children of unknown parents and adoptive parents.

[516] Article 25 of the 2003 Constitution of Rwanda contains provisions regarding acquisition of Rwandese nationality and rules on deprivation of nationality.

[517] Article 20 of the 1996 Constitution of South Africa states that no citizen may be deprived of citizenship; article 28(1)(a) of the same constitution provides that every child has the right to nationality from birth.

[518] Exceptionally, there are countries, such as Nigeria, which regulate matters of nationality through their constitutions without having a nationality act. See the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[519] Manby (n 68 above) 43.

[520] Section 12, Botswana Children's Act No. 8 of 2009.

[521] Section 7(1), Kenya Children Act No. 29 of 2022.

[522] Section 10, South Sudan Child Act No. 10 of 2008.

[523] Section 7, Lesotho Children's Protection and Welfare Act No 7 of 2011.

[524] Section 6, Tanzania Law of the Child Act 2009.

[525] CEDAW Committee Recommendations to Burundi (2016) available at https://www.ohchr.org/en/2016/10/committee-elimination-discrimination-against-women-examines-reports-burundi (accessed 5 July 2022).

applies specifically to children can be affected by a number of factors that could make the legal response ineffective. Beyond the contradictions between constitutional provisions and nationality codes, some countries follow nationality regimes which are highly restrictive in nature. The laws can be so restrictive that they make the very act of acquisition of nationality difficult and, in some cases, increase the risk of statelessness for both adults and children. In Mauritius, for instance, a national by birth, born in the country, can pass his or her nationality to a foreign-born child but that child cannot pass his or her own nationality on in turn, creating a risk of statelessness. Countries including Botswana, Côte d'Ivoire, Gambia, Mauritius, Nigeria, Seychelles and Zambia also have provisions which may make acquisition of nationality rather difficult.[526]

Beyond the specific challenges arising from the nature of nationality legislation, some of which are discussed in detail below, implementation of the protection provided in the various forms of laws depends very much on a number of other general factors. Lack of ratification of the relevant international laws is one of the factors affecting normative responses. Relevant instruments, such as the 1954 and the 1961 Conventions, which are key to establishing certain minimum protections for stateless people and in establishing certain rules designed to prevent situations in which people are rendered stateless, have not been ratified by most African countries.[527] However, it should also be noted that the major international instruments in relation to children, comprising strong safeguards against statelessness, have been ratified by almost all African countries. Domestic application and enforcement of the rights contained in such instruments, including protection of the right to a nationality, could be subject to a number of factors. These relate to the domestic governance structures, a general gap in child protection in a given country, the place of international law in the domestic system, and the limited role of courts in enforcing human rights as enshrined in international and national instruments.

The thesis acknowledges the multiplicity of factors required to ensure the implementation of normative standards with regard to matters of human rights at the domestic level. As discussed in this thesis,[528] implementation of the rights and freedoms included in the child rights instruments requires the establishment of national mechanisms for coordination implementation, law reform and judicial enforcement of the rights of children, awareness-raising, training and education, resource allocation and making children visible in budgets, the participation of civil society, international cooperation, and ratification and application of relevant international standards. For instance, in countries with a federal system, such as Ethiopia, enforcement of the right to nationality may be affected by systemic discrimination,

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[526] Manby (n 68 above) 43.

[527] As of September 2022, the 1954 Convention had been ratified by 27 African countries, while the 1961 Convention had been ratified by 21 African countries. See Ratification Status of the 1954 Convention https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en; see also Ratification status of the 1961 Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-4&chapter=5&clang=_en (accessed 7 September 2022).

[528] Section 3.4 of this thesis.

where protection is stronger in some jurisdictions but weaker in others. This thesis argues that a meaningful normative response on matters of nationality requires addressing such uneven and fragmented protection, which results in adverse and discriminatory effects on the recipients of rights across the country. In this regard, instituting enabling legislation that can establish an overarching coordination mechanism and ensure equal implementation of the rights contained in the relevant international instruments across all parts of the country, without discrimination, is a *sine qua non* for functional and effective normative response to the right to nationality.

Judicial enforcement of international laws on matters of nationality plays a significant role in preventing statelessness among children. The effectiveness of the enforcement of such laws depends on the place of international laws in a given state, as determined by its laws and whether it follows a monist[529] or dualist[530] system. According to the theory of monism, when confronted with a case, municipal courts are obliged to directly apply rules of international law in the same manner as municipal laws.[531] In dualist jurisdictions, national courts are restricted to the application of domestic laws. Therefore, in order for a rule of international law to be applied, it must first be transformed into national law through legislation, failing which the courts cannot apply it.[532] While the massive adoption of international human rights instruments is highly commendable, in order for these instruments to benefit the individuals for whom they are intended, the norms contained therein must be made to matter nationally. Individuals must be able, at the national level, to enforce the rights contained in the ratified instruments.[533]

Viljoen describes the process of aligning national legal systems with the international human

[529] Countries following the monist system view of international law and municipal law as a single unity composed of binding legal rules. They posit that there is a single universal system of law, and that international law and municipal law are aspects of such a system. Monists hold that the two legal systems are interrelated parts of one legal structure. See JG Starke 'Monism and dualism in the theory of international law' in SL Paulson (ed) *Normativity and norms: Critical perspectives on Kelsenian themes* (1999)

[530] Dualism treats international law and municipal law as two distinct and separate legal systems. The dualist theory asserts that international law should be limited to international decisions and should not prevail over domestic law in domestic decisions. International law, however, may be resorted to as a guide to interpreting domestic law where such a need arises. Domestic courts in dualist states can apply international law only if (a) it has been adopted by the state, or (b) it has been transformed into domestic law by national legislation; see JG Starke 'Monism and dualism in the theory of international law' in Paulson (n 531 above).

[531] DP O'Connell 'The relationship between international law and municipal law' (1960) 4 *Georgetown Law Journal* 432; JF Coyle 'Incorporative statutes and the borrowed treaty rule' (2010) 50 *Virginia Journal of International law* 656.

[532] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 9.

[533] In this regard, it is worth mentioning the experience of certain countries, such as Benin, Burkina Faso, Côte d'Ivoire, Mali, and Niger, where their nationality codes specifically provide that the terms of treaties on nationality to which the state is a party apply even if they are contradicted by national law. See RA Atuguba, FX Tuokuu & V Gbang 'Statelessness in West Africa: An Assessment of Stateless Populations and Legal, Policy, and Administrative Frameworks in Ghana' 8 (2020) *Journal on Migration and Human Security* 19.

rights standards as 'bringing human rights home'.[534] He argues that when states ratify the international human rights instruments, they undertake to implement the rights contained therein, and thereby assume the responsibility for bringing the rights home to the national level. It is at the national level that individuals can easily access and enforce against their own governments the rights and obligations contained in the ratified international human rights treaties.

For the purpose of this thesis, one way of giving effect to international treaties is thorough judicial enforcement of the right to nationality. Courts follow the doctrine of *stare decisis* (precedent) to create jurisprudence, building upon holdings of law so as to ensure that people in like circumstances of fact are treated alike. This is particularly relevant in common law countries, where judicial decisions constitute one of the most important sources of legal authority, along with legislative and regulatory enactments. Domestic normative standards should be read in conjunction with case law which construes the correct application of the legislation. With regard to the role of case laws in matters of nationality and statelessness, it would be beyond the scope of this thesis to provide a comprehensive examination of national cases and jurisprudence. However, it would be important to note the trend in litigation at the domestic level, to inform future studies and academic engagement. The trend in judicial enforcement of the right to nationality indicates that not many courts in Africa have encountered cases involving matters of nationality or prevention of statelessness. As of August 2022, reports indicate that a total of only 102 cases have been recorded in different African countries.[535] It would be instructive to discuss the cases from South Africa and Kenya as they have the greatest number of cases litigated at the domestic level on citizenship and statelessness.[536]

The case law in Kenya covers a range of issues, including the case of an abandoned infant who was found in Kenya, where the High Court ruled that the child should be presumed a Kenyan citizen by birth;[537] matters relating to citizenship by birth should not be taken away by refusal to provide documents of identification;[538] and being in Kenya illegally and being convicted does not revoke a person's citizenship by birth.[539] The courts in Kenya also considered matters related to one of the emerging challenges in the areas of nationality and statelessness, the implication of digital identity. In the *Nubian Rights Forum & 2 others v Attorney General & 6 others*, the High Court of Kenya dealt with the constitutionality of the National Integrated Identity Management System (NIIMS), which requires everyone residing

[534] Viljoen (n 400 above).

[535] For detail on the cases, see https://citizenshiprightsafrica.org/advanced-search/?fwp_media_type=national-courts (accessed 22 August 2022).

[536] South African courts have litigated a total of 22 cases, while Kenya's litigated 18 cases. See the database https://citizenshiprightsafrica.org/advanced-search/?fwp_media_type=national-courts. See also Kenya Citizenship and Nationality Rights Case Digest https://citizenshiprightsafrica.org/kenya-citizenship-and-nationality-rights-case-digest/ (accessed 22 August 2022).

[537] In the matter of *HG Alias Haa Baby H Alias a baby girl, Alias unknown baby v FKN and, CNW* No. E048 of 2020.

[538] *Hersi Hassan Gutale & Another v Attorney General & Another*, Petition 50 of 2011 eKLR (2013).

[539] *Galma Duba Gufu v Attorney General and another*, Petition No 5 of 2018, eKLR (2019).

in Kenya, including children, to register for the system. It is noted that the system could leave some at the risk of statelessness, as not everyone has primary identity documents such as birth certificates or national identity cards, which are required for enrolment.[540]

Similarly, in South Africa, the judiciary plays a meaningful role in strengthening the normative responses through case law on matters of nationality and statelessness, particularly as applicable to children's rights to a nationality. In *Menzile Naki and another v Director General: Department of Home Affairs and Another,* the High Court ruled the Birth and Death Registration Act (BDRA) regulations, which make a child's right to birth registration contingent on parents' documentation status, unconstitutional.[541] Dealing with matters of discrimination against children born to unmarried parents, in 2021 the South African Constitutional Court declared S10 BDRA unconstitutional, with the effect that mothers and fathers should have equal rights to register birth of children despite marital status.[542] Similarly, the 2020 constitutional case in the matter between *Chisuse v Director General, Department of Home Affairs* created strong jurisprudence guaranteeing the rights of all children with one citizen parent to be registered as citizens by the relevant government department.[543] The *Chisuse* case is a good example of the role courts can play in upholding a child-rights' based approach by interpreting nationality legislation in a manner mindful of the risks of statelessness among children.

The discussion above demonstrate that countries regulate matters of nationality and, in some instances, statelessness, mainly through specific nationality legislation. The trend shows that constitutional guarantees of one's right to a nationality are limited. Case laws are also not common in the areas of the right to nationality in general and prevention of statelessness among children in particular. In view of this, the sections below examine the legal responses of African countries as they apply to nationality and statelessness in children.

Modes of acquisition of nationality can be divided into two major categories. The first is acquisition of nationality by operation of the law, also called attribution of nationality, and the second refers to acquisition of nationality by application. The former refers to the application of three major principles where individuals are granted nationality automatically by the operation of the law. These are the principle of *jus soli*, the principle of double *jus soli* and the principle of *jus sanguinis*. The last refers to the acquisition of nationality by application, a system through which individuals acquire nationalities at a later date, not automatically from birth, by fulfilling various procedures, including declaration, registration and naturalisation.[544]

Focusing on these modes of attribution and acquisition of nationality, the following section examines the normative responses of African countries through a child-rights lens and

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[540] *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* Constitutional Petitions No. 56, 58 & 59 of 2019 eKLR (2020).
[541] *Menzile Naki and another v Director General: Department of Home Affairs and Another* (4996/2016) [2018] ZAECGHC 90.
[542] *Centre for Child Law v Minister of Home Affairs* CCT 101/20 [2021] ZACC 31.
[543] *Chisuse v Director General, Department of Home Affairs* [2020] 6 SA 14.
[544] Manby (n 55 above) 92.

considers whether they provide sufficient safeguards against preventing statelessness among children. It should be noted that the discussion does not attempt to examine the laws and regulation of all African countries. Instead, by providing arguments for the best way in which statelessness in children can be prevented, the thesis identifies trends and refers to relevant domestic experiences focusing on normative standards.

4.2 Nationality by operation of the law

Attributing nationality by operation of the law, sometimes also referred to as *nationality from birth* or *of origin*, implies a system which allows a child to automatically acquire a nationality from the moment of birth without any further procedures required for recognition by the state. Generally, nationality from birth is regulated based on *jus soli* or *jus sanguinis*. Countries which follow *jus soli* award nationality to children on the basis of birth in a territory; those that adopt *jus sanguinis* confer nationality from birth to a child of a parent who is already a citizen of that country.

4.2.1 *Jus soli* and prevention of statelessness in children

Looking at the trends in Africa, considering the degrees of delay, retrospectivity, discretion they grant, and the extent of conditions applied, one may distinguish four main forms of *jus soli* available in the laws of African countries: (i) automatically from birth, pure or absolute jus soli; (ii) by declaration or automatically at or before majority;[545] (iii) on the basis of a period of prior parental residence; and (iv) on the basis of parental birth in the country – also referred to as double *jus soli*.

Though application of an absolute *jus soli* is one of the most effective ways of ensuring that children born in a country are not at risk of statelessness, in Africa, at the time of writing, *jus soli* in its pure form, also called absolute *jus soli*, is found only in Chad, Lesotho and Tanzania.[546] Conditional *jus soli* appears in a variety of forms in the laws of many African

[545] A handful of countries require a child who is born in the territory to be resident in the country at majority, such that he or she is able to acquire nationality from birth. The application of these rules, however, can be different, as some allow attribution of nationality automatically, while others require a positive action to be taken by the child before majority through declaration or registration. For instance, countries such as Burkina Faso, Congo Republic and Guinea provide for automatic attribution of nationality to a child born on the territory who is still resident there at majority. Benin, Cameroon, CAR, Comoros, DRC, Equatorial Guinea, Gabon, Guinea, Mali, Mozambique, Rwanda, South Africa and Togo attribute nationality to a child born in the territory and resident there till the time that he or she acquires nationality by registration or declaration. For details of the laws, see the works of Manby (n 67 above). Mozambique provides an additional option to children born to foreign parents: when either of them is in Mozambique in the employ of the government of his or her country, they may declare that they wish the child to be Mozambican within one year of the child's birth, otherwise the child may claim nationality within one year of majority; see article 24(2) Mozambique Constitution of 2004 as amended in 2007.

[546] Article 11 of Chad Code de la Nationalité Ordinance No. 33 of 1962 provides for any child born in Chad to acquire nationality automatically at birth and for transmission of nationality on an equal basis by either parent; Chapter IV of the 1993 Constitution of Lesotho provides for citizenship to be attributed at birth based on birth in Lesotho. See also article 5 of Tanzania Citizenship Act No. 6 of 1995, which repeals and replaces the

countries. Some restrict the application of nationality by birth to specific groups of children, which in most cases would be discriminatory when restricting the application only to children of specific races.

The cases of Liberia and Uganda are a good example in this regard. Citizenship in Liberia is regulated by Chapter 4 of the 1986 Constitution and the 1973 Aliens and Nationality Law, the latter as amended in 2022. Both the Constitution and the Aliens and Nationality Law discriminate on the basis of race, as they provide nationality by birth or naturalisation only to persons who are 'Negroes' or of 'Negro descent'.[547] Considering the effect of such discriminatory provisions on the right to nationality of children, the CRC Committee, in 2012, called upon Liberia, 'to take urgent measures to amend its Constitution and citizenship laws to eliminate discrimination on the basis of colour or racial origin'.[548] In 2014, after consideration of the Initial Report of Liberia, the ACERWC made a similar observation.[549]

In Uganda, matters of nationality are governed by the 1995 Constitution and the Citizenship and Immigration Control Act of 1999. The 1995 Constitution provides for an explicit ethnic definition of Ugandan citizenship, includes a schedule listing ethnic groups that are considered Ugandan, and limits the application of *jus soli* to those who are members of one of the ethnic groups listed in the Constitution.[550] The law clearly excludes children of some groups of people, including those of European and Asian descent[551] and children who belong to the Maragoli communities,[552] from automatically getting nationality from birth because they are excluded from the list.

Making the application of *jus soli* difficult, others require residence, sometimes lawful residence, on a long-term basis of parents. For instance, countries such as Namibia and South Africa require legal residence to confer nationality to children on the basis of *jus soli*.[553] In South Africa, the law requires that both parents must be permanent residents, and the child only qualifies for nationality from birth if still resident in the country at majority.[554] This thesis takes the view that stipulating conditions which require children to wait until the age of

Citizenship Act 1961: it states that 'every person born in the United Republic on or after Union Day shall be deemed to have become and to have continued to be a citizen of the United Republic with effect from the date of his birth, and with effect from the commencement of this Act shall become and continue to be a citizen of the United Republic, subject to the provisions of section 30'.

[547] Article 27(b) of Liberia Constitution of 1986 states that '[i]n order to preserve, foster and maintain the positive Liberian culture, values and character only persons who are Negroes or of Negro descent shall qualify by birth or by naturalization to be citizens of Liberia'.

[548] CRC Committee Concluding Observations and Recommendations to Liberia, 2012, CRC/C/LBR/CO/2-4.

[549] ACERWC Concluding Observations and Recommendations to Liberia (2014) available at https://acerwc.africa/wp-content/uploads/2018/14/CO_Liberia_Eng.pdf (accessed 7 July 2022).

[550] Chapter 3 of the 1995 Constitution of Uganda as amended in 2018.

[551] Detailed analysis of the case of those of European and Asian descents is available at F Wooldridge and V Sharma, International Law and the Expulsion of Ugandan Asians in the *International Lawyer* 9 (1975) 30-76.

[552] See Maragoli Community Living in Uganda Demand Recognition, available at http://citizenshiprightsafrica.org/maragoli-community-living-in-uganda-demand-recognition/ (accessed 02 March 2019).

[553] Article 4(1)(b) of Namibia Constitution of 1990.

[554] Section 2(3) of South Africa Citizenship Act No. 88 of 1995 as amended in 2010.

majority to get citizenship by birth is contrary to the best interests of the child. Particularly in the case of South Africa, it should also be noted that section 2(3) of South Africa Citizenship Act is at odds with the South African Constitution, which provides for citizenship at birth.[555]

The application of *jus soli* is impeded by an additional restriction that could also result in statelessness in children. For children born in a territory to be able to become nationals from birth automatically, there are cases where at least one parent is required to be born in the country, a requirement known as double *jus soli*. What is required under double *jus soli* is also different from one country to another. Mozambique, for instance, recognises children born on the territory as citizens if a father or a mother is also born in Mozambique;[556] Togo requires not only both parents to be born in the country, but that the child be a habitual resident in the country;[557] Algeria and Tunisia[558] require that both grandparents on the paternal side must be born in the country. Algeria makes it harder, requiring both father and grandfather to have been born in the territory and to be of the Muslim religion.[559] In another instance, in Mali, the parent born in the country must also have the nationality of another African state for the child born in the territory to be granted a nationality.[560] In Morocco, nationality from birth can be claimed, not attributed automatically, with a preferential right to a child of a father born in the territory who is attached to a country of Muslim religion and Arabic languages.[561]

One can refer to the provisions of article 5(1) of the Draft Protocol on Nationality and Statelessness in Africa, which draws on the principle of double *jus soli* as a common provision in many African states. The draft Protocol recognises the role that double *jus soli* could play in addressing the challenges of statelessness in Africa. However, for this to happen it should be done without restrictive and discriminatory requirements. It is in line with this thinking that the ACERWC, in its General Comment on article 6 of the ACRWC,[562]

> encourages States Parties to adopt legal provisions – already in place in many African States – that a child born in the State with one parent (either mother or father) also born in the State acquires the nationality of that State at birth.

As noted above, there are countries which provide additional, more stringent and in some cases discriminatory, requirements of double *jus soli.* Hence, the author of this thesis argues that additional elements in double *jus soli* which go beyond the requirement of 'one parent (either mother or father) also born in the state' should be measured against human rights standards in general and child-rights principles in particular. Specifically, all criteria established by states relating to acquisition of nationality by children must not discriminate on the basis of 'the child's or his/her parents or legal guardians' race, ethnic group, colour,

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[555] Article 28(1)(a) of the 1996 Constitution.
[556] Article 23(1) of the Mozambique Constitution of 2004 as amended in 2007.
[557] Article 1, Togo Nationality code of 1978.
[558] Article 7, Tunisia Nationality code 1963 as amended in 2010.
[559] Article 32, Algeria Nationality Code of 1970, as amended in 2005.
[560] Article 227, Mali Code des Personnes et de la famille 2011.
[561] Article 9(1), Nationality Code 1958 as amended in 2007.
[562] ACERWC General Comment No. 2 (n 142 above) para 92.

sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status'.[563]

Though the application of the rules vary, a number of countries require residence at majority for children born in the territory to get nationality at birth.[564] Mozambique, for instance, provides an additional option to children born to foreign parents: when either of them is in Mozambique in the employ of the government of his or her country, they may declare that they wish the child to be Mozambican, within one year of the child's birth, otherwise the child may claim nationality within one year of majority.[565] In this regard, Mozambique's position is in line with the ACERWC's recommendation, which states in its General Comment: [566]

> In situations where a child has parents who are of different nationalities, the Committee recommends that children be given the right to hold both nationalities at least until the age of majority. In those countries where dual nationality of adults is not permitted, the child may then be afforded a prescribed period following majority within which to choose which nationality to hold. In this instance, States should take all appropriate measures to inform children on reaching majority that they need to make such a choice and of the procedures by which to do so.

Though few countries adopt the principle of pure or absolute *jus soli*, a significant number of African countries apply conditional *jus soli* in their nationality laws to attribute nationality to the child who is born on their territories. However, it would be difficult to conclude that a country can ensure that no child is born stateless just by adopting a *jus soli* rule to nationality. As mentioned above, the forms of *jus soli* that most African countries adopt involve lengthy delays, retrospective and onerous conditions, and administrative discretion in granting nationality to children, which generally create unnecessary obstacles to full citizenship and may leave the children at risk of statelessness.

Jus soli plays a significant role in preventing statelessness in children. However, *jus soli* itself cannot prevent all statelessness cases and it would be unwise to rely solely on this approch. Conditional or unconditional *jus soli* provisions often leave gaps that create or maintain a situation of statelessness at birth. Just as a law based solely on *jus sanguinis* tends to exclude nationality from groups of people, such as those who are descended from individuals who have migrated from one place to another, so an exclusive *jus soli* rule, would prevent individuals from claiming the nationality of their parents if they had moved away from their 'historical' home.

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[563] Article 3 of the ACRWC.

[564] For instance, countries such as Burkina Faso, Congo Republic and Guinea provide for an automatic attribution of nationality to a child born on the territory who is still resident there at majority, while Benin, Cameroon, CAR, Comoros, DRC, Equatorial Guinea, Gabon, Guinea, Mali, Mozambique, Rwanda, South Africa and Togo attribute nationality to a child born on the territory and resident there till the time he or she acquires nationality by registration or declaration. For details of the laws, see Manby (n 68 above).

[565] Article 24(2), Mozambique Constitution of 2004 as amended in 2007.

[566] ACERWC General Comment No. 2 (n 142 above) para 22.

Hence, *jus soli* provisions could work better to prevent statelessness among children if they are supported by other strong safeguards against statelessness. For instance, for *jus soli* to work towards preventing statelessness in children, an important first step is the removal of discrimination in law, not only on the basis of gender but race, ethnicity or religion. Countries whose laws include discriminatory provisions of this type significantly increase the risk of statelessness for children. Besides, as discussed in the previous chapter,[567] *jus soli* may not solve the problem of statelessness among children if it is not supported by a well-functioning, effective and universal birth registration system.

The case of Lesotho may help to better understand how statelessness among children can be created even in countries that have adopted an absolute *jus soli* rule. As mentioned, Lesotho is one of the few African countries which follows an unconditional *jus soli*, through both the Constitution and Citizenship Order, which provides the right to nationality for anyone born in the territory of Lesotho.[568] However, a closer look at its laws reveals legal gaps that could create cases of statelessness in children. For instance, in Lesotho there are no provisions, either in the Constitution or in the Citizenship Order, for granting nationality to 'foundlings', and as a consequence a child found in Lesotho and who appears to have been born in Lesotho is not afforded the right to nationality at birth. With regard to the acquisition of nationality by stateless children, the Citizenship Order makes provision for a stateless person to apply for Lesotho citizenship at the age of 18, but requires, as a condition, that the stateless person has resided lawfully in Lesotho prior to his application.[569] This is often an impossible requirement, as stateless persons frequently do not have any enabling documents and are not in a position to acquire legal status in any country in the absence of some special consideration such as a statelessness determination mechanism to document them. Furthermore, this provision means that children who are stateless will not have access to citizenship until they attain adulthood.

Similarly, Tanzania has one of the few laws in Africa which provides for attribution of citizenship on the basis of birth in the territory. The application of such a principle in attribution of nationality to all children born in Tanzania faces practical challenges, especially for children of foreign parents born in Tanzania. Gaps in safeguards, such as the low level of birth registration, continue to create greater risks of statelessness. Recognising such gaps in nationality affairs, the CRC Committee recommended that Tanzania make greater efforts to expand access to birth registration, particularly in rural areas, by ensuring registration free of charge and making provision for late registration.[570]

This thesis, therefore, argues that although *jus soli* is an effective way to confer nationality in an inclusive manner and to strengthen prevention measures against statelessness among children, it would be erroneous to consider *jus soli* in itself as the ultimate solution to ending statelessness. It is important to note that the fight against statelessness among children

[567] See the discussion in section 3.7 of this thesis.
[568] Chapter IV of the Constitution of Lesotho 1993 and Part II of the Lesotho Citizenship Order No. 16 of 1971.
[569] Section 10(1) (a) and (b), Citizenship Order No. 16 of 1971.
[570] CRC Concluding Observation to Tanzania (2006).

requires states to use more complex and targeted tools, ones pertaining not only to the attribution of nationality at birth, but also other principles which can directly tackle instances that could create statelessness among children.

4.2.2 Special cases: children born on the territory who would otherwise be stateless

As discussed in chapter three,[571] international and regional instruments provide a child with the right to acquire a nationality without specifying which rules states should apply when granting nationality to children. The provisions do not oblige state parties to grant nationality to every child born on their territory under all circumstances, i.e., they do not prescribe universal *jus soli*. However, states assume special responsibilities with regard to the realisation of the right to acquire a nationality for children born within their borders.

The responsibility that states have with regard to the realisation of the right to acquire a nationality for children born within their borders shall apply to all children who would otherwise be stateless. In accordance with the principle of non-discrimination, such responsibility should be executed regardless of the parents' legal status, including residence status; the parents' sex, race, religion or ethnicity, social origin or status; the parents' past opinions or activities; the child belonging to an ethnic minority group; or the child being born to refugees.

According to the UNHCR's Global Action Plan to End Statelessness 2014 – 2024 (Global Action Plan), about 60 per cent of states in the world have laws that allow children born in their territory to acquire their nationality if they do not acquire any other nationality at birth.[572] Many more countries have protracted situations of statelessness within their borders, with children born into statelessness daily; this is the case in Côte d'Ivoire, for instance.

Looking at the laws in African countries, contrary to what is prescribed in article 1 of the 1961 Convention and article 6(4) of the ACRWC, most countries fail to provide for an explicit right to nationality for children born in their territory who would otherwise be stateless. Currently, only 13 African countries specifically provide in their nationality laws that children born in their territory who would otherwise be stateless shall have the right to nationality.[573] However, the application of provisions regarding children who would otherwise be stateless reveals discrepancies between countries. For instance, some provide an automatic attribution of nationality to children who would otherwise be stateless, while others attribute nationality through application.[574] For instance, Malawi attaches conditions to granting nationality to those who would otherwise be stateless. The 1966 Citizenship Act of Malawi specifically provides for the registration of stateless persons as citizens if they can

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[571] See the discussion in section 3.7 of this thesis.

[572] UNHCR, Guidelines on Statelessness No. 4 (n 486 above) para. 20.

[573] These countries are Angola, Burkina Faso, Cameroon, Cape Verde, Chad, Guinea-Bissau, Lesotho, Malawi, Namibia, São Tomé and Principe, South Africa and Togo. See Manby (n 68 above) 49.

[574] In Malawi and Angola, attribution of nationality for children who would otherwise be stateless is not automatic but by application.

show that they are stateless and were born in Malawi or have a parent who is Malawian; the applicant must also satisfy the authorities that he or she has been ordinarily resident in Malawi for three years, intends to remain there, and has no serious criminal convictions. If the person is under 21, an application can be made on his or her behalf.[575]

As discussed in chapter three,[576] the case of children born in a territory who cannot acquire the state's nationality or a nationality of any other state and would thus be 'otherwise stateless' is primarily covered under article 1 of the 1961 Convention, which states that '[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless'.[577] The 1961 Convention places the primary responsibility for preventing statelessness among children on the state of birth. Accordingly, it provides that the state of birth of an otherwise stateless person can either adopt an automatic acquisition of its nationality upon birth in its territory, or for acquisition of nationality by application at an age determined by domestic law if certain conditions are fulfilled. States that do not provide for an automatic acquisition of nationality at birth may require the fulfilment of one or more of the conditions exhaustively listed in article 1(2) of the 1961 Convention. Imposing any conditions other than those elaborated would violate the terms of the 1961 Convention.[578] Moreover, the exhaustive character of the list implies that the state does not have any discretionary power to deny nationality if the conditions mentioned under domestic law in conformity with article 1(2) of the 1961 Convention are met. To provide for a discretionary naturalisation procedure for otherwise stateless children is thus not in conformity with the 1961 Convention.[579]

The first permissible condition for acquiring nationality through application is that a state can require an individual to lodge an application during a period of time beginning not later than after the applicant reaches the age of 18 years and ending not earlier than the age of 21 years.[580] As mentioned above, some countries in Africa, instead of automatically attributing nationality to the children born on the territory, require children to claim it at the later stage. Indeed, these countries could justify practices of such nature on the basis of the flexible approach adopted by the 1961 Convention.

However, it is submitted that the requirement adopted by the 1961 Convention does not seem to be in line with the provisions of recent international and regional treaties,[581] which oblige states to facilitate the acquisition of nationality of children who would otherwise be stateless at birth. As the UNHCR recommends, children who would otherwise be stateless are

[575] Section 18 of Malawi Citizenship Act of 1966.
[576] See the discussion in section 3.7 of chapter three.
[577] Article 1(1) of the 1961 Convention.
[578] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 149.
[579] Summary Records of the second and third meetings, UN Doc. E/AC.32/SR.2 & 3 (Jan. 26, 1950); Econ. & Soc. Council, Ad Hoc Committee on Statelessness and Related Problems, Report, UN Doc. E/1618, UN Doc. E/AC.32/5 (Jan. 16, Feb. 16, 1950) 7.
[580] Article 1(2)(a) of the 1961 Convention.
[581] See article 24(3) of the ICCPR, article 7(1) of the CRC and article 6(3) of the ACRWC.

automatically granted nationality at birth. Given that some sort of assessment would be needed, there may be little difference between automatic attribution of nationality at birth (to a child who has not acquired another) and a process that requires an application for nationality. But if there are time limits within which such an application must be made, the difference can be significant, since a delay may lead to statelessness. An automatic attribution, on the other hand, could be substantiated at any point.[582] Similarly, the ACERWC states that [583]

> as much as possible, children should have a nationality beginning from birth … by definition, a child is a person below the age of 18 and the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the State Party to comply with its children's rights obligations.

Hence, it is the author's view that it is no longer acceptable to leave children stateless for a significant period by fixing a late start for the application period.

The second permissible condition is that a state may require an applicant to establish habitual residence in a country for a period not exceeding five years immediately preceding the lodging of the application or ten years in all.[584] It is important to note that the Convention does not require the residence to be either lawful or uninterrupted. Hence, a stateless child born in the territory of a contracting state who did not acquire the nationality of any other state at birth may later lodge an application for the acquisition of the nationality of the state he or she was born in, even if he or she had lived for a considerable period of time in another country.[585]

Regarding the maximum term of five years' residence immediately before the application and the ten-year requirement for the entire residence, this thesis agrees with the position expressed by De Groot that[586]

> it should be underlined that a period of ten years, and even a period of five years, could be considered long in light of the principles contained in more recent human rights treaties and the overall objective of the treaty to reduce the causes of statelessness.

It is submitted that the application of such provisions should be subject to the general principles of children's rights in such a manner that, though the Convention prescribes a ten-year maximum time limit, it is in the best interests of the child that states grant nationality to the child at or soon after birth. Therefore, states that apply an application procedure requiring

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[582] UNHCR, Guidelines on Statelessness No. 4 (n 486 above) para 34.

[583] *Open Society Justice Initiative on behalf of children of Nubian Descents v Kenya* (n 326 above) para 42.

[584] Article 1(2)(b) of the 1961 Convention.

[585] See United Nations Conference on the Elimination or Reduction of Future Statelessness, Summary records of the 9th Plenary Meeting (1959) 2 available at https://legal.un.org/diplomaticconferences/1959_statelessness/vol2.shtml (accessed 20 September 2022).

[586] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 151.

a certain period of habitual residence should provide for a period as short as possible.

The third permissible requirement relates to a criminal conviction test. The Convention states that 'the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge'.[587] Here, states should note that the criminal record refers to the criminal history of the person and not his or her parents. Hence, establishing rules which may affect the nationality of the child for crimes his or her parents have committed is contrary to the provision of the Convention. By allowing children to acquire nationality independent of the residence status of their parents, states not only comply with the terms of the 1961 Convention and ensure respect for the child's right to a nationality, but also act in accordance with the principle of the best interests of the child. In this regard, with a view to avoiding statelessness among children, states should provide rules to grant nationality for children born on their territory of stateless parents, parents of unknown nationality, or of migrant and refugee parents, regardless of the residence status of their parents.

The CRC Committee has commented on numerous occasions that all children should be protected from statelessness, in accordance with their right to acquire a nationality, regardless of their parents' legal status, including residence status.[588] The outcome of an application for nationality, legal residence or similar status by the parents of a child born on the territory should not prejudice the right of the child to acquire nationality, if the child would otherwise be stateless. The European Court, in the matter of *Mennesson v France*, ruled as follows:[589]

> [A]lthough the parents may have chosen to break the law (in that case, by using surrogacy to commission children even though this is prohibited under French legislation), the effects of France's denial of certain elements of the children's identity were not limited to the parents alone – they affect the children. In that context, 'a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.

Thus, the author argues that the process and the child-rights element in the prevention of statelessness among children should not be confused with immigration or any other status control considerations.

The last permissible condition of the 1961 Convention that states are allowed to require is that the applicant 'has always been stateless'.[590] This provision seems to assume that applicant should always have been stateless and that the burden of proof rests with the state to

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[587] Article 1(2)(c) of the 1961 Convention.

[588] For instance, see the CRC Committee's Concluding Observation and Recommendations to the Netherlands (2015), where the Committee 'recommends that the State party ensure that all stateless children born in its territory, irrespective of residency status, have access to citizenship without any conditions'; available at https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NLD/INT_CRC_COC_NLD_20805_E.pdf (accessed 20 September 2022).

[589] ECtHR, *Mennesson v France* Application No. 65192/11 (2014).

[590] Article 1(2)(d) of the 1961 Convention.

prove the contrary.[591] This requirement does not seem in line with the purpose of the Convention, which is the reduction of statelessness. The more acceptable principle would be for states to provide for loss of the nationality acquired by birth on the territory if it is later discovered that the child actually does hold another nationality.

4.2.3 *Jus sanguinis* and prevention of statelessness in children

The majority of African countries apply *jus sanguinis* and grant nationality to children born in the country of one parent who is a national, whether that parent is the father or mother, and whether the child is born in or out of wedlock; most of these countries extend this to those born outside the territory.[592] However, some allow for nationality to be passed for only one generation outside of the country, which means that a national by birth born in the country can pass his or her nationality to a foreign-born child, but that child cannot pass on his or her nationality in turn.[593] The case of Tanzania is a good example in this regard. Section 6 of the Citizenship Act states: [594]

> Every person born outside the United Republic on or after Union Day shall, with effect from the date of his birth, be deemed to have become and to have continued to be, and with affect from the commencement of this Act shall become and continue to be, a citizen of the United Republic if at the date of his birth his father or mother is or was a citizen of the United Republic otherwise than by descent.

This provision restricts the transmission of citizenship outside the country; that means a national from birth who is born in the country can transmit his or her nationality to a foreign-born child, but that child cannot pass on his or her nationality to a child also born outside of Tanzania.

In some cases, though nationality may be transmitted, there are additional requirements either to take positive steps to claim the right to nationality, or to notify the authorities of the birth. For instance, Mozambique requires all children born outside of the country to declare their intention of remaining nationals within one year after majority.[595] For Eswatini, a child born abroad of a national father who was also born abroad must notify the authorities of his or her desire to remain a national of the country within one year of majority. If this is not done, the person ceases to be a national.[596] Namibia requires a child born abroad to Namibian father or mother to be registered at any Namibian diplomatic mission in accordance with the laws of registration of birth. Alternatively, the child has to be registered within a year after re-entry in Namibia.[597] Failure to register within the stipulated time may mean forfeiture of the right to citizenship. A child born outside of South Africa, at least one of whose parents was a South

[591] UNHCR, Guidelines on Statelessness No. 4 (n 486 above) para 48.
[592] Manby (n 55 above) 130.
[593] Such countries include Gambia, Lesotho, Malawi, Mauritius, Eswatini and Tanzania. For detailed analysis, see Manby (n 55 above) 130.
[594] Section 6, Tanzania Citizenship Act of 1995.
[595] Article 23(3), Constitution of Mozambique of 2004 as amended 2007.
[596] Article 43(3), Constitution of the Kingdom of Eswatini of 2005.
[597] Section 2 of the Namibian Citizenship Act of 1990.

African citizen at the time of the child's birth, has a claim to South African citizenship by descent. The child's birth must, however, be registered in South Africa for the child to acquire South African citizenship.[598] Under its 2009 constitutional amendments, Zimbabwe requires birth registration in Zimbabwe of children born abroad, unless the parents were ordinarily resident in Zimbabwe or posted abroad on state duties.[599] These requirements could be difficult to fulfil in practice, especially where the country of the parents' nationality has no diplomatic representation in their country of residence.[600]

Applying a child-rights lens to these and other similar normative responses, the author submits that such provisions, in the absence of adequate safeguards, may create potential cases of statelessness in children. In countries where registration is required within a specific period, safeguards need to be in place in cases where the children or their parents fail to claim, or where parents decide not to adhere to the time limits set. Safeguards, which are lacking in most of the laws, may include a non-discretionary procedure of reclaiming citizenship as of right by the child, and judicial review of the decisions of the authorities by the affected child.

Another common trend in *jus sanguinis* laws is the case of discriminatory provisions. As mentioned, in contemporary Africa the majority of nationality laws automatically grant nationality to a child born on the territory to a citizen parent. However, as explained in the paragrpahs below, there are still countries that discriminate against women and grant citizenship only to children born to a male parent; among these countries, some apply the discriminatory provision only in cases where the child is born outside of the territory.[601] For instance, in Burundi, although the 2005 Constitution provides both mothers and fathers the same right to transmit nationality to their children, the Nationality Code of 2000 restricts automatic attribution of nationality of origin to those born of a Burundian father, unless the child is born out of wedlock and not recognised by the father.[602] A draft law to remove gender discrimination and other aspects has been prepared but is not yet before the Council of Ministers.[603] The matter has been noted by treaty bodies, such the CEDAW Committee, urging Burundi to amend the Nationality Code so as to bring it in line with international standards.[604]

Gender-based discrimination in nationality matters (specifically in *jus sanguinis* systems)

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[598] Section 3, South Africa Citizenship Act 88 of 1995.

[599] Article 6, Constitution of Zimbabwe of 1981, as amended 2009. See also Manby (n 78 above).

[600] Manby (n 55 above) 134.

[601] The countries with various forms of discriminatory provisions in nationality matters include Benin, Burundi, Guinea, Liberia, Libya, Mauritania, Sierra Leone, Somalia, Sudan, Swaziland and Togo. For a detailed discussion of the laws of the individual countries, see Manby (n 68 above).

[602] Article 9 of the Constitution of Burundi of 2005; article 4 of Loi No. 1-013 du 18 Juillet 2000 Portant Réforme du Code de la Nationalité Burundaise.

[603] UNHCR, Statelessness and Citizenship in the East African Community (2018) 12; available at https://reliefweb.int/report/world/statelessness-and-citizenship-east-african-community (accessed 12 September 2022).

[604] CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination against Women, CEDA W/C/BDI/CO/4 (2008) 30.

comes in different forms in different countries. Although the 2010 nationality law made progress in granting women married to foreign spouses the right to pass their own nationality to their children, in Libya article 3 of the Constitution continues to define a Libyan as one who is born to a Libyan father or to a Libyan mother and a father who is stateless or whose nationality is unknown. There is no mention in article 3 of children born to a Libyan mother who is married to a man who has a nationality other than Libyan.[605] In its recommendations to Libya, the CRC Committee expressed concern about discrimination in transmission of nationality by Libyan mothers to their children.[606]

The CEDAW Committee expressed similar concerns in 2009.[607] The Sudanese Nationality Act 1994, as amended in 2005, 2011 and 2018, still discriminates against women, as it allows a child born to a Sudanese mother to acquire Sudanese nationality by birth by following an application process.[608] These provisions from the 1994 Act are at variance with article 7 of the Sudanese Constitution, which guarantees that 'every person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship'.[609]

In Togo, the 1978 Nationality Law contains a safeguard to grant citizenship to children born in its territory who cannot claim the nationality of another state, but it allows Togolese mothers to confer their nationality on their children only if the father is stateless or of unknown nationality. The provisions of the Nationality Law are contrary to article 32 of the 1992 Constitution, which grants Togolese nationality to children born to Togolese fathers or mothers. Similarly, in Liberia, the Aliens and Nationality Law of 1973 excludes children born abroad to Liberian mothers from acquiring Liberian citizenship. These provisions are inconsistent with article 28 of the Liberian Constitution of 1986, which establishes that any child who has a parent who was a Liberian citizen at the time of birth acquires citizenship, provided that the person renounces any other nationality upon attaining majority.

There exist discriminatory provisions on the basis of other grounds in the application of *jus sanguinis* in a number of countries in Africa, such as whether a child is born in or out of wedlock; and discrimination on the basis of race, ethnicity or religion.[610] Such grounds of discrimination have been identified by treaty bodies and regional instruments[611] as areas of

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[605] Articles 3 and 11, Libyan Nationality Law No. 24 of 2010.

[606] CRC Committee Concluding observations of the Committee on the Rights of the Child: Libyan Arab Jamahiriya, CRC/C/15/Add.84 (1998) 12; available at http://citizenshiprightsafrica.org/wpcontent/uploads/2016/02/CRC_Committee_on_Rights_of_the_Child_CRCC15Add.84_23-Jan-98.pdf (accessed 12 September 2022).

[607] CEDAW Committee Concluding observations of the Committee on the Elimination of Discrimination against Women: Libyan Arab Jamahiriya CEDAW/C/LBY/CO/5 (2010) 17; available at https://www.refworld.org/docid/49c0ce7e2.html (accessed 12 September 2022).

[608] Article 4(3), Sudanese Nationality Act of 1994 as amended in 2005, 2011 and 2018.

[609] Article 45, Sudanese Constitution of 2019.

[610] Countries such as Benin, Burundi, Cameroon, Cote d'Ivoire, Gabon, Guinea, Libya, Madagascar, Mali, Niger, Somalia, Sudan, Swaziland and Togo require additional procedures for establishing descent in the case of children born out of wedlock. For detail, see Manby (n 68 above).

[611] Article 5(1) of the European Convention on Nationality. (The rule of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion,

concern. For instance, the CRC Committee points out the problematic legal framework in Cameroon where it recommends the State Party to 'amend the Nationality Code to repeal discriminatory provisions relating to the acquisition of nationality by children born out of wedlock'.[612] In its recommendations to Togo, the CRC Committee, noting the intersection between gender discrimination in the nationality laws and the risk of statelessness among children born out of wedlock, expressed its concern that 'mothers cannot pass their nationality to their children, and that children born out of wedlock or children with foreign fathers may, in some instances, be denied Togolese citizenship and/or left stateless'.[613]

Discriminatory provisions in nationality laws impede children's rights to a nationality, contributing immensely to the probability of statelessness. The Draft Protocol on Nationality and Statelessness in Africa could be instructive in this regard. The Draft Protocol states that in determining the nationality of a child, the law shall not distinguish between those born in and out of wedlock. Furthermore, child participation in nationality matters is a crucial consideration.[614] Beyond the principle of child participation already prescribed in the CRC and ACRWC, the Draft Protocol provides clearer guidance:[615]

> A State Party shall ensure that in all judicial or administrative proceedings affecting the nationality of a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Discriminatory provisions in nationality matters should also be seen in the context of general provisions that directly or indirectly discriminate against children on the basis of prohibited grounds. The author argues that the intersectionality of discriminatory provisions needs to be taken into account for the sake of a comprehensive response to statelessness in children. For instance, it should be noted how criminalisation of sexual relations outside marriage, and the societal and other legal discrimination against children born out of wedlock, could perpetuate the risk of rendering them stateless. As Fisher writes, '[S]ome parents will not register their children for the fear of governmental or societal repercussions. Children left without confirmation of their identities, place of birth, or descent, are then left at risk of statelessness.'[616]

Finally, the special cases of children born abroad who would otherwise be stateless should also be looked at within the context of *jus sanguinis*. As indicated above, many countries following *jus sanguinis* rules provide for unlimited transmission of nationality for multiple

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race, colour or national or ethnic origin.)

[612] CRC Committee, Concluding Observations to Cameroon (2017), UN Doc No. CRC/C/CMR/CO/3-5, par.21

[613] CRC Committee, Concluding Observations to Togo (2005), UN Doc. No. CRC/C/15/Add.255, par.34 and 36.

[614] Article 10(2) of the Draft Protocol on Nationality and Statelessness.

[615] Article 10(3) of the Draft Protocol on Nationality and Statelessness.

[616] B Fisher 'Why Non-Marital Children in the MENA Region Face a Risk of Statelessness' *Harvard Human Rights Journal Online* (2015) 4.

generations of those born abroad to their nationals, whether they have become stateless or not. Other countries, however, neither allow transmission of nationality for the children of a parent who has been resident outside the country for an extended period or for a second or third generation born abroad, nor provide a safeguard for children who would otherwise be stateless.

The 1961 Convention places the primary responsibility for preventing statelessness among children on the state of birth. However, a State Party to the Convention also has obligations to children of its nationals born outside its territory. Article 4 of the Convention requires a state to recognise the nationality of a child born outside its territory to a parent who has its nationality if the child would otherwise be stateless. Thus, states not only have particular obligations with respect to the prevention of statelessness among children born on their territory, but also with regard to children born to their nationals abroad. It is, therefore, essential that states provide the right to children born abroad to acquire the nationality of a parent, so long as the child does not acquire the nationality of the state of birth.

4.3 Acquisition of nationality by application

As mentioned, acquisition of nationality by application refers to those who have become nationals of a given country at a later date, usually as adults, by various processes including declaration, registration and naturalisation. Though the application of this rule in most cases relates to adults, it also affects the right to nationality of children. Though the rights of those who are nationals from birth and by application are the same in many countries, there are cases where some countries apply distinctions that could directly affect the rights of the respective children. The following paragraphs examine the trends in African nationality laws in the context of nationality by application, with the focus on naturalisation, and present arguments for addressing the gaps in preventing statelessness among children.

4.3.1 Nationality by naturalisation

Naturalisation is defined as a 'mode of acquisition of nationality not previously held by the target person that requires an application by this person of his or her legal agent as well as an act of granting nationality by a public authority'.[617] According to this definition, naturalisation could be done in two ways. Primarily it is the process of acquisition where a person applies for citizenship to the state. This aspect of naturalisation requires the target persons to apply to acquire nationality which is subject to various conditions and evaluations.

Secondly, naturalisation could also be a legal entitlement, where public authorities must grant nationality to the applicant if and when the relevant conditions specified by law have been acknowledged as being successfully completed, or as a discretionary act.[618] As a matter of

[617] Manby (n 55 above) 152.

[618] Looking at the laws in Africa, one notes that most of them adopt a highly discretionary form of naturalisation. Discretionary naturalisation is obviously all the more precarious where, even upon successful completion of relevant conditions, public authorities reserve the right to deny nationality to an applicant.

practice, globally all states provide for the possibility of naturalisation. UN Conventions relating to the Status of Refugees and the Status of Stateless Persons require states to facilitate naturalisation of refugees[619] and stateless persons.[620] It would then warrant the conclusion that 'availability of naturalisation may now be required as a matter of international law'.[621] The 1997 European Convention on Nationality is also instructive. It requires that State Parties provide for 'the possibility of naturalisation of persons lawfully and habitually resident on its territory'.[622] As Benhabib writes, '[i]t would be objectionable from a moral point of view [not to provide] any procedure or possibility for foreigners and resident aliens to become citizens at all; that is, if naturalization were not permitted at all.'[623]

All African countries permit, in principle, the acquisition of nationality by naturalisation on the basis of long-term residence and the fulfilment of other conditions. The material and procedural conditions that states prescribe in their laws to regulate naturalisation 'can make [this] either a liberal and relatively easy progression from settlement to nationality, or a restrictive, onerous process full of impediments that may not lead to nationality at all'.[624] Due to the absence of clear provisions dealing with naturalisation under international law, such discretion of states seems to be abused. Taking their inspiration from the *Nottebohm* case, states assert that the right to a nationality set forth in the Universal Declaration of Human Rights (UDHR) is founded on the existence of a genuine and effective link between an individual and a state.[625] Such a conceptualisation of discretionary power in nationality matters enables states to exercise their capacity to deny nationality – at least for international purposes – in the absence of a genuine link. Naturalisation derives its validity from the inverse application of the 'genuine link' requirement. As Spiro notes, '[T]he genuine-link test could be turned around to require the extension of citizenship to individuals in the presence of such a link.'[626]

The problem lies with the variance in the thresholds. In applying naturalisation, countries tend to set the thresholds, sometimes arbitrarily, on the basis of various requirements. The most common requirements applicable for naturalisation include integration requirements (language and civics tests), disqualifying naturalisation criteria, discriminatory naturalisation criteria, affinity-based naturalisation preferences, administrative discretion, processing issues, application fees, discriminatory birthright citizenship practices, and *jus soli* for

[619] Article 34 of the Convention relating to the Status of Refugees of 1951.
[620] Article 32 of the Convention relating to the Status of Stateless Persons of 1954.
[621] PJ Spiro 'A new international law of citizenship' 105 (2011) *The American Journal of International Law* 723.
[622] Article 6(3) of the European Convention on Nationality of 1997.
[623] S Benhabib *The rights of others: Aliens, Residents and Citizens* (2004) 134.
[624] Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion Sara Wallace Goodman November 2010, EUDO Citizenship Observatory page 1 http://eudo-citizenship.eu/docs/7-Naturalisation%20Policies%20in%20Europe.pdf (accessed on 02 February 2019).
[625] UNHCR, Nationality and Statelessness: A Handbook for Parliamentarians (n 38 above) 9.
[626] Spiro (n 621 above) 722.

intergenerational migrants.[627]

Focusing on the most common trends in naturalisation laws, the paragraphs below interrogate the issues that this thesis investigates, i.e., the extent to which the laws on acquisition of nationality through naturalisation can prevent statelessness in children. Three major drivers which should inform suggested reviews of norms on naturalisation in Africa. These are the growing trend in international human rights law that tends to limit state's discretion in nationality matters; norms of pan-Africanism that aspire to see fluid borders where free movement of persons on the continent is ensured, as envisaged by the 1991 Abuja Treaty and the AU's Agenda 2063;[628] and, above all, child-rights principles.

As the Committee on Elimination of Racial Discrimination (CERD) notes in its 2004 General Comment, State Parties are required to '[e]nsure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and to pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents'.[629] The European Convention on Nationality provides guidance in this regard. It states that '[e]ach State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory'.[630] On the basis of the notion of limited naturalisation, the thesis breaks down the components of the common requirements and assesses their conformity with international norms from the point of view of children's rights.

4.3.2 Requirements of naturalisation

Requirement of residency

In Africa, countries require some period of residence as a qualification for naturalisation. The European Convention on Nationality provides that the period of residence required as a condition for naturalisation should not exceed ten years.[631] No other international and regional instrument prescribe such limitations. Hence, there are significant variations among countries, ranging from two to 35 years' residence requirements.[632] The thesis does not object to the mere fact of introducing duration of residency as a requirement. But there should be limits to the acceptable length of durational residency requirements. Lessons can be drawn

[627] Spiro (n 621 above) 724.

[628] Arguments on the basis of these norms are available in chapter five of this thesis, which discusses issues of migration, displacement and statelessness in the context of Africa.

[629] CERD, General Recommendation No. 30 on the Discrimination of Non-Citizens, CERD/C/64/Misc.11/rev.3 (2004) para 13.

[630] Article 6(3) of the European Convention on Nationality of 1997.

[631] *Ibid.*

[632] At the lowest number of years, Liberia requires two years of continuous residence before an application for naturalisation is filed – see section 21.1(2) of Liberia's Aliens and Nationality Law of 1973 (amended 1974). The Central African Republic requires as many as 35 years – see article 27 of the Central African Code of Nationality, Law No. 1961.212 of 1961. More than 20 countries in Africa provide for the right to be naturalised based on legal residence of five years. Chad Nigeria, Sierra Leone and Uganda require 15 or 20 years. See Manby (n 55 above) 152.

from trends in other jurisdictions, where states with longer residency requirements have been pressed to shorten them. In the context of a major international controversy regarding its post-Soviet citizenship regime, Latvia's 16-year residency requirement proved 'particularly controversial'. It was later reduced to five.[633] CERD denounced Liechtenstein's 30-year residency requirement as 'excessively lengthy'.[634] In Africa, it is a clear gap in the current debates, and the current Draft Protocol on Nationality and Statelessness fails to provide guidance on this. Treaty bodies such as the CRC and ACERWC should also engage with the challenges such requirements pose to children's right to nationality.

The residency requirement is usually compounded by additional requirements, as most countries require proof of lawful residence as the basis for an application for naturalisation. Countries such as Liberia[635] make it a mandatory requirement that the residence must not be interrupted. There are countries which require the applicant to have a permanent resident status at the time of application. For instance, in South Africa a person must first become a permanent resident, 'a process which takes a minimum of five years; following acquisition of permanent residence, a further five years' residence is required to become a citizen'.[636] Several states have the even more demanding requirement that it is only the years with permanent residence status that count towards naturalisation.[637] International law does not prohibit the inclusion of such requirements in naturalisation procedures.

However, the thesis argues that it should not apply in the case of stateless persons. Since a stateless person cannot establish a nationality in one state without documents from another state, such a person cannot even regularise her or his residence. A requirement that residence must be lawful should not be applied in such a way as to exclude on a permanent basis anyone who has at any time been present in the state without proper documentation. It is in line with this argument that the Draft Protocol on Nationality and Statelessness prescribes that '[i]n the case where entitlement to nationality or other right provided under this Protocol depends on habitual residence, a State Party shall not require in its national law that such residence be lawful and continuous if the person is stateless'.[638]

Criminal record, good character, financial, and health requirements

Spiro calls these above **'**disqualifying naturalisation criteria'.[639] States tend to disqualify individuals who have a criminal history or who lack good moral character or other indicia of personal integrity from eligibility for naturalisation. In some countries, an applicant must provide proof of good health, excluding, for example, people with disabilities from acquiring

[633] Spiro (n 621 above) 724.
[634] CERD, Concluding Observations: Liechtenstein, UN Doc. CERD/C/LIE/CO/3 (2007) para 17.
[635] Section 21.1(2) of Liberia's Aliens and Nationality Law of 1973 (amended 1974) requires two years of uninterrupted residence.
[636] Discretionary grant, usually on the basis of long-term residence. See Bronwen Citizenship 2016, 7
[637] Manby (n 55 above).
[638] Article 7 of the Draft Protocol on Nationality and Statelessness.
[639] Spiro (n 621 above) 725.

nationality.[640] In Algeria, for instance, the naturalisation requirement includes being 'sound in body and mind'.[641] Such requirements go beyond being ill-defined: they are discriminatory. To address this, countries should have clear criminal-record conditions for residence-based acquisition. Such barriers may come to implicate human rights norms, especially if they are applied on a discriminatory or arbitrary basis.

Inspiration could be drawn from the experience of the citizenship law of the new Czech Republic. The following paragraph illustrate how applying a criminal record, which is not linked with acquisition of nationality, could affect the right to nationality of individuals: [642]

> Under the original, 1993 Czech nationality legislation, those with designated Czech nationality under Czechoslovakian law and resident in Czech territory automatically acquired citizenship in the new state; those resident but not designated as Czech nationals were barred from citizenship if they had a criminal record. The condition rendered thousands of Roma residents ineligible for citizenship, attracting criticism from the Council of Europe and the Organization for Security and Co-operation in Europe. A Council of Europe report concluded: 'Admittedly, a State may decide who are its citizens but it is doubtful whether, in a case of State succession, under international law, citizens that have lived for decades on the territory, perhaps are even born there, can be excluded from citizenship just because they have a criminal record.' The Czechs retreated in 1996, softening the clean-record requirement with respect to residents as of the breakup of the former Czechoslovakia.

Membership requirements: Race, ethnicity, religion, language, value, and integration

Some countries also set conditions requiring a naturalising applicant to be a descendent of a particular race or ethnicity, a member of a particular religion, demonstrate a level of language proficiency and/or country knowledge, as well as sign or swear an oath of allegiance to the country or constitution, to profess a commitment to democratic values or to demonstrate his or her loyalty in other ways. An applicant may also be asked to meet either a general integration requirement or participation in social activities.[643] It is clear that in some form such thresholds to citizenship are consistent with existing international human rights norms, even though in practice they restrict access to citizenship. However, requirements for integration into society raise human rights concerns where they have a discriminatory impact.

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[640] Manby (n 68 above) 8.

[641] Article 10(6) of the Algerian Nationality Law, No. 1970-86 of 1970.

[642] Spiro (n 621 above) 726.

[643] Ethiopia requires the ability to communicate in any one of the languages of the nations and nationalities of the Country – article 5(3) of Ethiopian Nationality Proclamation No. 378 of 2003; Egypt requires an applicant for naturalisation to be knowledgeable in Arabic – Egypt's Nationality Act No. 26 of 1975; Botswana requires a knowledge of Setswana or another language spoken by a tribal community in Botswana – article 13 of Botswana's Citizenship Act No. 8 of 1998; Rwanda requires respect for Rwandan culture and patriotism – Organic law No 30/2008 of 2004; Ghana requires knowledge of an indigenous language and provides for preferential treatment for naturalisation for those of African descent – section 14(e) of Ghana's Citizenship Act of 2000.

Particularly in Africa, as Manby notes, language and cultural requirements for naturalisation may be used in practice to restrict citizenship on an ethnic basis.[644]

4.3.3 Requirements of naturalisation and statelessness in children

The above-mentioned requirements, coupled with lack of procedure for a right of appeal or justification in response to a negative decision, may put naturalisation procedures at odds with human rights standards and due process of law. Most African countries do not have laws which require the authorities to justify the rejection of an application or allow for appeal.[645] Instead, naturalisation procedures are left entirely to the discretion of the executive.[646] In a failure to comply with international standards, there are major normative gaps in the laws of African countries with regard to naturalisation for refugees and stateless person.[647] Only a few countries provide easier terms of access to nationality for refugees and stateless persons in line with their obligations under international and regional instruments.[648] Analysing the trend, Manby notes that 'the countries that deal most effectively and humanely with long-term refugees are those with most liberal naturalisation regimes for foreigners in general'.[649]

Having a clear understanding of the concept of acquisition of nationality through naturalisation, and the position of most of African laws on this, would lead the reader to identify the theme of this, namely the prevention of statelessness among children. The point that needs clarification at this juncture is the link between the acquisition of nationality by naturalisation and the prevention of statelessness among children.

The above-mentioned gaps in human rights and child-rights based approaches to the acquisition of nationality through naturalisation could result in statelessness among children in different ways. First, in cases where countries follow highly restrictive rules on naturalisation, there is a probability that individuals may not be able to acquire nationality. This would leave their children at risk of statelessness. To prevent statelessness among

[644] Manby (n 260 above) 142-143.

[645] An exception is Liberia, where the Aliens and Nationality Law gives the circuit court jurisdiction to hear applications of naturalised Liberian citizens; the attorney-general may also designate an immigration officer to conduct a personal investigation of the applicant, on the basis of which he or she may petition the court in support of or opposition to the application. The court must then give reasons in cases of denial of the application. See article 21(1) and (5) Aliens and Nationality Law of 1973; see also Manby (n 54 above) 155.

[646] African countries which do not have procedures for providing justifications or for an appeal against the decisions of the executive include CAR, Comoros, Congo Republic, Cote d'Ivoire, Djibouti, Equatorial Guinea, Lesotho, Madagascar, Mali, Mauritania, Niger, Seychelles, Swaziland, Togo, Zambia and Zimbabwe. See Manby (n 55 above) 154.

[647] Article 34 of the 1951 Refugee Convention requires State Parties to facilitate the assimilation and naturalisation of refugees and to expedite naturalisation proceedings.

[648] Countries which explicitly allow refugees to acquire nationality through naturalisation include Ghana, Guinea-Bissau, Lesotho, Mozambique and Nigeria. Others merely provide an implicit right to naturalisation, without explicitly allowing long-term refugees to apply for naturalisation. With regard to stateless persons, only Malawi and Lesotho have explicit provisions in their nationality laws allowing the same to apply for nationality through naturalisation.

[649] Manby (n 55 above) 168.

children, states should consider reviewing their laws on naturalisation and make the requirements less restrictive and the procedures more predictable. In particular, in cases where the person would otherwise be stateless, as prescribed in the Draft Protocol on Nationality and Statelessness, countries should not require that residence be lawful and continuous.[650] In regard to good-character requirements, states should consider only crimes with sentences of imprisonment for qualified periods instead of absolute refusal. Besides, as mentioned above, states should provide legal guarantees for common administrative proceedings, including reasoned decisions, the right of appeal, and representation before an independent administrative authority and/or a court. On matters which affect the interests of children, these proceedings should pass the child-friendliness test in line with the principle of the best interests of the child. In countries that adopt a discretionary procedure of naturalisation, there should be a safeguarding principle which requires the authorities to consider all circumstances of the case and the impact of refusal of the application on the individual and his or her children.

Secondly, rules on naturalisation may have a direct impact on children because the status of the child could also be changed in cases where parents become nationals of a given country through naturalisation. In most African countries, there are provisions with regard to the effect of naturalisation of adults on their children.[651] Others require the children to apply for naturalisation independently, so the change of the status of their parents may not affect them.[652] There are some countries in Africa which do not allow children to derive nationality from their parents in cases of naturalisation.[653] Botswana does not allow children to apply for naturalisation in their own right.[654]

It is one thing to provide laws on naturalisation with regard to the application and effect of acquisition of nationality of adults through naturalisation on their children, but beyond that states should note that their laws and provisions on naturalisation need to take into consideration the rights of the child. In particular, rules which prevent children applying for naturalisation in their own right, or do not give them an opportunity to be heard if the naturalisation of a parent would affect their status, would be contrary to acceptable international standards. The 1954 Convention requires the Contracting States, as far as possible, to facilitate the assimilation and naturalisation of stateless persons.[655] This should include stateless children.

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[650] Article 7 of the Draft Protocol on Nationality and Statelessness.

[651] For instance, the following countries provide automatic acquisition of nationality by children in cases where their parents naturalise: Algeria, Benin, Burundi, Chad, Côte d'Ivoire, Comoros, CAR, DRC, Djibouti, Egypt, Gabon, Madagascar, Mauritania, Niger, Rwanda, Senegal, and Togo. See Manby (n 260 above) 142-143.

[652] These countries include Angola, Cape Verde, Eritrea, Ethiopia, Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Mauritius, Mozambique, São Tomé and Principe, Seychelles, Sierra Leone, South Africa, South Sudan, Tanzania, Zambia and Zimbabwe. See Manby (n 260 above) 142-143.

[653] Manby (n 260 above) 142-143.

[654] Article 12 of the Botswana Citizenship Act No. 8 of 1998 states that application for naturalisation can be made only by 'a person of full age'.

[655] Article 32 of the 1954 Convention.

The CRC Committee, in its various recommendations to State Parties, also strongly suggests that states should establish mechanisms through which children can acquire nationality through naturalisation. For instance, in its concluding observations on the combined third and fourth periodic reports of the Islamic Republic of Iran, the CRC Committee expressed its concern about the fact that [656]

> naturalization is only possible upon reaching 18 years of age and thus does not address statelessness in childhood … and the difficult eligibility requirements for naturalization, including proof of the father's documents and proof of marriage, which automatically excludes children born out of wedlock.

Similarly, the UN Committee against Torture (CAT) in its recommendation to Estonia requires the latter to '[e]hance the efforts by the Citizenship and Migration Board to raise the awareness of parents whose children are eligible for naturalisation through the simplified procedure of the requirements for citizenship'.[657] The Special Rapporteur on Myanmar, addressing the plights of statelessness, requests that the governmen[658]

> ensure that all children who are born in Myanmar and who do not have a right to the nationality of another state are able to acquire Myanmar citizenship, regardless of the status of their parents, and provide for naturalization under a revised citizenship law.

4.4 The case of 'foundlings' and children of unknown parents

As noted in the previous chapter,[659] unless states put specific safeguards in place to address the situation of foundlings and children of unknown parents, there is a distinct risk of statelessness due to the lack of parental ties and, sometimes, lack of evidence of birthplace. At the centre of states' obligations in this regard is the right of every child to acquire a nationality. This also requires states to put in place effective measures to ensure that no child found abandoned is left stateless. The recommendation of the CRC Committee is instructive in this regard. In its concluding observation on Fiji, the Committee stated:[660]

> The Committee takes note of article 7 of the Citizens Decree, which stipulates that any infant found abandoned in Fiji is deemed to have been born in Fiji unless there is evidence to the contrary. However, the Committee is concerned that this stipulation might carry a risk of statelessness for children of whom it can be proven that they have not been born in Fiji, but whose nationality can nevertheless not be established … The Committee recommends that the State party take all the

[656] CRC Committee Concluding Observations on the combined third and fourth periodic reports of the Islamic Republic of Iran, CRC/C/IRN/CO/3-4 (2016) para 45; see also CRC Committee Concluding Observations on the combined second and third periodic reports of Brunei Darussalam, CRC/C/BRN/CO/2-3 (2016) para 33.
[657] CAT Committee: Concluding Observations on the fifth periodic report of Estonia, CAT/C/EST/CO/5 (2013) para 21.
[658] Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/25/64 (2014) para 78.
[659] See the discussion in section 2.2.3.
[660] CRC Committee: Concluding Observations on the combined second to fourth periodic reports of Fiji CRC/C/FJI/CO/2-4 (2014) para 25.

necessary measures to avoid a child found abandoned in Fiji being stateless.

Children of unknown parents and foundlings present a particular challenge to states in terms of guaranteeing access to nationality, since key facts about their origin are unknown.[661] That makes the two cases one of the oldest problems of statelessness, which states have sought to address by concluding international agreements. The 1930 Hague Convention established one of the longest-standing norms relating to the prevention of statelessness for those who cannot acquire their parents' nationality, i.e., the right to nationality in the state where they were found for children of unknown parents. Article 14 of The Hague Convention provides that

> [a] child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known. A foundling is, until the contrary is proved, presumed to have been born in the territory of the State in which it was found.

Later, article 2 of the 1961 Convention endorsed the protection given in the Hague Convention to foundlings, providing that '[a] foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State'. An important difference between the two conventions is that article 2 of the 1961 Convention only mentions 'foundlings' and not, as in article 14 of the 1930 Hague Convention, 'children of unknown parents'. Despite the challenging nature of the matter, provisions are missing from the CRC and ACRWC regarding acquisition of nationality of this group of children.

Looking at the trend in normative responses, globally, according to the UNHCR's estimates, at least 29 per cent of all states have no provision in their nationality laws to grant nationality to children of unknown origin found in their territory.[662] In Africa, the provisions for unknown parents relate to foundlings only, which in most cases refers to infants or a young child who is unable to explain his or her origins at the date he or she was found.[663] There are countries which do not grant any citizenship rights based on birth in their territory, even for foundlings or children of unknown parents.[664] Some laws specifically set an age. For instance, Kenya sets the age at eight,[665] and Zimbabwe at 15.[666] Some countries do not have a provision relating to foundlings or children of unknown parents.[667] Few countries provide

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[661] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 161.

[662] UNHCR, Global action plan to end statelessness 2014-2024; available at https://www.unhcr.org/ru/wp-content/uploads/sites/73/2019/09/End-Statelessness-GlobalActionPlan-2019-Final-web.pdf (accessed 18 September 2022).

[663] For instance, section 8(4) of the Nationality Act of South Sudan contains a foundling provision for a person who is 'first found in South Sudan as a deserted infant of unknown parents' to be deemed, until the contrary is proven, a South Sudanese national.

[664] African Union, ACHPR, The Rights to Nationality in Africa (2014) 25.

[665] Article 9 of Kenya's Citizenship and Immigration Act of 2011.

[666] Section 36(3) of the Constitution of Zimbabwe of 2013.

[667] Countries include Botswana, Côte d'Ivoire, Equatorial Guinea, Gambia, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, Seychelles, Sierra Leone, Somalia, South Africa, Tanzania and Togo. See B

specific laws on the acquisition of nationality for children of unknown parents.[668]

In terms of modality of the acquisition, some, such as Angola and Guinea-Bissau, provide for a foundling to acquire nationality at birth,[669] while others require application to be made. For instance, South Sudan requires that 'the legal guardian of the applying deserted infant must additionally provide the Issuing Authority with the place and date the infant was found, and the confirmation that his/her parents are unknown'.[670] Provisions of this kind may pose serious practical questions as to how to confirm the unknown character of the parents.[671]

Looking at the provisions on foundlings and children of unknown parents both at the domestic and international level, the following major questions need to be addressed: 1) when is a child considered a foundling? 2) what happens if evidence demonstrates that the child was born abroad or that the child has non-national parents? 3) what is the difference between 'foundlings' and 'children of unknown parents'? Domestic legislation, beyond guaranteeing the right to a nationality to foundlings and children of unknown parents, should then be able to address these questions with regard to foundlings and children of unknown parents.

The term 'foundling' in itself requires clarification as to whether it refers only to newborn babies or whether it includes all children. The *Oxford English Dictionary* defines the word 'foundling' as 'an infant that has been abandoned by its parents and is discovered and cared for by others'.[672] According to UNHCR, the term 'infant' in this context should be interpreted as 'all young children who are not yet able to communicate accurate information pertaining to the identity of their parents or their place of birth'.[673]

Such interpretation of 'foundlings', nevertheless, would leave a gap with regard to avoidance of statelessness of children found abandoned if it is obvious that the child concerned is not a newborn baby.[674] To address this challenge, academics like Groot, suggest that 'states should be encouraged to treat children who are found abandoned in their territory, with no known parentage, as far as possible as foundlings with respect to acquisition of nationality'.[675] Applying this suggestion would mean that states may consider extending the provisions of foundlings to all children found abandoned in their territories.

This thesis, therefore, argues that there needs to be a change with regard to the usage of the

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Manby 'Citizenship law in Africa: A comparative study' (2016) 49-51.

[668] These countries are Burundi, CAR, Congo Rep, DRC, Kenya, Rwanda, South Sudan, Sudan, Uganda, Zambia, and Zimbabwe. See B Manby 'Citizenship law in Africa: A comparative study' (2016) 49-51.

[669] Articles 9 and 14 of Angola's Lei da Nacionalidade No. 1/05 of 2016; article 5 of Guinea-Bissau's Lei da Nacionalidade No.2/1992, as amended 2010.

[670] Article 46 of South Sudan's Nationality Regulation of 2011.

[671] For detailed discussion of foundling provisions in Africa, see B Manby 'Citizenship law in Africa: A comparative study' (2016) 49-51.

[672] Oxford English Dictionary (1989).

[673] UNHCR, Guidelines on Statelessness No. 4 (n 486 above) para. 58.

[674] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 162.

[675] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 162.

term ‘foundlings’. First of all, legally speaking, many countries seem to confuse the application of foundlings with children of unknown parents: in some cases, they are deemed to be one and the same. It is because of this confusion in many domestic jurisdictions that the UNHCR recommends that provisions on foundlings should ‘apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth’.[676] In line with this recommendation, though the rules on ‘foundlings’ are intended to cover the challenges of only the newborn, some countries in practice choose to extend the scope of application and cover all young people, which then overlaps with the protection under children of unknown parents. Hence, in order to have clear demarcation between the rules on ‘foundlings’ and ‘unknown parents’, a more expressive term should be adopted which agrees with the motive behind the introduction of protections for foundlings.

In this regard, the term ‘newborn’ should be used instead of ‘foundlings’, which would then clearly show which group of children is intended to enjoy the protection under the provisions. The use of the term ‘foundling’ may also fail the best-interests test as it could affect the dignity of the child in question and expose him or her to moral injury in the future. In addition, it is submitted that states should apply the requirement, ‘children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth’, only to cases of the newborn and not to children of unknown parents. Hence, the age limit on the protection of the right to nationality for children of unknown parents should be extended to the age of 18, so as to include all children.

Another problem relating to the protection of the right to nationality of unknown children is that children whose parents are unknown are not considered from a legal point of view, hence some groups of children might not be able to enjoy the protection of provisions on the right to nationality. For instance, there could be cases where the parents abandon the child without recognising him or her, even if the parents are not, strictly speaking, unknown from a biological point of view (i.e., the birth has been witnessed). Moreover, though not common in African countries, there are cases where a child has no legal parent even though a biological parent may be known.[677] Such children are legally in a similar vulnerable position as foundlings; hence, the best interests of the child require states to adopt a rights-based approach to the matter and expand the meaning of ‘unknown parents’ to include rejection or non-recognition of parenthood. The child could then enjoy the benefit of the relevant protection against statelessness.

The question, ‘What happens if the identity of the child’s parents is later discovered; must nationality be forfeited, even if it results in statelessness?’ remains another challenge. International law, including the 1961 Convention, does not expressly regulate the situation in which evidence is subsequently found of the parents or place of the foundling. However,

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[676] UNHCR, Guidelines on Statelessness No. 4 (n 486 above) para 58.

[677] For example, this is the case with the ‘delivery under X’ in France, which allows a woman who gives birth to a child out of wedlock to ask not to be mentioned as the mother on the birth certificate of the child. See GR De Groot ‘Children, their right to a nationality and child statelessness’ in Edwards & Van Waas (n 67 above) 163.

Groot writes that the interpretation given during the preparatory negotiations of the 1961 Convention was that 'the child would possess the nationality of the country in which he had been found until shown to be entitled to another nationality'.[678] In some cases, the laws assume that the child will necessarily have acquired a foreign nationality by virtue of the establishment of filiation, and no safeguard against statelessness is offered.

The CRC Committee has expressed its concern about these policies, which undermine the child's enjoyment of the right to a nationality as protected in the CRC, and are against the best interests of the child concerned.[679] A safeguard against statelessness must, therefore, be built into such legislative provisions. This is easily achieved, for example, by providing a provision prescribing that if the child's parents become known before the child reaches a certain age, and they are of foreign nationality, the nationality of the child can be relinquished at the request of the legal parents, provided that the child does not become stateless as a consequence of this action and that the child is also given an opportunity to express his or her views. If uncertainty arise at any point during the process, consideration needs to be made for the child to maintain his or her nationality.

4.5 The case of adoption

Intercountry adoption can also raise problems when it comes to children's enjoyment of the right to nationality.[680] When a child is adopted across an international border, particularly by adoptive parents who hold another nationality, the nationality of the child will usually follow that of the adoptive parents. If the country of the child's original nationality provides for automatic loss of nationality upon foreign adoption, however, while the country of nationality of the adoptive parents does not automatically or immediately allow for acquisition of nationality, statelessness can result; international safeguards have been developed to ensure that this scenario is avoided.[681]

It should also be noted that the adopted child's legal position in nationality law should be, as far as possible, identical to the position of a biological child. This is prescribed under The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption.[682] A better protection in this regard is also available in the European system, where the European Convention on the Adoption of Children (Revised) states that[683]

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[678] GR De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 161.

[679] CRC Committee, Concluding Observations to Croatia, CRC/C/HRC/CO/3-4 (2014) paras. 26-27.

[680] After considering the challenges that intercountry adoption could result in, which include matters of nationality, the ACRWC suggests it should be done as a measure of last resort. Article 24(b) of the Charter provides that states shall 'recognize that intercountry adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.

[681] Article 5(1) of the 1961 Convention and article 8(2) of the CRC are particularly relevant in this context.

[682] Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1995.

[683] Article 11(1) of the European Convention on the adoption of children CETS No. 058 of 1968.

> upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established.

It is, however, unfortunate that only a few international treaties deal with the nationality position of adopted children; such provisions are also missing from the major child-rights instruments, including the CRC and ACRWC.

The Hague Convention and the 1961 Convention are among the very few international treaties to provide rules on the nationality of an adopted child. They specifically state that the loss of nationality as the result of adoption shall be conditional on the possession or acquisition of another nationality.[684] The CRC Committee interprets article 7 of the 1961 Convention as obliging states to avoid statelessness among children who are adopted from abroad. In particular, the Committee has expressed concern that a child can be left stateless during the adoption process, meaning between the time of arrival and their formal adoption. For instance, it states:[685]

> The Committee is further concerned about the uncertainty of the legal status of children adopted from abroad by Swiss parents during the year before the adoption process is finalized … The Committee recommends that the State party … (c) Accelerate the assessment procedure and ensure that a child adopted from abroad is not stateless or discriminated against during the waiting period between his or her arrival in the State party and formal adoption.

Another issue relevant to matters of nationality of the child in the context of intercountry adoption is the question of what happens in the event of revocation or annulment of an adoption. Again, the most relevant instruments, both on nationality and child-rights issues, do not include provisions that could guide states in this regard; hence referring to the European system could be instructive in this context. Principle 10 of Recommendation 2009/13 states that revocation or annulment adoption should not cause the loss of nationality acquired by this adoption.[686] Besides, Principle 15 provides that 'revocation or annulment of an adoption will not cause the permanent loss of the nationality acquired by the adoption, if the child is lawfully and habitually resident on their territory for a period of more than five years'.[687]

Looking at the trend in African laws on acquisition of nationality to children in cases of adoption, Manby summarises the features as follows:[688] laws which allow automatic

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[684] Article 17 of the 1930 Hague Convention; article 5(1) of the 1961 Convention.

[685] CRC Committee, Concluding Observations on the combined second to fourth periodic reports of Switzerland CRC/C/CHE/CO/2-4 (2015) para 51.

[686] Council of Europe: Committee of Ministers, Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children, CM/Rec(2009) 28; available at https://www.refworld.org/docid/4dc7bf1c2.html (accessed 12 June 2017). See also R De Groot 'Children, their right to a nationality and child statelessness' in Edwards & Van Waas (n 67 above) 164-165.

[687] Council of Europe: Committee of Ministers, Recommendation (n 686 above).

[688] B Manby Citizenship in Africa: A comparative study (2016) 57.

acquisition of nationality subject to completion of legal adoption process;[689] laws which provide options to the adopted children;[690] laws which provide discretionary naturalisation;[691]and countries with no provision on matters of nationality rights in cases of adoption.[692]

The laws in most of the above-mentioned countries lack sufficient detail in dealing with the effect of adoption on the nationalities of the children concerned. In particular, they do not explicitly rule out loss of nationality leading to statelessness. The laws fail to take into consideration the possible challenges that children could face in the country of the adoptive parents in securing a nationality for the child. Hence, this thesis argues that, in formulating nationality laws and even laws governing intercountry adoptions, it is important for states to put a procedure in place that monitors whether the nationality laws of the receiving state are in alignment with international standards, such that children are not exposed to statelessness, even temporarily.

As provided under the ACRWC and CRC, intercountry adoption should be considered a last resort for resolving the family situation of the child who does not have adequate parental care if he or she cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in his or her country of origin.[693] The idea is to make all efforts in order to find a family environment for the child in his or her country and thus avoid the necessity that the child must leave his or her country of origin. Hence, the competent authority has to try to find a suitable solution for the child within his or her country, and if, despite all efforts, a resolution cannot be found (for instance, if no one has applied for adoption of the child concerned, or no one wants to take the child into foster care, and so on), the child will be available for intercountry adoption. This practice is more or less common in all African countries which allow intercountry adoption.

Considering the links between nationality, statelessness and adoption, a much-neglected area in all levels of laws, from international to domestic, it is the author's view that sending countries should make the rules on intercountry adoption even tighter, by not approving an intercountry adoption if the laws of the receiving country may fail to ensure access to nationality for the adoptee, or if the receiving country does not provide sufficient safeguards against statelessness among children in the context of adoption. Such requirements should be explicitly provided through nationality laws, in laws which govern adoption in a given country, and/or in child-rights legislation.

Finally, as the right to know about one's origin, being a fundamental right, could be linked to

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[689] The countries include Angola, Botswana (if the child is under 3 years of age), Chad, Côte d'Ivoire, Gabon, Ghana, Guinea Bissau, Mali, Mauritius, Mozambique, Namibia, Rwanda, São Tomé and Principe, Senegal, Seychelles, Swaziland, Tunisia and Zambia. See also Manby (n 688 above) 57.

[690] The countries include Burundi, Cameroon, Cape Verde, CAR, DRC, Eritrea, Ethiopia, Kenya, Madagascar, South Africa, Uganda and Zimbabwe. See also Manby (n 688 above) 57.

[691] The countries include Botswana, Lesotho and Mauritania. See also Manby (n 688 above) 57.

[692] Algeria, Burkina Faso, Comoros, Congo Republic, Egypt, Gambia, Liberia, Libya, Malawi, Morocco, Niger, Nigeria, Somalia, South Sudan and Togo. See also Manby (n 688 above) 57.

[693] Article 24(b) of the ACRWC; article 21(1)(b) of the CRC.

proof of nationality and key elements required for determination of one's nationality, laws should also be developed in order to provide and ensure this fundamental right of the child in cases of adoption. The right of the adoptee to know his or her origin requires that the child have access to adoption files in line with his or her evolving capacity.

4.6 Deprivation, loss, renunciation, and prevention of statelessness

Deprivation of nationality is not a new phenomenon. In the words of Chickera and Vlieks, 'the power to deprive citizenship is as old as the power to grant citizenship'.[694] They state that modern history has witnessed 'the most egregious and shocking consequences of the power to deprive, when concentrated in the hands of a few, unchecked by democratic institutions, and targeted at vulnerable minorities'.[695] Deprivation of citizenship was a necessary precursor from the Holocaust to the genocide of the Rohingya. Limiting the power of states to deprive citizenship, the post-war world has introduced international human rights instruments recognising the centrality of protecting everyone's right to a nationality, while also prohibiting arbitrary deprivation and protecting those who have no nationality.

However, the promise of this era has been only half-delivered, because, despite the stronger rules and institutions in place to protect the right to nationality, states continue to find new ways to circumvent the trappings of the law and justify their actions in stripping persons of citizenship.[696] Thought citizenship-stripping is no longer seen as democratic, and the prohibition of arbitrary deprivation of nationality has become anchored in international human rights law, most states resist increasing these powers, and deprivation of nationality is in active use across a range of contexts. The World's Statelessness Report 2020 notes: [697]

> In this new era of rising authoritarianism, growth of the security state, genocide, and increasing populism, xenophobia and racism, citizenship is under threat in ways not seen for generations. As more states instrumentalise nationality and treat it as a privilege that can be taken away, members of minority communities, human rights defenders, dissidents and suspected terrorists are all more likely to be stripped of their nationality – facing acute human rights deprivations as a result.

With justifications ranging from public security threats and political motives to fraud in naturalisation, loss of citizenship by an anchor person (spouse or parent), expiry of citizenship after long-term residence abroad, or loss in case of acquisition of a foreign nationality, there is, worldwide, growing misuse of citizenship-stripping powers to target some, consequently undermining the sanctity of citizenship for all and resulting in statelessness. In Africa, a number of high-profile cases have involved the use of targeted

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[694] A Chickera and C Vlieks 'Why we need a Year of Action against citizenship stripping'; available at https://globalcit.eu/why-we-need-a-year-of-action-against-citizenship-stripping/ accessed (19 September 2020).
[695] *Ibid.*
[696] Institute on Statelessness and Inclusion 'The World's Statelessness Report 2020: Deprivation of Nationality' (2020) 131.
[697] The World's Statelessness Report 2020 (n 696 above) 132.

denial or deprivation of nationality as a political tool.[698] Such practices have not stopped, and there are still cases in several countries where deprivation of nationality as a measure has been imposed on political opponents and journalists.[699] Abuse of immigration law to silence non-citizens has also been used to silence critics among long-term residents of countries.[700]

4.6.1 Defining deprivation and loss of nationality

Setting rules on 'deprivation of nationality', nationality laws have used various terms, such as 'loss', 'withdrawal', 'denial', and 'stripping' of nationality, as well as imputed renunciation of nationality.[701] In some cases, international law treats 'deprivation' and 'loss' of nationality separately. For instance, the 1961 Convention uses the expression 'loss of nationality' to describe withdrawal of nationality which is automatic, by operation of law (*ex lege*),[702] and the term 'deprivation' to describe situations where the withdrawal is initiated by the authorities of the state.[703] The UDHR simply prohibits 'arbitrary deprivation' without mentioning 'loss of nationality'.[704] However, the UNHCR's Guidelines, resolutions of the Human Rights Council and the Decisions of the Inter-American American Court of Human Rights assert that the prohibition of arbitrary deprivation of nationality in article 15 of the UDHR encompasses both 'loss' and 'deprivation' of nationality, including where a state arbitrarily precludes a person or group from obtaining or retaining a nationality (e.g., on discriminatory grounds).[705] The UNHCR adopts the term 'withdrawal of nationality' to refer to both loss and deprivation of nationality.[706] Others may use these terms interchangeably.

'Deprivation' and 'loss' of nationality as prescribed in the 1961 Convention have one major element in common, namely lack of consent or voluntarily request by the individual concerned. In this regard, for the purpose of this thesis, 'deprivation of nationality' refers to

[698] For instance, in 1999 the High Court in Zambia declared that Kenneth Kaunda, president of the country from 1964 to 1991, was not a citizen of the state he had governed for 27 years. The same year, the courts in Côte d'Ivoire annulled the nationality certificate of former prime minister Alassane Ouattara, on the grounds that it had been issued irregularly.

[699] In August 2006, the government of Tanzania again stripped two journalists of nationality, Ali Mohammed Nabwa, weekly consulting editor of *Fahamu*, and Richard Mgamba, a reporter with the Mwanza-based *Citizen* newspaper. In 2001, the government declared that four individuals were not citizens, although giving them the option of applying for naturalisation. See Manby (n 260 above) 127-140.

[700] Manby (n 260 above) 139.

[701] Institute of Statelessness and Inclusion 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure' (2020) 23.

[702] Articles 5-7 of the 1961 Convention.

[703] Article 8 the 1961 Convention.

[704] Article 15, UDHR.

[705] See UNHCR Guidelines No. 5 on Loss and Deprivation of Nationality under articles 5-9 of the 1961 Convention on the Reduction of Statelessness; available at https://www.refworld.org/docid/5ec5640c4.html (2020) para 9; UN Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, A/HRC/13/24 92009) para 23; Inter-American Court of Human Rights, Case of *Expelled Dominicans and Haitians v Dominican Republic*, Series C No. 282 (2014) paras. 238, 318 and 469.

[706] UNHCR Conclusion of the Experts' Meeting – Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (the Tunis Conclusion) (2014) para 10.

any loss, withdrawal or denial of nationality that was not voluntarily requested by the individual. As stated in the Principles on Deprivation of Nationality as a National Security Measure, deprivation of nationality occurs[707]

> where a State precludes a person or group from obtaining or retaining a nationality, where nationality is automatically lost by operation of the law (also referred as loss of nationality in the 1961 Convention),[708] and where acts taken by administrative authorities result in a person being deprived of a nationality.

In addition to the working definitions above, guidelines and jurisprudence have also provided more guidance on the areas that loss and deprivation of nationality should cover. In particular, such authoritative interpretations of articles 5-9 of the 1961 Convention on loss and deprivation of Nationality are provided by UNHCR in its conclusion of the Expert Meeting – Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (the Tunis Conclusion), and Guidelines No. 5 on Loss and Deprivation of Nationality (UNHCR Guidelines No. 5).[709]

Interpreting articles 5-9 of the 1961 Convention requires the application of acceptable rules of interpretation under international law, where the principle of good faith, the ordinary meaning of the terms used in their context, and the object and purpose of the Convention are given due consideration. The UNHCR Guidelines No. 5, where relevant, make reference to the *travaux préparatoires* of the 1961 Convention, as well as other treaties which contain supplementary or corresponding obligations and developments in customary international law.[710] In particular, to regulate matters of statelessness among children resulting from deprivation of nationality, it is necessary that the relevant provisions of the 1961 Convention are read and interpreted in the light of additional obligations that states have under other treaties, as well as those they have as a matter of customary international law. These include 'developments on the fundamental right to a nationality and the prohibition of arbitrary deprivation of nationality, as well as subsequent developments in international human rights law generally'.[711]

In this regard, deprivation of nationality also covers situations in which there is no formal act of the state, but where the practice of the authorities responsible for nationality indicates that they have ceased to consider a particular individual (or group) as a national.[712] Situations where individuals who were previously documented as nationals are denied all identity documents that can prove nationality, actions such as confiscation or destruction of identity

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[707] Section 2.2.1 of the Principles on Deprivation of Nationality as a National Security Measure, Institute of Statelessness and Inclusion (2020); see also Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality, A/HRC/13/34 (2009) para 23.

[708] Articles 5 and 6 of the 1961 Convention.

[709] UNHCR Guidelines No. 5 (n 705 above) para 5.

[710] UNHCR Guidelines No. 5 (n 705 above) para 5

[711] UNHCR Guidelines No. 5 (n 705 above) para 5

[712] UNHCR, Expert Meeting – Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (Tunis Conclusions) (2014) para 11; available at https://www.refworld.org/docid/533a754b4.html (accessed 18 February 2021).

documents and/or expulsion from the territory, and statements by authorities that a person is not a national, would also be evidence of withdrawal of nationality.[713]

Referring to the *travaux préparatoires* of the 1961 Convention, the Experts in the Tunis Conclusion also agreed that where 'a state repeals or restricts with retroactive effect a legislative ground for acquisition of nationality, persons who possessed the nationality of the State concerned may be deemed by the State never to have acquired its nationality'.[714] The effect is that the nationality of these persons is withdrawn. The same applies, according to the Tunis Conclusion, to loss or deprivation of nationality in cases with retroactive effect, such as 'deprivation of nationality due to fraud during the naturalisation procedure with retroactivity to the moment of naturalisation'.[715] Similarly, the 2020 UNHCR Guidelines No. 5 on the 1961 Convention state that any legislation relating to the deprivation of nationality should be 'in line with the general principle that a person may not be tried for conduct that was not an offence at the time the conduct occurred'.[716] The same conclusion is to be drawn in all cases where a state claims *ex post facto* that the conditions for acquisition were never fulfilled, for example where it is established that the conditions which led to the automatic (*ex lege*) acquisition of the nationality were not satisfied.[717] Such withdrawal is still loss or deprivation rather than non-acquisition of nationality.

'Deprivation of nationality by proxy', as introduced by the Institute of Statelessness and Inclusion, also needs particular attention.[718] Deprivation of nationality by proxy refers to measures which might not amount to deprivation of nationality in its strict sense but which have similar implications for one's right to nationality, such as 'restricting a person's ability to leave or enter their country of nationality or limiting access to travel documents necessary to that end, can constitute arbitrary deprivation of nationality'.[719] According to Principle 10, states must not subject persons to proxy measures without subjecting such decisions to the same tests and standards set out in these Principles. Such measures may include the withdrawal of, or refusal to renew, passports or other travel documents, and the imposition of travel or entry bans. Such restrictions may leave a person at the risk of statelessness; hence, in taking proxy measures, states need to subject their decisions to the same tests and standards set out in international law regarding deprivation of nationality.

The grounds that remain most relevant regarding the deprivation of nationality are those relating to fraud or misrepresentation in the acquisition of nationality.[720] In this regard, the

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[713] *Ibid.*

[714] UNHCR, Tunis Conclusions (n 712 above) para 12.

[715] UNHCR, Tunis Conclusions (n 712 above) para 12; this situation is also referred to as 'nullification', which means that citizenship is invalidated retroactively (*ex tunc*).

[716] UNHCR Guidelines No. 5 (n 705 above) para 13.

[717] UNHCR, Tunis Conclusions (n 712 above) para 13.

[718] See Principles on Deprivation of Nationality as National Security Measure, Principle 10.

[719] Commentary on the Principles on Deprivation of Nationality, para 185. See also Tunis Conclusions (n 712 above) para 186.

[720] Commentary on the Principles on Deprivation of Nationality, para 185. See also Tunis Conclusions (n 712 above) para 69.

Human Rights Council states that 'loss or deprivation of nationality can only be justified where the fraud or misrepresentation was perpetrated for the purpose of acquiring nationality and was material to its acquisition'.[721] Such prohibition of proxy deprivation has its legal basis in article 8(4) of the 1961 Convention, according to which 'a Contracting State shall not exercise a power of deprivation … except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body'. Similarly, article 12(2) (4) of the ICCPR and article 12(2) of the African Charter on Human and Peoples' Rights also contain provisions regarding one's right to enter, remain in and return to one's own country. Any restrictions on the right to leave one's country, according to the Human Rights Committee, must be interpreted narrowly and not impair the essence of the right.[722] Hence, in discussing prevention of statelessness among children as result of deprivation of nationality, the view taken in this thesis is that this should be interpreted broadly, and all the above-mentioned circumstances should be considered as loss or deprivation rather than non-acquisition of nationality.

Focusing on cases of statelessness among children that could result from deprivation and loss of nationality, the sections below seek to answer three questions: first, whether there are sufficient legal frameworks at the international and regional levels to prevent statelessness among children as a result of deprivation or loss of nationality; secondly, whether the prohibition of 'arbitrary deprivation of nationality' applies in cases of statelessness; and thirdly, whether the laws in African countries have adequately addressed the scenarios in which statelessness in children could result from deprivation of nationality.

4.6.2 Statelessness among children as a result of deprivation and loss of nationality

International law sets safeguards against statelessness by introducing minimum requirements to regulate the applications of loss and deprivation of nationality. The UDHR sets the requirement of 'arbitrariness' by prescribing a general rule that '[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.[723] Building on the UDHR, the 1961 Convention establishes more detailed and additional requirements to regulate measures that states should take in deprivation of nationality, including the test of statelessness.

Regarding loss of nationality, the 1961 Convention provides that [724]

> [i]f the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional

[721] UN Human Rights Council, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary General', A/HRC/25/28 (2013) para 10

[722] Human Rights Committee, 'General Comment No. 27: Freedom of movement (article 12)' (1999) CCPR/C/21 para 13.

[723] Article 15 of the UDHR.

[724] Article 5 (1) of the 1961 Convention.

upon possession or acquisition of another nationality.

The Convention, in principle, prohibits loss of nationality where it would render a person stateless.[725] The 1961 Convention, however, permits loss of nationality that would result in statelessness in limited circumstances relating to residence abroad for substantial periods by naturalised persons or persons born abroad.[726] Interpreting the elements of the 1961 Convention in relation to loss of nationality, the UNHCR's Guidelines No. 5 state that 'even in those cases, loss of nationality resulting in statelessness is permitted only where such persons do not conform to requirements that may be prescribed in law allowing retention of nationality in these special circumstances'.[727]

Similarly, regarding deprivation of nationality, the 1961 Convention directs that '[a] Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless'.[728] However, exceptions to this prohibition are provided where the Convention allows for deprivation of nationality even if it results in statelessness.[729] These grounds include, for example, situations where nationality has been gained by misrepresentation or fraud, or where a naturalised person living abroad for some consecutive years specified by the law, which cannot be less than seven, fails to declare to the appropriate authority his or her intention to retain his nationality.[730] The exceptions, according to the 1961 Convention, can only be done through a procedure that respects due process, which includes ensuring the right to a fair hearing by a court or other independent body.[731]

The question that needs to be addressed is whether the permitted grounds of statelessness in deprivation and loss of nationality in the 1961 Convention pass the test of child protection principles, which considers statelessness, in all its forms, as antithetical to the best interests of children. For instance, applying article 8(2) of the 1961 Convention, a State may 'legally' deprive a child of nationality if evidence shows that his or her nationality status was established on the basis of fraudulent behaviour or fraudulent information provided about him or her, such as when the full identity of the child, including existing family relationships, is not disclosed by his or her legal representative.

In its attempt to address this question, the UNHCR states that, in view of the overriding principle of the best interests of the child set out in the CRC, 'a range of other factors will

[725] Article 7(6) of the 1961 Convention provides that '[e]xcept in the circumstances mentioned in this article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention'. A further safeguard against statelessness in the context of loss of nationality is found under article 7(3) of the 1961 Convention, which provides that '[s]ubject to the provisions of paragraphs 4 and 5 of this Article, a national of a Contracting State shall not lose his nationality, so as to become stateless, on the ground of departure, residence abroad, failure to register or on any similar ground'.

[726] Article 7(4) of the 1961 Convention.

[727] UNHCR Guidelines No. 5 (n 705 above) para 12.

[728] Article 8 of the 1961 Convention.

[729] Articles 7(4), 7(5), 8(2) and 8(3) of the 1961 Convention.

[730] Article 8(2) and (3) of the 1961 Convention.

[731] Article 8(3) of the 1961 Convention.

need to be examined (including the ties to country concerned), in light of the general principle of proportionality, and not solely whether the child acquired nationality on the basis of fraud conducted by an adult guardian'.[732]

With regard to the exception under article 7(4) that allows a naturalised person to lose his or her nationality on account of residence abroad for a period specified by the law, the UNHCR states that '[a]s an exception to the general prohibition of loss of nationally resulting in statelessness, this provision should be applied restrictively'.[733] Introducing a differential treatment, the 1961 Convention leaves naturalised citizens more vulnerable to loss of nationality resulting in statelessness than citizens by birth, which, in accordance with the view of this thesis, violates the principle of non-discrimination in international human rights law. The UNHCR also provides guidance on the other condition of article 7(4) of the 1961 Convention which requires the naturalised person must have resided abroad for a period of 'not less than seven consecutive years'. Guideline No. 5 states that[734]

> in accordance with the object and purpose of the 1961 Convention, the individual concerned should not lose nationality so as to become stateless if they do not have permanent residence in the State abroad and enjoy all the rights attached to permanent residence, including the right to seek naturalization, as appropriate.

Another ground which justifies the loss or deprivation of nationality, even if it would result in statelessness, as mentioned in article 7(4) of the 1961 Convention, is the person's failure to declare to the appropriate authority his or her intention to retain his nationality as specified in its domestic laws of the state concerned. Indeed, the validity of such a ground should be re-examined in the light not only of child protection principles but of changing circumstances in the contemporary world. The UNHCR states that 'the aim of article 7(4) is to preserve a Contracting State's ability to ensure that its nationals maintain an effective connection to it'.[735] However, the notion of what constitutes 'an effective connection' to a state has changed since the drafting of the 1961 Convention. Society has evolved and people are far more mobile. It is no longer unusual for a person to reside habitually in a country other than his or her country of citizenship. It is in recognition of these changing circumstances that Africa's Draft Protocol chooses the term 'appropriate connection', which should be interpreted in a broader sense than the notion of 'genuine link' or 'effective nationality'.[736]

Textual reading and application of the above-mentioned provisions of the 1961 Convention would put the instrument at odds with international and regional instruments that uphold the right to a nationality of the child and prohibit statelessness among children. Causing statelessness by depriving the nationality of children, either directly or derivatively, goes

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[732] UNHCR, Tunis Conclusions (n 712 above) para 39.
[733] UNHCR Guidelines No. 5 (n 705 above) para 33.
[734] UNHCR Guidelines No. 5 (n 705 above) para 35.
[735] UNHCR Guidelines No. 5 (n 705 above) para 37. See also UN Conference on the Elimination or Reduction of Future Statelessness, Summary Records, 11th meeting of the Committee of the Whole, A/CONF.9/C.1/SR.11, (1961) 2-4; UN Conference on the Elimination or Reduction of Future Statelessness, Summary Records, 16th meeting of the Committee of the Whole, A/CONF.9/C.1/SR.16 (1961) 2-3.
[736] Article 1 (16) of the Draft Protocol on Nationality and Statelessness.

against the principle of the best interests of the child and so cannot be justified. It is the view of this thesis that the provisions of the 1961 Convention (specifically those providing exceptional grounds for loss and deprivation of nationality resulting in statelessness) need to be read in line with child rights principles so that they pass the test of child rights based approach as protected under the contemporary international and regional laws as discussed in chapter three of this thesis. Hence, states need to institute safeguarding principles which provide that loss or deprivation of nationality does not result in statelessness among children in any circumstances.

One important safeguard against statelessness among children lies in dealing with derivative loss of nationality. Derivative loss occurs if a person has acquired citizenship derivatively because of his or her relations with another person and that person loses his or her citizenship. This mode of loss applies practically only to close family members, i.e., spouses and natural or adopted children. Where a parent (or both parents) loses or is deprived of his or her nationality, article 6 of the 1961 Convention provides that an extension of the withdrawal of nationality to the children is never to result in statelessness. This rule applies regardless of the reason for the withdrawal of the parent's nationality, including where the conduct of the parent is so serious as to allow for deprivation of nationality even if it results in statelessness under article 8(3) of the 1961 Convention.

Another instance where children could be exposed to risk of statelessness due to loss of nationality is the case of adoption. According to article 5(1) of the 1961 Convention, the acts of states regarding loss of nationality as a result of recognition, legitimation or adoption, should never result in statelessness. Hence, safeguards need to be available, regardless of the exceptional circumstances provided in the 1961 Convention. When the child does not acquire the nationality of the adoptive parent automatically but after some period of residence, the original nationality should not be lost automatically upon conclusion of the adoption, until the new nationality is actually acquired.[737] Article 5(1) also applies if it is established that the family relationship which constituted the basis of a child's acquisition of nationality was registered erroneously. This includes situations in which the identity of the parent (relevant for *jus sanguinis* acquisition of nationality) has been erroneously recorded, or where it is discovered, after acquisition of the nationality by an *ex lege* extension of naturalisation from a parent to a child, that no family relationship ever existed between the parent and the child.

The CRC Committee's recommendations on the irrevocability of nationality of children plays a pivotal role in addressing the gaps in the 1961 Convention.[738] In its Concluding Observation on the second periodic report on the Islamic Republic of Iran, the Committee recommends that 'all children are registered at birth and acquire an irrevocable nationality without discrimination'.[739] In asserting the right of every child to preserve their nationality,

[737] R Bauböck and V Paskalev 'Citizenship Deprivation: A Normative Analysis' 82 CEPS Paper in Liberty and Security in Europe (2015) 25.
[738] Concluding Observation to the second periodic report of the Islamic Republic of Iran CRC/C/15/Add.254 (2005) para 36.
[739] UNHCR, Tunis Conclusions (n 712 above) para 38.

regardless of the question of whether loss or deprivation leads to statelessness, the CRC Committee demonstrates the importance of understanding the content of State Parties' obligations under the Convention, which need to be taken into account in the interpretation and application of related norms, such as those under the 1961 Convention which tolerates loss or deprivation of nationality from a child as long as this does not lead to statelessness. Lessons could also be taken from the European system. The European Convention on Nationality goes the furthest in limiting state power to deprive citizenship if the conduct makes the person concerned, children included, stateless.[740]

Another concept that this section considers in relation to responses of African laws on loss and deprivation of nationality and statelessness among children is that of 'arbitrariness', which is set out primarily under article 15 of the UDHR. The *Oxford English Dictionary* defines the word 'arbitrary' as acts that are based on random choice or personal whims rather than on any reason or system'. However, from a legal or human rights law point of view, arbitrariness extends beyond this particular definition. For example, arbitrariness has been interpreted in relation to a particular human right, such as arbitrary detention,[741] and arbitrary interference with privacy.[742] Arbitrariness is also established in international jurisprudence which looks at necessity, proportionality and reasonableness.[743] The Human Rights Committee states that 'the notion of arbitrariness must not be equated with "against the law", but be interpreted more broadly to include such elements as inappropriateness and injustice',[744] and that [745]

> the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Convention [ICCPR] and should be, in any event, reasonable in the particular circumstances.

In line with the approach adopted by the Human Rights Committee, there could be instances where withdrawal of nationality could be considered arbitrary, and hence falls within the ambit of prohibited acts. For instance, the 1961 Convention provides that '[a] Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic,

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[740] Article 4 of the European Convention on Nationality of 1997.

[741] Article 9 of the ICCPR.

[742] Article 17 of the ICCPR.

[743] For instance, see the African Commission on Human and Peoples' Rights, Communication 211/98, *Legal Resources Foundation v Zambia* (2001), where the Commission decided that retroactive application of laws could amount to arbitrariness. The Commission found against the Zambian government's notorious constitutional amendment that required anyone who wanted to compete for the presidency to prove that both parents were Zambians from birth (an amendment patently aimed at preventing former president Kenneth Kaunda from running for president again), and ruled that the provision violated articles 2, 3 and 13 of the Charter.

[744] UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (1988) para 4.

[745] Human Rights Committee, General Comment No. 16, CCPR/C/21/Rev/ 1, pp. 19–20.

religious or political grounds',[746] even if the act does not result in statelessness. This has been reinforced by the statements of the UN's human rights bodies. For example, the Committee on the Elimination of Racial Discrimination, in its General Recommendation on discrimination against non-citizens, states that 'deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties' obligations'.[747]

Any decision to deprive a person of nationality must also follow certain procedural and substantive standards to avoid arbitrariness.[748] Among the procedural standards to be followed are the rights to have the reasoned decision issued in writing, open to administrative or judicial review and subject to an effective remedy.[749] The substantive standards imply that the decision must have a legitimate purpose and follow the principle of proportionality.

On the basis of these requirements, this section attempts to answer whether deprivation of nationality amounts to arbitrariness if it results in statelessness among children. Answering this question requires analysis of the principle of proportionality. The principle entails that for 'withdrawal of nationality to be proportionate, measures leading to the withdrawal should serve a legitimate purpose that is consistent with the objectives of human rights law, and necessary to achieve the aim pursued by the State'.[750] Given the severe consequences of statelessness on children and the unqualified prohibition of statelessness in children under international and regional instruments, loss or deprivation of nationality that results in statelessness among children would hardly serve a legitimate purpose and hence would amount to arbitrariness. Despite the UNHCR's guide, which states that 'withdrawal of nationality that results in statelessness would conceivably be possible to justify as proportionate in limited and narrow circumstances', it is submitted that those narrow circumstances are too narrow to exist in the child protection discourse, which considers statelessness as inimical to the best interests of the child.

As the ACERWC notes, international law allows and recognises some of the rules upon which loss, deprivation, or withdrawal of nationality can take place. Any loss or deprivation of nationality will need to comply primarily with three criteria: it should be aimed at achieving a legitimate purpose; it should take the least intrusive method; and it has to be proportional to the right or interest it aims to protect.[751] In this regard, the Committee analysed the application of section 10(3) of the Sudanese Nationality Act,[752] which can leave

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[746] Article 9 of the 1961 Convention.

[747] The Committee on the Elimination of Racial Discrimination on Discrimination against Non-citizens, General Recommendation No. 30 of HRI/GEN/1/Rev.7/Add.1, 4 (2005).

[748] Human rights and arbitrary deprivation of nationality: Report of the Secretary-General A/HRC/25/28 (2013) 31-34.

[749] *Ibid*

[750] UNHCR Guidelines No. 5 (n 705 above) para 94. See also Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 19 December 2013, A/HRC/13/34, para 25; and Human Rights Council, Human rights and arbitrary deprivation of nationality: Report of the Secretary-General, 19 December 2013, A/HRC/25/28, para 4.

[751] ACERWC, Communication 005/Com/001/2015 *The African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v the Republic of the Sudan* (2018) para 80.

[752] Section 10 (3) of the Sudanese Nationality Act of 1994 as amended in 2005, 2011 and 2018.

a child stateless, and decided that[753]

> it is not complying with the provisions of the ACRWC as they are stated in article 6(3) & (4). In the particular case, in a situation whereby Ms Iman would effectively be rendered stateless, it would be difficult, if not impossible, to argue that section 10(3) of Sudanese Nationality Act is proportional to the interest that the legislation is aimed to protect.

The ACERWC does not find the measure taken by Sudan in automatically changing nationality requirements without giving due regard to the impact it is having on individuals, to the effect that people like Ms Iman can also be at the risk of statelessness, proportional to the interest of the state it is trying to maintain.

4.6.3 The trend in African laws on deprivation and loss of nationality

The laws of many African states provide extremely broad grounds for deprivation of nationality, and some even exclude deprivation of nationality from review by the courts. In practice, African states wishing to deny a person nationality 'have often asserted that a person was erroneously recognised as a national'.[754] It is also common in most African countries for a naturalised citizen to be deprived of his or her nationality if the individual has committed a serious crime against the state, or fought for a foreign country against the state that has granted him or her its passport.[755]

As discussed in Section 4.6.1 of this thesis, provisions allowing a state to revoke nationality acquired by naturalisation through fraud or other abuse of process, or if the person has joined the military of, or works in the service of another state, are relatively common throughout the world and are permitted by the 1961 Convention. The most common provision for automatic loss of birth nationality is in case of acquisition of nationality of another state, in countries where dual nationality is not allowed.[756]

Revocation of nationality from birth is far more problematic. In Africa, countries have legislation[757] which prohibits the deprivation of nationality against the person's will from nationals from birth.[758] Though the prohibitions in these countries apply whether the person would become stateless or not, it would be difficult to conclude that these countries have sufficient safeguards against statelessness in cases of loss and deprivation of nationality. Some countries have contradictory laws, the application of which could create statelessness.

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[753] ACERWC, Communication 005/Com/001/2015 (n 751 above) para 81.

[754] Citizenship Rights in Africa Initiative, Loss and Deprivation of Nationality; available at http://citizenshiprightsafrica.org/theme/loss-and-deprivation-of-nationality/ (accessed 28 September 2020).

[755] Manby (n 260 above) 128.

[756] As Manby writes, this is the case in about 20 states; Manby (n 55 above) 169.

[757] Some countries, for instance Ethiopia and South Africa, have constitutional provisions prohibiting deprivation of nationality. Article 33 of the Ethiopian Constitution provides: 'No Ethiopian national shall be deprived of his or her Ethiopian nationality against his or her will.' Article 20 of the South African Constitution states: 'No citizen may be deprived of citizenship.'

[758] Manby (n 55 above) 169.

For instance, though the South African Constitution states that 'no citizen may be deprived of citizenship', the Citizenship Act does provide for automatic loss or discretionary deprivation of nationality, with no safeguard against statelessness.[759] Similarly, in Comoros, the 1979 nationality code is not in line with the Constitution, which prohibits the deprivation of nationality of a citizen by birth.[760] Moreover, the fact that most of these countries fail to provide an explicit safeguard against statelessness increases the risk of statelessness. Only a few provide for protection against statelessness in cases of deprivation of nationality.[761]

Another gap in the laws of some countries is the introduction of additional grounds for deprivation of nationality that are not prescribed under any international or regional treaties. For instance, Namibia allows deprivation of nationality on the grounds that a person has already been deprived in another country. This does nothing but increase the likelihood of statelessness.[762]

Gender discrimination in loss of nationality may be another challenge that could increase the occurrence of statelessness in children. In Togo, for instance, the law allows for a foreign woman to automatically become Togolese on marriage to a Togolese man, but the same law states that she also automatically loses Togolese nationality if she is divorced.[763]

The decision to deprive someone of nationality is not always subject to appeal or court review; a number of countries have provisions allowing for revocation of naturalisation at the discretion of a minister, and without appeal to any independent tribunal.[764] Such denial of due process of law applies mainly to adults, as the nationality laws do not even consider the children in the process. Absence of provisions ensuring due process and court reviews of the executive's decisions on nationality matters violates the very notion of the child-friendly system that states need to install.

The thesis argues that the principle of rule of law should apply fully to nationality cases involving children just as it applies in the case of adults. States must then make sure that elements of due process, such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, are also guaranteed for children in nationality matters, including in cases of deprivation of nationality. Reviewing nationality laws requires states to evaluate the appropriateness of their justice systems in nationality matters to establish whether they speak to the needs of the children in their jurisdictions. This could be instructive in informing the need to revisit the substantive laws and procedures in nationality matters.

To conclude, prevention of statelessness in children as result of deprivation or loss of

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[759] Section 6 of South African Citizenship Act No. 88 of 1995.

[760] Article 5 of the Comoros Constitution of 2001. Articles 51-56 of the Comoros Nationality Code of 1979.

[761] These countries are Lesotho, Mauritius, and Zimbabwe. Countries such as Namibia, Rwanda, Senegal and South Africa provide, in Manby's words, 'partial protection, allowing statelessness to result in some circumstances or providing a rather vague guarantee'. See Manby (n 55 above) 174.

[762] Article 9(3)(e)(ii) of Namibia's Citizenship Act of 1990.

[763] Article 23 of the Togolese Nationality Code of 1978.

[764] Manby (n 67 above) 10.

nationality requires a legal response which conforms to some of the basic principles that limit state discretion, such as prohibition of arbitrary deprivation of nationality, avoidance of statelessness, non-discrimination, ensuring the best interests of the child as the primary consideration in decisions or actions affecting children, and instituting a justice system that passes the test of child-friendliness.

4.7 Renunciation of nationality

Renunciation of nationality is 'loss of nationality by specific act of the individual concerned'.[765] Procedures regarding renunciation could be relevant particularly in a situation where a state does not permit dual nationality. It would then be necessary for the individual to renounce his or her original nationality. In this regard, renunciation of nationality relates to the right to change his or her nationality, which is a recognised protection under the UDHR and the 1961 Convention.[766] Article 15(2) of the UDHR prescribes that no one should be denied the right to change his or her nationality, which entails that the process of renunciation shall not require the formal consent of the state concerned. On the other hand, the 1961 Convention requires states to ensure that the person should not become stateless while renouncing his or her nationality.

In voluntary renunciation it is always the individual that initiates the loss. Yet this initiative need not be sufficient to bring about the desired result. There are two procedures for renunciation: by declaration or by release. These mirror a similar distinction between naturalisation by declaration or discretionary administrative decision. In the former case, it is the individual who has the sole power to bring about the loss, whereas in the latter the government needs to agree to a citizen's request or application to be released.[767]

Although most African countries provide laws that a person has the right to renounce his or her nationality,[768] such provisions are still missing in a number of countries.[769] Regarding prevention of statelessness during renunciation, there are notable gaps in some African countries, as the laws fail to require the assurance that the person has already acquired or will definitely acquire another nationality or be able to reacquire the nationality of origin in case this does not happen.[770] African states should then provide safeguards against statelessness

[765] Manby (n 260 above) 48.

[766] Article 15 (2) of the UDHR states: 'No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'; article 7 of the 1961 Convention.

[767] Bauböck and Paskalev (n 737 above).

[768] However, contrary to what is prescribed under article 15(2) of UDHR, most of these countries require the person to obtain permission to release himself or herself from obligations to the state. These countries include Algeria, Benin, Botswana, Burkina Faso, CAR, Comoros, Republic of Congo, Côte d'Ivoire Egypt, Ethiopia, Gambia, Guinea, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe. See Manby (n 260 above) 177.

[769] Including the DRC, Cameroon, Chad, Djibouti, Equatorial Guinea, Eritrea, Liberia, Libya, Mauritania, Niger, South Sudan and Tunisia; Institute of Statelessness and Inclusion Report on Deprivation of Nationality (n 701 above). See also Manby (n 260 above) 177.

[770] Such safeguards are missing entirely in Cameroon, Chad, DRC, Equatorial Guinea, Eritrea, Gabon, Liberia,

during the process of renunciation. This includes, for instance, explicit procedures to ensure that a person does in fact have another nationality before renunciation is accepted. In the context where an application for naturalisation in another country requires proof of renunciation of the original nationality, the original state should put procedures in place to end the renunciation if the new nationality is not confirmed.[771] If the person has renounced nationality in one state and subsequently becomes stateless, the first state should provide re-acquisition of its nationality.[772]

The Macedonian system provides a good example of how to provide strong assurances against statelessness in the law for the context of renunciation. Not only does it require the submission of documents, along with the request for renunciation of nationality by parents on behalf of their child, showing that the child is guaranteed to acquire another nationality, but Macedonian citizenship is also automatically restored if, within one year from the date of renunciation, the foreign nationality has not been acquired.[773] Nationality can also be reacquired by a child where it has been lost by renunciation, if he or she has legally and continuously resided in the country for at least three years by the age of 25.[774] This gives children the possibility of reversing actions relating to their nationality which were taken by their parents on their behalf and which they may ultimately not agree with.

Ensuring child participation in matters involving renunciation of nationality is also crucial. Guided by the principle of the evolving capacity of the child and the best-interests-of-the-child principle, states need to set the age when children can consent to renunciation of nationality. In this regard, lessons can be drawn from European countries.[775] In preventing statelessness among children, it is instructive to refer to the Draft Protocol on Nationality and Statelessness where it prescribes that '[a] State Party shall not prohibit its national from the voluntary renunciation of his or her nationality unless such renunciation would render the person stateless'.[776]

4.8 Conclusion

This chapter presented an overview of African laws on matters of nationality and the prevention of statelessness among children. Among the aspects missing from the current legal framework in many African countries is the lack of a child-rights approach to nationality

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Libya, Niger, Nigeria, Rwanda, South Africa, Sudan, Tanzania and Zimbabwe. See Manby (n 256 above) 178.

[771] Manby (n 54 above) 48.

[772] Interpreting the 1961 Convention and avoiding statelessness resulting from loss and deprivation of nationality, UNHCR (2013).

[773] Article 19 of Citizenship of the Republic of Macedonia, no. 67/1992; 8/2004, 98/2008 and 158/2011 of 2011.

[774] Ibid.

[775] For instance, in the Netherlands a child's nationality can be renounced only pursuant to a parental request with the child's consent from the age of 12 onwards. In Austria, Bulgaria, Lithuania, Romania, Slovakia and Slovenia, the age for consent is set at 14 years. In the Czech Republic and Finland, the age is 15 years; in France and Poland, it is 16 years. In some states, the child is heard by the court on the issue from a certain age onwards – for example, in Germany and Hungary, from the age of 14 years. See Renouncing Citizenship; available at https://fra.europa.eu/en/content/renouncing-citizenship (accessed 18 November 2021).

[776] Article 15 of the Draft Protocol on Nationality and Statelessness.

matters. Most of the nationality laws are from the colonial era when there was a limited discourse concerning human rights in general and children's rights in particular. Crucial aspects of the child-rights approach to normative responses are generally lacking. Gaps in legislation include a lack of safeguards against statelessness, a lack of judicial review of administrative decisions in matters of citizenship, a complete lack of children's voices in nationality-related proceedings, and discriminatory provisions that directly affect the nationality status of children.

The chapter identified further possible areas of research, and provides guidance on what needs to be done by states to install a legislative framework that passes the test of a child-rights based approach. The chapter argues that nationality matters need to be examined in line with the risk of statelessness in children, without making this dependent on the parent's lack of nationality, their residence status, or the length of time spent in the country of the child's birth.

The chapter also argued that a purely descent-based nationality law should be revised, as there are situations where states adopt laws that provide for citizenship to be conferred at birth only on the basis of descent from a citizen, providing no rights to children who were born on the state's territory even if they are still resident there at majority and even if their parents and grandparents were also born there. Such a purely descent-based system leaves substantial numbers of children at risk of statelessness. Gaps in laws regarding the right to a nationality in the case of foundlings also leave unaccompanied children separated from their parents at a particular risk.

The chapter examined the link between lack of due process and statelessness in children, and argues that due process, which is often not respected in the recognition, conferral and withdrawal of nationality, should be at the centre of nationality proceedings to avert the risk of arbitrary decision-making in the administrative application of nationality laws.

Finally, in line with the Draft Protocol on Nationality and Statelessness, the chapter submitted that in all judicial or administrative proceedings affecting the nationality of a child who is capable of communicating his or her own views, an opportunity should be provided for the views of the child to be heard, either directly or through an impartial representative as a party to the proceedings, with those views taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Chapter Five:
The Not-So-Future Cases of Statelessness among Children in Africa

5. Introduction

Statelessness can occur in any corner of the world, affecting any group of children. However, some groups of children are particularly exposed to statelessness due to peculiar vulnerabilities. Various factors may play a role in exacerbating such vulnerabilities. As discussed in the previous chapters, children of economically disadvantaged parents, children belonging to geographically isolated rural communities, children with disabilities, children associated with countries with discriminatory provisions in nationality matters, adopted children, children of unknown parents, children who belong to marginalised ethnic groups, and the like, remain at greater risk of statelessness due to discriminatory practices and the inability or impossibility of satisfying all evidentiary requirements for submitting nationality applications.

In addition to analysing normative gaps that could lead children to statelessness, the thesis discussed the legal responses to attribution and acquisition of nationality and the prevention of statelessness among children, including the case of children who would otherwise be stateless, and laws on loss, deprivation, renunciation and reacquisition of nationality, and prevention of statelessness among children. Apart from what was presented in the previous chapters, there are also existing and emerging political, environmental, and technological trends, both at the global and regional levels, that could expose children to statelessness. Focusing on matters of migration and forced displacement as well as emerging challenges, such as the association of children with terrorism and extremist groups and the national security measures countries may tend to take, the present chapter assesses the particular vulnerabilities of children that could leave them at greater risk of statelessness, and argues for the establishment of a holistic and proactive normative response which countries should put in place to prevent statelessness among children in Africa.

5.1 The old-new dynamics of nationality and statelessness

As discussed in previous chapters, the problem of statelessness, globally and in Africa, is not new. Hundreds of thousands, perhaps millions, of Africans of all ages do not have access to a nationality. The drivers of statelessness in Africa, such as colonial history, border changes, migration, poor civil registry systems, gaps in nationality laws and discrimination based on gender, ethnicity and religion, have been persistent challenges on the continent. However, the dynamics of some of these factors are changing quickly. Hence, children on the continent, as in other parts of the world, face more barriers and serious challenges in accessing nationality. The chapter focuses on two major factors and their interaction with statelessness among children in Africa, namely cases of migration and forced displacement, and counter-terrorism

measures.

Before going into detail on these factors and how they interact with matters of nationality and statelessness among children, it is important to explain the rationale behind the phrase 'old-new dynamics' in the subheading above.

From the onset, it should be noted that the issues covered in this chapter and their interaction with statelessness are not new phenomena. For instance, the links between migration, exile, mobility, and statelessness are old phenomena of political history. As Benhabib writes, '[i]n the early decades of the twenty-first century, exile, statelessness, and migration have emerged as universal experiences of humanity.'[777] With new challenges, migration is hobbling the moral imperative of coupling the globalisation of the economy with the universalisation of political, economic, social and cultural rights, including the right to a nationality.

Since the early 1900s, the world's population has quadrupled, the number of countries has increased from 50 to more than 200, and more borders mean more migrants. These changes in trends have impacted on global policies on migration, with countries resorting to restrictive immigration policies, stringent population movement controls, and political attacks against undocumented aliens. However, interstate borders are too porous to stop the flow of people, particularly to the developed world.[778]

In Africa, with the establishment of the African Union in 2002, the spirit of pan-Africanism has been revived with new vision and the aspiration of creating political and economic integration and pan-African citizenship. Africa has been aptly described as a continent on the move. There are various migratory configurations inside and outside the continent, but the most visible are labour migration, refugee flows and internal displacement.[779] Of the migrants on the move in Africa, the majority are children and young people. The triggers for these movements include rapid growth of the labour force coupled with sluggish growth in employment, conflicts, civil unrest, environmental disasters, oppressive regimes and concomitant abuse of human rights, and poverty. Globally, Africa has the largest number of internally displaced persons (IDPs).

The African continent has also been experiencing frequent protracted conflicts and crisis situations. These have included civil wars, intercountry wars and other forms of armed violence, including terrorist activities. In crisis situations, proof of children's birth registration may be lost or left behind when people flee; children without identification are at risk of statelessness, especially if they are separated from their families and relatives.

Despite growing trends in mobility on the continent, some countries in Africa appear to

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[777] S Benhabib *Exile, Statelessness, and Migration – Playing Chess with History from Hannah Arendt to Isaiah Berlin* (2018) xv.

[778] How immigration has changed the world – for the better, available at https://www.weforum.org/agenda/2016/01/how-immigration-has-changed-the-world-for-the-better/ (accessed 20 May 2020).

[779] UNHCR, Global Trends Forced Displacement (2016) available at https://www.unhcr.org/5943e8a34.pdf (accessed 18 May 2020).

continue weaponizing nationality as an exclusionary tool, further deepening xenophobic sentiments towards other Africans. There are cases where countries are implementing increasingly restrictive measures to reduce migration flows, deepening political and social xenophobia, and increasing nationalism. The use of detention as a primary immigration management tool is widespread among many African countries.[780] Migrants, refugees and asylum-seekers, including children, are facing arbitrary, unlawful, indefinite, and multiple compounding periods of detention. This contravenes international and regional legal obligations.[781] Immigration detention is one of the contemporary challenges that exacerbates statelessness among children in migration and displacement situations. Though it is an old phenomenon, migration is producing new challenges in matters of nationality, leaving many children at the risk of statelessness.

Another growing problem this chapter examines is when deprivation of nationality as a counter-terrorism measure causes or risks causing statelessness among children. The chapter explores the relationship between counter-terrorism measures that countries are taking to ensure national security and strike a balance in ensuring the right to a nationality and avoidance of statelessness among children. Terrorism, as an emerging global challenge, is putting the foundations of the modern state under threat. In response, the use of deprivation of nationality as a counter-terrorism and national security measure is becoming more visible across the globe. As the Institute on Statelessness and Inclusion states:

> [T]hough it is currently practiced in a small number of countries, it is becoming a major challenge as growing number of States are resorting to deprivation of nationality as a counterterrorism and national security measure; some states have amended their laws to expand existing powers or introduce new powers to enable deprivation of nationality, others have relied on existing powers, which have been construed expansively to apply to situations not previously envisaged.[782]

The challenge is already present in Western countries, where governments struggle to adopt adequate measures to counter the potential threat associated with the return of their citizens who have been involved in acts of terrorism, such as those who, together with their families, travelled to Syria and Iraq to join ISIS. In the Netherlands, for instance, a controversial amendment was passed in 2017 which enables the Minister of Justice and Security to revoke Dutch citizenship from a dual national who has joined an organisation that is listed as constituting a threat to national security, without a criminal conviction and while the citizen is abroad.[783] Legislative changes introduced by other states such as Austria, Belgium,

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[780] International Detention Coalition, Alternative to immigration detention in Africa – A summary of member findings from six countries, 2015 – 2016 (2016), available at https://www.refworld.org/pdfid/5a5f55e04.pdf (accessed o5 June 2020).

[781] See article 3 of the UDHR, article 9 of the ICCPR, and article 6 the African Charter on Human and Peoples' Rights.

[782] Principles on Deprivation of Nationality as a National Security Measure (n 709 above).

[783] European Network on Statelessness 'The counter-productiveness of deprivation of nationality as a national security measure' (2020) available at https://www.statelessness.eu/blog/counter-productiveness-deprivation-nationality-national-security-measure (accessed 19 September 2020).

Denmark, France, and the UK have also made it easier for the executive to deprive subjects of citizenship on national-security grounds, which has led to debate about the legitimacy and compatibility of citizenship-deprivation powers with the principles of liberal democracy.[784]

In Africa, the development of counter-terrorism policies has proceeded without concern for human rights in general or children's rights in particular. States are increasingly introducing wider definitions on what constitutes a terrorist act, in some instances thereby increasing the types of behaviour that may lead to loss of nationality. The section below, while recognising the importance of confronting terrorism in all its forms, highlights profound tensions between the right to nationality of the child and ensuring national security, and examines policy considerations in line with the prevention of statelessness in children.

The discussion above indicates that although the issues are not new in nationality discourse, various factors affect their interaction with statelessness in children; hence, the term 'old-new dynamics' comes into the picture.

5.2 Prevention of statelessness among children in situations of migration and of forced displacement

5.2.1 Defining migration and forced displacement

How one defines migration and forced displacement is crucial how one understands the link between displacement and statelessness. 'Forced displacement', though not a legal term in international law, has been used to describe movements of group of people who are recognised and protected under international law. At the intra-national level, data on forced displacement are collected and compiled by international agencies such as the UNHCR and IOM and NGOs such as the International Displacement Monitoring Center (IDMC). Accordingly, these organisations provide workable definitions of forced displacement that align with the arguments in this thesis. For instance, according to the UNHCR:

> [f]orced displacement occurs when individuals and communities have been forced or obliged to flee or to leave their homes or places of habitual residence as a result of or in order to avoid the effects of events or situations such as armed conflict, generalized violence, human rights abuses, natural or man-made disasters, and/or development projects.[785]

Similarly, the IOM defines forced displacement as:

> [t]he movement of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations

[784] S Mantu '"Terrorist" citizens and the human right to nationality' (2018) 26 *Journal of Contemporary European Studies* 28.

[785] UNHCR 'Forced and Unlawful Displacement, Handbook the Protection of Internally Displaced Persons' available at https://www.unhcr.org/4794b2d52.pdf (accessed 09 September 2020).

of human rights or natural or human-made disasters.[786]

A key element of 'forced displacement' is the absence of will or consent. Forced displacement happens where people have fled or been forcibly removed from their homes, evicted or relocated to another place not of their choosing, whether by state or non-state actors. Hence, for the purpose of this thesis, forced displacement is used to describe the following categories of people: refugees (including those in refugee-like situations);[787] asylum-seekers; IDPs; victims of trafficking and smuggling; people in mixed and irregular migration situations;[788] disaster-induced migrants;[789] and people in resettlement situations.[790]

The lack of definition under any international or regional law makes defining migration (especially internal) a controversial activity. At one end of the spectrum, migration is defined as the movement of people over some distance (or at least from one migration-defining area to another) and from one usual place of residence to another. At the other end of the spectrum, the definition of migration discards the requirements that migration must involve a change of residence and a move across some distance.[791] As the discussion in this chapter focuses on migration in a forced-displacement context, engaging in debates around the definition of 'migration' is beyond the scope of the chapter. Hence, for the purpose of this thesis, migration refers to 'the voluntary or involuntary movement of persons away from their place of usual residence, either across an international border or within a state'.[792] The term includes a number of well-defined legal categories of people, such as migrant workers, persons whose particular types of movements are legally defined, such as smuggled migrants, as well as those whose status or means of movement are not specifically defined under

[786] IOM, Glossary on Migration (2019). The definition is adapted from the Guiding Principles on Internal Displacement, annexed to United Nations Commission on Human Rights, Report of the Representative of the Secretary-General, Mr Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39, Addendum (11 February 1998) UN Doc. E/CN.4/1998/53/Add.2, para. 2.

[787] Refugee-like situations pertain to groups of persons who are outside of their country or origin and who face deportation risks similar to those of refugees, but for whom refugee status has, for practical or other reasons, not been ascertained. See UNHCR 'Global Trends' (2013) 39.

[788] Mixed migration refers to complex population movements, including refugees, asylum-seekers, economic migrants, victims of trafficking, smuggled migrants, unaccompanied minors and other migrants; irregular movement takes place outside of the regulatory norms of the countries of origin, transit and destination. See IOM 'World Migration Report' (2008) available at https://worldmigrationreport.iom.int/world-migration-report-2008 (accessed 09 September 2020).

[789] Disaster-induced migration refers to the displacement of people as a result of a serious disruption of the functioning of a community or a society, one involving widespread human, material, economic or environmental losses or impacts that exceed the ability of the affected community or society to cope using its own resources. See UN Office Disaster Reduction, 2009.

[790] Resettlement refers to the transfer of refugees from the country in which they have sought protection to another state that has agreed to admit them with permanent residence status. IOM 'Glossary on Migration' (2019) available at https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (accessed 09 September 2020).

[791] P Kok 'The definition of migration and its application: Making sense of recent South African census and survey data' (1999) 7 *Southern African Journal of Demography* 19.

[792] IOM Glossary on Migration (n 786 above).

international law, such as international students.[793]

In the case of children, this thesis argues that the concept of forced displacement and migration should be discussed in line with the discourse around 'children on the move'. The term 'children on the move' gained prominence in child-rights discourse between 2000 and 2010 and was used to describe children who had left their places of habitual residence to other places within or outside their countries.[794] The term has since been expanded and applied by different institutions working for and with children to cover a wider spectrum of children in different forms of migratory situations. The Inter-Agency Working Group on Children on the Move has described this population as:

> children moving for a variety of reasons, voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, and whose movement, while it may open up opportunities, might also place them at risk (or at an increased risk) of economic or sexual exploitation, abuse, neglect and violence.[795]

Save the Children International describes children on the move as:

> those children moving for a reason, voluntarily or involuntarily, within or between countries, with or without their parents or other caregivers and whose movement might place them at risk (or at an increased risk) of economic or sexual exploitation, abuse, neglect or violence.[796]

The definitions entail that common elements in movements of children are the high risk of vulnerability to exploitation, abuse, neglect or violence. It is in this context that this chapter examines matters of migration in the context of forced displacement and how the latter links to statelessness in children.

5.2.2 Global and regional legal and policy frameworks regulating children in forced displacement and migration situation

The central argument of this chapter, as in the case with the rest of the chapters, is that states' responses to preventing statelessness among children should be informed by child protection principles. The thesis, while acknowledging children's own demand for mobility as a reasonable quest, argues that the phenomenon of children on the move should be seen as primarily a child protection matter. It would be difficult to expect that nationality laws will be favourable to a child who is residing in a country other than his or her country of origin if that

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[793] IOM Glossary on Migration (n 786 above).

[794] K Vella 'Power, paternalism and children on the move' (2016) 3 *Journal of International Humanitarian Action* 3.

[795] FXB Center for Health and Human Rights at Harvard University 'Children on the move An Urgent Human Rights and Child Protection Priority' (2016) 5.

[796] Terre Des Hommes, What Can You Do to Protect Children on the Move (2012) 22, available at http://destination-unknown.org/wp-content/uploads/Handbook-Children-On-The-Move-WEB.pdf (accessed 09 September 2020).

same country fails to ensure that its migration policy complies with child protection principles and if it fails to ensure children's right to education, access to health and other services regardless of nationality. Prevention of statelessness among children in displacement or migration situations is and should be derived from and guided by general child protection principles. Hence, it is important to navigate the major laws and policy frameworks which are in place to protect the rights of children in migration and displacement situations.

Various legal and policy frameworks at global and at regional levels aim at regulating matters related to children in migration and displacement situations. They include the core set of universally applicable human rights treaties, as well as laws and policies directed at the protection of specific groups of children on the move, including migrant workers and their families, victims of child trafficking, victims of the worst forms of child labour, refugees, and IDPs. Focusing on the rights of children on the move, the paragraphs below present the major laws and policies, both at the global (UN) and regional (African) levels.

i. The rights of children on the move under international and regional laws

At the UN level, the rights of children on the move are broadly enshrined in major UN instruments including in the UDHR, ICESCR and ICCPR. These instruments set out a range of basic human rights that apply to all, irrespective of nationality, legal status, or age. The ICCPR provides an example of the general principle of equality, with no discrimination, that underlies international human rights law as it relates to non-citizens, and the narrow nature of exceptions to that principle. According to its article 2(1), each State Party

> undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the contemporary international human rights framework, it is an accepted principle that non-citizens (especially children on the move) are guaranteed freedom from arbitrary killing, inhumane treatment, slavery, arbitrary arrest, unfair trial, invasions of privacy, forced labour, and child labour. They also have the right to education, an adequate standard of living (including housing, food, water, and sanitation), the protection of health and safety, and other labour regulations, and consular protection.[797]

The CRC provides strong protection for children on the move. Its provisions guarantee children's right to birth registration and to acquire a nationality, particularly in cases where a child would otherwise be stateless. Children's rights to health, shelter, and education, provisions requiring states to protect children from violence, abuse, neglect, exploitation, sexual abuse, and provisions prohibiting unlawful and arbitrary deprivation of liberty, are protections which apply to all children regardless of their citizenship or the absence of it. The

[797] For detailed analysis on the rights of non-citizens in the contemporary human rights framework, see OHCHR the Rights of Non-Citizens (2006), available at https://www.ohchr.org/sites/default/files/Documents/Publications/noncitizensen.pdf (accessed 25 September 2020).

CRC also provides appropriate protection and humanitarian assistance which need to be availed to refugee or asylum-seeker children, whether accompanied or otherwise, in the enjoyment of applicable rights set forth in the Convention and other international human rights or humanitarian instruments.[798]

In 2005, the CRC Committee issued General Comment No. 6, which deals with states' obligations to unaccompanied and separated children outside of their country of origin.[799] As explained in the General Comment, the application of the four cardinal principles is crucial in guiding states in their response to matters involving the rights of children on the move. Issues which could be considered controversial in domestic jurisdictions can be addressed by testing them against the four principles. Concerns such as prioritisation of the child's interests over other considerations of the state, including those related to immigration control or public order, the legality of detention of children in migration or displacement situations, application of cessation clauses in refugee contexts, the process of integration, social inclusion and acquisition of nationality, including the processes of naturalisation, could be resolved through application of these four underlying principles.[800]

In addition to the legal instruments above, global framework documents have also been developed and endorsed by the UN General Assembly, with sets of principles and proposed actions relevant to matters of children on the move. For instance, the Sustainable Development Goals (SDGs),[801] alongside the Goals that apply to children in displacement situations as much as to other children,[802] include targets that relate specifically to migration, mobility and legal identity:

i. Goal 10: 'Reduce inequality within and among countries' – and several of its targets, particularly Target 10.7 on migration – 'Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies';

ii. Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive

[798] Article 22 of the CRC.

[799] CRC, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, available at: https://www.refworld.org/docid/42dd174b4.html (accessed 20 September 2020).

[800] In addition to the CRC, there are also legal frameworks that deal in particular with the protection of the rights of children on the move. For instance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, which supplements the UN Convention against Transnational Organised Crime; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; and the 1951 UN Convention Relating to the Status of Refugees, as amended by the 1967 Protocol.

[801] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, General Assembly resolution of 25 September 2015, UN document A/RES/70/1 of 21 October 2015.

[802] Such as SDG 3 ('Ensure healthy lives and promote well-being for all at all ages') and SDG 4 ('Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all').

> institutions at all levels', notably Target 16.2, 'End abuse, exploitation, trafficking and all forms of violence against and torture of children'; and Target 16.9, 'Achieve universal legal identity and birth registration by 2030'.

Besides the SDGs, the New York Declaration for Refugees and Migration (the New York Declaration),[803] the Global Compact for Safe, Orderly and Regular Migration,[804] and the Global Compact on Refugees[805] take the protection of children, particularly unaccompanied and separated children in migration and refugee situation, as the core of their aspiration and operative framework. For instance, the New York Declaration declares that member states commit to:

> protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families … to provide for basic health, education and psychosocial development and for the registration of all births on their territories. [806]

As regards statelessness, the Declaration recognises that 'statelessness can be a root cause of forced displacement and that forced displacement, in turn, can lead to statelessness … encourage States to consider actions they could take to reduce the incidence of statelessness'.[807] Similarly, the Global Compact for Migration promotes a child-sensitive approach to regulating migration, upholding 'the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children'.[808]

Except in a few cases, most of the UN documents dealing with forced displacement and migration issues do not specifically speak to the challenges of children on the move. This thesis recognises that the instruments are not established to deal specifically with children, but the one thing that laws need to do is provide standards which regulate interactions based on the principles of inclusiveness and relevance. For instance, a law which is established to regulate matters of migration in society is reasonably expected to dissect the application and implication of its principles on various groups in a given society, especially children. Principles which are made for adults whose status does not put them in vulnerable situations may not work for children and other groups who are not privileged enough to live a life without stigma and discrimination. Problems in orientation, which result in a lack of specific principles that apply to specific groups within a community, lead to a lack of child protection mechanisms. This in turn results in gaps in ensuring the right to nationality and the

[803] The New York Declaration for Refugees and Migration, adopted by the UN General Assembly 19 September 2016.
[804] The Global Compact for Safe, Orderly and Regular Migration, endorsed by the UN General Assembly 19 December 2018.
[805] Global Compact on Refugees, endorsed by the Un General Assembly 17 December 2018.
[806] New York Declaration of 2016, para 32.
[807] New York Declaration of 2016, para 72.
[808] See the preamble of the Global Compact for Safe, Orderly and Regular Migration.

prevention of statelessness among children.

At the African level, the mechanisms for protection and promotion of children's rights are drawn primarily from the provisions of the ACRWC. The Charter covers a wide range of issues relevant to the protection of the rights of children in migration and displacement situations. Article 19 provides the child's right to parental care and protection, and prohibits the separation of a child from his or her parents against his or her will, except as determined by a judicial authority in accordance with law and in the best interest of the child.[809] A child who is separated shall have the right to maintain regular contact with his or her parents and the right to information on the whereabouts of his or her family members. The state is responsible for notifying the parent(s) of a child who has been apprehended by the state or its agents.[810] Article 22 obligates states to prevent children from being engaged in armed conflict, and to respect and ensure respect for the rules of international humanitarian law, which affect the child. Article 23 also protects the rights of refugee children, providing, among other things, for states to put in place measures to assist children to obtain refugee status, whether accompanied or unaccompanied, and to cooperate with other international organisations to assist the child trace his or her parents or relatives. Where the child's relatives cannot be traced, states have to ensure that the child is accorded the same protection as any other child temporarily or permanently deprived of a family environment.

In addition to the ACRWC, relevant provisions are available in the African Charter on Human and Peoples' Rights, the continent's foundational human rights instrument. The Charter guarantees the right to freedom of movement in Article 12, which includes the right to leave and to return to one's country, to seek and obtain asylum in instances of persecution, and the prohibition of expulsion of non-nationals, either individually or *en masse.* The African Commission on Human and Peoples' Rights has held that the violation of rights such as freedom from discrimination against migrant communities has a consequent effect on their freedom of movement.[811]

The 1969 OAU Convention Governing Specific Aspects of Refugee Problems (the OAU Convention on Refugees)[812] defines 'refugees' by taking African realities into consideration. The Convention places an obligation on member states to apply the provision without discrimination on the basis of 'race, religion, nationality, membership of a particular group or political opinions'.[813] Article 2 of the OAU Convention on Refugees provides that no refugee should be subjected by a state to measures such as rejection, return or expulsion that would force him or her to return to or remain in a territory where his or her life, liberty or physical integrity would be threatened. Furthermore, article 5 provides that voluntary repatriation should be respected and that repatriation should not be against one's will. Child refugees are

[809] Article 19(2) of the ACRWC.
[810] Article 19(3) and (4) of the ACRWC.
[811] ACHPR, Communication 317/06, *The Nubian Community in Kenya v The Republic of Kenya* (2015), paras 167 and 168.
[812] OAU, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session Addis Ababa. 10 September 1969; entered into force 20 June 1974.
[813] Article 4 of the OAU Convention on Refugees.

anticipated to benefit from these provisions. The interaction between refugee laws and prevention of statelessness among children is discussed in detail below.

The Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention)[814] provides that states shall protect the rights of internally displaced people without discrimination.[815] Article 9(2) of the Convention requires special protection for and assistance to IDPs with special needs, including separated and unaccompanied children, pregnant women and mothers with young children. The article further requires that states take the necessary measures such as establishment of specialised mechanisms to trace and reunify families separated due to displacement and to help re-establish family ties. Under article 13, similar to Principle 20 of the UN Guiding Principles on Internal Displacement, the Convention requires states to ensure that IDPs are issued with the relevant documents, such as personal identification documents, civil certificates and birth certificates, without any form of discrimination. Such protection is also extended to separated and unaccompanied children.

In addition to the legal frameworks, the continent has development, integration and protection polices and frameworks that provide principles and guidance to regulate the ever-growing challenges that children in displacement and migration situations face. The AU's Agenda 2063, the continent's ambitious development strategy, encompasses several aspirations. Although its references to child protection issues are limited, it calls for 'an Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children'.[816] Following the adoption of Agenda 2063 as part of its major migration frameworks, the AU recently adopted the Revised Migration Policy Framework for Africa and Plan of Action (2018–2030),[817] which aims at respecting and protecting the rights of all persons, regardless of their migration status, nationality, gender, race or ethnic origin, including through countering xenophobia, racism and discrimination. The Revised Migration Policy Framework specifically recognises the changing age composition of migrant flows as it is reflected in the increasing number of children who are migrating independently of parents or caregivers. The Framework document states:

> Whether migration is forced, as reflected in the very high percentage of children in refugee camps, or voluntary, the special needs of children, adolescent and youth need to be catered for, and include adequate health care, education, shelter and protection from rights violations. In many parts of the world, including certain regions in Africa, child trafficking is a critical challenge that must be addressed from different angles .[818]

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[814] The Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention) adopted, October 23, 2009; entered into force 6 December 2012, https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa

[815] Article 9(1) of the Kampala Convention .

[816] Aspiration 6 of the AU Agenda 2063 (2015).

[817] AU Revised Migration Policy Framework for Africa and Plan of Action (2018-2030) (AU Revised Migration Policy Framework for Africa) adopted by the AU Executive Council in 2018.

[818] Revised Migration Policy Framework for Africa, para 9.9.

Compared to its predecessor, the 2006 Migration Policy Framework,[819] the Revised Migration Framework is progressive in nature, as it responds to emerging challenges on matters of nationality and statelessness, particularly among children, and their association with migration and forced displacement. The Framework document states:

> The right to a nationality is a fundamental right recognised under international law. Nevertheless, forcibly displaced persons are affected disproportionately by the problem of statelessness, especially women and children. Persons may become stateless as a result of inter-State conflict and the consequent redrawing of political boundaries, or as a result of extended stays abroad and changes in civil status while abroad. Stateless persons are unable to avail themselves of the protection of citizenship and are consequently vulnerable to the deprivation of their rights.[820]

Referring to SDG 16, under target 16.9, where states commit to provide legal identity to all, including birth registration, the Revised Framework recommends that AU member states recognise the vulnerabilities of children to statelessness through changes to national borders, definitions of citizenship, or the revision of laws that do not extend citizenship to migrants or children born to women with an irregular status. The Revised Framework also requires states to develop national legislative and policy frameworks to counter statelessness, particularly in the case of long-term residents, by reforming citizenship legislation and/or granting rights similar to those enjoyed by foreigners residing in the state; enhancing birth registration to address statelessness; and 'ensur[ing] that everyone, including migrants, [is] able to acquire, change, retain and confer their nationality on an equal basis and that such a right is reflected in nationality laws'.[821]

Mention should also be made of the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, which provides a comprehensive set of measures addressing human trafficking;[822] the recently adopted Protocol on Free Movement of Persons, Right of Residence, and Right to Establishment;[823] and the Agreement Establishing the African Continental Free Trade Area (AfCFTA).[824] These also play a meaningful role in informing the policy direction that needs to be taken as regards the treatment of migration and movement of people, and should be adapted to the particular needs of children.

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[819] AU Migration Policy Framework for Africa and Plan of Action, 2006.

[820] AU Revised Migration Policy Framework for Africa, para 6.6.

[821] See the recommended strategies of the Revised Migration Policy Framework for Africa, para 6.6.

[822] The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, adopted in 2006 in Tripoli by the AU-EU Ministerial Conference on Migration and Development.

[823] AU, Protocol on Free Movement of Persons, Right of Residence, and Right to Establishment, adopted by the AU Assembly in January 2018.

[824] The agreement establishing the AfCFTA with three protocols (on trade in goods, trade in services and dispute settlement) was adopted by the AU Assembly on 21 March 2018 in Kigali, Rwanda, and signed by 44 African states. The AfCFTA aims at boosting intra-African trade, growing local businesses and creating jobs opportunities whilst eliminating tariff and non-tariff barriers. The AfCFTA entered into force on 30 May 2019, and since its creation, 52 of the 55 AU member states have signed it.

It is submitted that although the AU frameworks cover a wide range of protection issues for children in migration and forced displacement situations, they do not adequately address the complex realities of children on the move or cater to the protection needs of significant groups of children on the move. Many such children have multiple legal statuses, either simultaneously or in succession. For example, child migrants may be smuggled initially but then end up trapped in situations of trafficking or stateless children may seek asylum as a means of securing state protections. The frameworks fail to respond to these layers of realities. Most of the instruments and the policy frameworks treat children generally as a homogeneous group; and layers of vulnerabilities among children on the move are not covered in sufficient detail. The legal and policy responses are not tailored to differences in vulnerabilities such as between girls and boys, the particular vulnerabilities of children with disabilities who are also on the move, and the differences in the needs and expectation of older and younger children. The frameworks also do not specifically address how the size and rate of arrival of populations of children on the move impact on the delivery of their rights and obligations, or how practical preventative measures can be taken to better ensure individual child-rights assessments and enforcement in times of mass migration.

5.2.3 Forced displacement and migration trends in Africa

Although humanity has been migratory since its origin, the contemporary world is witnessing an unprecedented level of human mobility. More people than ever before live in a country other than the one in which they were born.[825] Throughout its history, Africa has experienced migratory movements and displacements, both voluntary and forced, which have contributed to its contemporary demographic landscape. Historically, displacement and migration in Africa have been categorised into three main periods: the pre-colonial, the colonial and the postcolonial.[826] Colonisation and post-independence links with former colonial powers greatly shaped the migration patterns observed today, and will continue to influence future trends. The driving forces of the dynamics and patterns of migration vary across Africa's regions. Though these trends may be age-old phenomena stretching back to the earliest periods of history, their manifestations and impacts have changed over time as the world has become more globalised.

Hence, this thesis argues for consideration of a fourth era in displacement and migration trends in Africa: the integration era. The integration era concerns the trends since the establishment of continental and sub-regional blocks such as the AU and RECs. In particular, over the last 15 years migration has increased in all of Africa's regions, and is characterised by a largely young migrant population (that is, under the age of 30) and diverse migratory flows.[827] These flows include increasing numbers of children on the move, rural-to-urban migration, labour migration, and a rise in irregular migration and the numbers of refugees, asylum-seekers and IDPs.

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[825] New York Declaration for Refugees and Migrants, adopted by the UN General Assembly 13 September 2016, para 2.

[826] AU Revised Migration Policy Framework for Africa, para 6.

[827] *Ibid.*

Over the last decades – what the thesis refers to as the integration era – deteriorating political, socio-economic and environmental conditions, as well as armed conflict, insecurity, environmental degradation and poverty, have been significant root causes of mass migration and forced displacement in Africa. The trend shows that some people move in search of new economic opportunities and horizons; others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses.[828] Others yet do so in response to the adverse effects of climate change and natural disasters, and many move for a combination of these reasons.[829]

Conflict is one of the main causes of movement of people and children, both in Africa and globally. It was reported in 2016 that the highest number of child refugees originate 'from Somalia, followed by South Sudan, Sudan, the Democratic Republic of Congo and the Central African Republic'.[830] Conflict in these and other countries has become a constant threat to the welfare of children, both to those who remain within state borders and those who flee.[831]

According to a report by the UNHCR, in 2019, the number of forcibly displaced people within countries and across borders as a result of persecution, conflict or generalised violence has grown by more than 50 per cent in the last 10 years. UNICEF estimates that children accounted for 42 per cent of those internally displaced by conflict at the end of 2019; that is, about 19 million children.[832] The most recent global estimate of the total number of child migrants is approximately 31 million. There are about 13 million child refugees, 936,000 asylum-seeking children, and 17 million children who have been forcibly displaced inside their own countries.[833]

This thesis argues that, despite the opportunities they offer, in general the movements of children, especially of children that are separated or unaccompanied, should be regarded from a protection point of view. Children on the move, regardless of whether they are refugees, IDPs, economic migrants or of any other category, face significant protection risks. They are more likely to be victims of violent crime, including sexual and gender-based violence (GBV) abuse and exploitation. They are often denied basic provisions such as food and water and endure uncomfortable conditions, they may be arrested by immigration authorities, they may be held to ransom, beaten or otherwise abused to compel their relatives to pay. If the children reach their destination, they may face long immigration or asylum procedures, uncertainty and discrimination.

The movement of persons, including through forced displacement, has also given rise to a

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[828] IOM *World Migration Report* (2020) 106

[829] *Ibid.*

[830] UNICEF *Uprooted: The Growing Crisis for Refugee and Migrant Children* (2016) 56.

[831] *Ibid.*

[832] UNICEF, Lost at Home, the risks and challenges for internally displaced children and the urgent actions needed to protect them, (2020) available at https://www.unicef.org/sites/default/files/2020-06/Lost-at-home-risks-and-challenges-for-IDP-children-2020.pdf (accessed 25 September 2020).

[833] IOM *World Migration Report* (2020) 6.

host of problems relating to documentation, legal status and citizenship. Specifically, as observed by the CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, children on the move are vulnerable to violations of their right to nationality and face the risk of statelessness.[834] Statelessness in situations of forced displacement and migration occurs when these groups of children are not considered as nationals by the country of origin, the host country, or the country of transit. The link between statelessness and movement of children, particularly those who are in forced displacement situations, could be threefold: statelessness as a cause of displacement; statelessness as a consequence of displacement; or statelessness as a challenge in a displacement context.[835]

In keeping with the subject of this thesis – the prevention of statelessness among children – the following paragraphs, focusing on statelessness as a consequence of displacement, present the link between children on the move and legal responses to matters of statelessness in the context of Africa.

5.2.4 Children on the move and statelessness

Discussing the nexus between children on the move and statelessness in Africa is particularly challenging given the turbulent history and evolution of citizenship on the continent. What is now referred to as 'cross-border' was not entirely cross-border. Thanks to colonisation and the arbitrary demarcation of boundaries, concepts around belonging were irrevocably changed. Belonging was reformulated, and so the movement of people within specific areas now becomes labelled as 'cross-border'. This historical trajectory defined the jurisdiction of the state concerned, redefined the parameters of power, and regulated the movement of people.[836] These historical events, coupled with the precarious and unstable circumstances that displacement can create, resulted in the risk of becoming stateless.

In the context of migration and displacement, children who are at the risk of statelessness in many parts of Africa include children of the descendants of historical migrants, children of contemporary migrants, children of cross-border populations, and children in vulnerable situations. Focusing on these groups, the paragraphs below explain how statelessness in children occur in the context of movements.

In the context of historical migrants in West Africa, for instance, children of the descendants of traders – such as the Lebanese, who in the late nineteenth century came to West Africa

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[834] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) & CRC Committee, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration CMW/C/GC/3-CRC/C/GC/22 para 3.

[835] NRC 'Statelessness and Displacement, Scoping Paper' (2016) available at https://www.nrc.no/globalassets/pdf/reports/statelessness-and-displacement.pdf (accessed 07 October 2020).

[836] L Hovil 'Ensuring that Today's refugees are not tomorrow's stateless: solutions in refugee context' in LV Waas & K Melanie (eds) *Solving Statelessness* (2017) 72.

from the then Ottoman Empire and what are now Syria and Lebanon[837] – are among the groups of 'doubtful' nationality.[838] Many of the descendants of those who migrated before independence face difficulties in obtaining documentation of the nationality of the country where they are resident. The reason could be that they are those, as Manby writes, 'for whom the transitional provisions adopted in the laws at independence were not well adapted, or where those laws were early on amended or manipulated to exclude targeted populations from access to nationality and the broader rights of citizenship'.[839] Children of people whose parents or grandparents moved prior to independence and never obtained documentation as nationals of the new states are also among the group who are at the risk of statelessness.

The most obvious problems of this type are faced in Côte d'Ivoire, where the law includes no *jus soli* element, such that those born in the country over several generations still remain foreigners.[840] In the Southern African region, political and economic changes during colonisation caused hundreds of thousands of Africans to be displaced from their habitual residence. The descendants of these migrants and their children find their right to citizenship and belonging questioned till today. Among them are, for example, Zimbabweans whose ancestors came from Mozambique, Zambia or Malawi.[841] Similarly, in the Eastern African region, descendants of historical migrants and their children (those whose ancestors came from outside of the continent – from Europe, Asia or the Middle East – and those whose ancestors came from elsewhere in Africa) also face the risk of statelessness. They include children of Nubian descendants in Kenya and Comorian migrants to Zanzibar and Kenya.[842]

Children of migrants are more at risk, especially in those countries that provide no rights at all based on birth in the country, even if the person remains resident there until majority and beyond. Differences in the law have a real impact. In those countries that follow the double *jus soli* system, the responsible authorities apply the rules to the second generation born in the country. A person born in Senegal or Niger, for example, of one parent also born in that country will, even if subject to a degree of instinctive discrimination, be able to establish his or her nationality.[843] However, children born in the country of those who themselves migrated have no access to nationality; only the grandchildren become nationals. Where only citizenship by descent is provided for, such as in Côte d'Ivoire or Nigeria, it may be impossible for the descendants of those who migrated from another country, however many generations ago, to become recognised as nationals.[844]

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[837] A Arsan 'Interlopers of Empire: The Lebanese Diaspora in Colonial French West Africa' (2014).

[838] B Manby 'Nationality Migration and Statelessness in West Africa' (2015) 46; the clearest case of laws adopted specifically to exclude Lebanese from citizenship (and thus political power) is the situation in Sierra Leone, where specific amendments to the law were made immediately after independence to exclude those not of 'negro African descent' from citizenship by birth.

[839] Manby (n 838 above) 47.

[840] See the discussion in section 1.1.2 of this thesis.

[841] Manby (n 79 above) 7.

[842] B Manby *Statelessness and Citizenship in East African Community* (2018) 38.

[843] Manby (n 838 above) 51.

[844] Manby (n 838 above) 51.

Another group of children in displacement situations are those in more vulnerable circumstances as victims of smuggling, trafficking or harmful practices, such as slavery-like practices, female genital mutilation (FGM), and child marriage. Children in these situations are often completely undocumented, and many of them also have no birth registration in their country of origin. For example, a Human Rights Watch report on girls working as domestic servants in Guinea, some of whom come from neighbouring countries, noted that most girls crossing the border from Mali to Guinea entered the country without documentation, including identity documentation.[845] A report by Anti-Slavery International on children working in the cocoa plantations in Côte d'Ivoire similarly reported that many crossed borders without any identity documents.[846] This lack of documents not only leaves the children vulnerable to trafficking and exploitation, but could also prevent them from establishing their nationality.

Children, especially girls living in cross-border territories, may flee from their country of origin to avoid acts of harmful practices. For instance**,** across the Sahel region, historical systems of slavery and caste discrimination persist in contemporary forms, perhaps most of all in Mauritania.[847] In Niger, the anti-slavery group Timidria has reported on the practice of men taking additional wives beyond the four permitted in Islam, provided those additional wives are of 'servile' origin. These women, known as *wahayu*, are bought and sold, Niger and Nigeria; especially in the Tahoua region of Niger,.[848] Typically they are sold even before puberty, and may remain in servitude their entire lives. These girls who are 'additional wives' in the *wahaya* system are usually completely undocumented, crossing borders without any identity papers. Their children, who, in Niger, are not regarded as legitimate children of the 'master' and remain as domestic servants to the family (and if girls may themselves be sold as *wahayu*), are also likely to be unregistered at birth and undocumented thereafter, which perpetuates generations of statelessness.[849]

As Van Waas writes, 'racism towards certain groups is to be found in most migration countries and with it comes new "opportunities" for discrimination and denial of citizenship'.[850] In addition, linguistic or cultural barriers may prevent people in displacement and migration situations from accessing and utilising mechanisms that can play a vital role in preventing statelessness, such as birth registration procedures or appeals procedures in the

[845] Human Rights Watch, Bottom of the Ladder: Exploitation and Abuse of Girl Domestic Workers in Guinea, June 2007, available at https://www.hrw.org/reports/2007/guinea0607/5.htm (accessed 01 November 2020).
[846] Anti-Slavery International, Ending Child Trafficking in West Africa – Lessons from the Ivorian cocoa sector, December 2010, available at https://www.antislavery.org/wp-content/uploads/2017/01/cocoa_report_small.pdf (accessed 1 November 2020).
[847] See, for example, the information at the website of Anti-Slavery International, http://www.antislavery.org/english/slavery_today/descent_based_slavery/slavery_in_mauritania.aspx, and at SOS Esclaves, Mauritania, http://www.sosesclaves.org/ (accessed 5 November 2020).
[848] Timidria and Anti-Slavery International, Domestic and sexual slavery in Niger, 2012 available at https://www.antislavery.org/wp-content/uploads/2018/10/Wahaya-report.pdf (accessed 10 November 2020).
[849] Manby (n 838 above) 79-80.
[850] Van Waas (n 37 above) 164.

event of a nationality dispute.[851] These and other scenarios entail that various factors may expose children on the move to a heightened risk of statelessness. Focusing on the two major factors, birth registration and conflict of laws, the following section presents cases of how movement, particularly forced displacement, results in statelessness among children in Africa.

ii. Children on the move, birth registration and statelessness

Lack of documentation, such as proof of birth registration, is one of the factors which could expose children to statelessness. As discussed in the previous chapter,[852] although birth registration is not a proof of nationality in and of itself, it is crucial to establishing the elements necessary to determine citizenship, including both parentage and location of birth. As the ACERWC states in its General Comment No. 2, the rights to a name, registration upon birth, and nationality are interlinked.[853] Despite its relevance in ensuring the right to nationality, the right to birth registration is one of the rights that constantly appears not to be fully implemented by African states.[854]

Several factors explain the low rate of birth registration in Africa: poverty, discrimination against women, lack of education, being part of particular indigenous groups, or belonging to certain vulnerable groups such as refugees (particularly those in protracted situations), asylum-seekers, or migrants.[855] The likelihood of displacement causing families to lose their legal documents (birth certificates or proof of identity) is very high. This makes it even more challenging for families to register their children and obtain crucial identification documents.

As discussed in the previous chapter,[856] birth registration is protected at the outset as a child's right in certain widely ratified international instruments, such as CRC, ICCPR and ACRWC. They all require registration to be effected immediately after birth and without discrimination of any kind, irrespective of the child's legal status or that of the parents. Moreover, the right to be registered at birth is also affirmed in the Convention on Migrant Workers and the Convention on the Rights of Persons with Disabilities.[857] With regard to IDPs, the Guiding Principles on Internal Displacement,[858] though, do not explicitly address the issue of registering children born to IDPs. They do, however, state that 'the authorities concerned shall issue to [IDPs] all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage

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[851] *Ibid.*

[852] See section 3.8.1.5 of this thesis.

[853] ACERWC General Comment No. 2 (n 142 above), para9.

[854] On the gravity of the problem of birth registration in Africa, see the discussion in chapter three of this thesis. See also ACERWC General Comment No. 2 (n 142 above).

[855] ACERWC, Children on the move study (2019) 29; see also ACERWC GC No. 2 (2014), para3.

[856] Section 20 of the Guiding Principles on IDPs

[857] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, art 29; Convention on the Rights of Persons with Disabilities, art 18(2).

[858] The Guiding Principles on Internal Displacement (Guiding Principles IDPs), adopted by the UN General Assembly in 1998, consist of 30 standards that outline the protections available to IDPs.

certificates'.[859] At the regional level, the Kampala Convention adopts wording similar to that of guiding principle 20.[860]

In the context of children on the move, the principles of equality and non-discrimination are central to the implementation of universal birth registration, because children who are vulnerable and marginalised are also more likely to be unregistered.[861] Violation of such a right compromise the enjoyment of other rights and, during displacements, the likelihood that lack of birth registration will result in serious abuses of human rights is most acute. Hence, it is imperative to recognise that a child's right to birth registration is equally valid and applicable to all children at all times. As the UNHCR's Executive Committee states, 'registration and documentation, especially birth registration as a proof of birth of a person, contribute to enhancing protection and the implementation of durable solutions, including by documenting links with countries of origin'.[862]

The ACERWC in its recommendations and decisions, draws the attention of various states to the gaps in their birth registration laws and practices that have left children of refugees and asylum-seeking or migrant families unregistered.[863] Numerous resolutions and reports of the UN Human Rights Council stress the importance of universal and accessible birth registration, and its critical role in preventing statelessness.[864] In March 2017 the Human Rights Council adopted a resolution on birth registration by consensus, where it stressed states' obligation to register all births in their jurisdiction without discrimination of any kind, including the cases of children born to migrants, non-nationals, asylum-seekers, and refugees. It explicitly linked the prevention of statelessness to the achievement of the 2030 Agenda's goal to provide legal identity for all, including birth registration.[865] The New York

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[859] Section 20 of the Guiding Principles on IDPs.

[860] Article 13 of the Kampala Convention.

[861] See OHCHR, Strengthening policies and programmes for universal birth registration and vital statistics development, A/HRC/33/22 (2016), para12f available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/33/22 (accessed 20 July 2020); CRC, General Comment No. 7: Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1 (2005) para. 25; ACERWC General Comment No. 2 (n 138 above); and CRC, General Comment No. 7: Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1 (2005) para. 25.

[862] UNHCR, Conclusion on civil registration (2013) available at https://www.refworld.org/pdfid/525f8ba64.pdf (accessed 23 July 2020).

[863] See, for instance, the ACERWC's Concluding Observations and Recommendations on the Initial Report of the Republic of Angola, https://acerwc.africa/wp-content/uploads/2019/07/Angola_CO_Initial_Report.pdf; Concluding Observations and Recommendations on the 1st periodic Report of the Republic of Kenya https://acerwc.africa/wp-content/uploads/2018/14/kenya%20Concluding%20Observation%20final.pdf; Concluding Observations and Recommendations on the Initial Report of the Kingdom of Lesotho https://acerwc.africa/wp-content/uploads/2018/14/Concluding%20Observation%20%20Lesotho.pdf; Concluding Observations and Recommendations on the 1st Periodic Report of the Republic of South Africa https://acerwc.africa/wp-content/uploads/2019/07/Concluding%20observation%20for%20South%20African%20Periodic%20State%20Party%20Report.pdf; and ACERWC, Communication No. Com/002/2009 (n 323 above), para40.

[864] UNHCR Good Practices Paper – Action 7: Ensuring birth registration for the prevention of statelessness (2017) available at: https://www.refworld.org/docid/5a0ac8f94.html (accessed 23 February 2021).

[865] Human Rights Committee, Birth registration and the right of everyone to recognition everywhere as a person

Declaration for Refugees and Migrants also includes important commitments for states to reduce statelessness and register the births of all refugee children in their territories.[866]

Despite these safeguards, birth registration remains difficult in situations of forced displacement. Parents on the move often have the same reasons for not registering the birth of their children as their counterparts in the general population, but in many cases, they also face additional challenges specific to their status. They may have been displaced to areas under the control of non-state armed groups, where government registration no longer takes place; they may be legally required to start the process in their place of residence, or where the birth took place; they may have to submit civil documentation lost in the course of their displacement; or the registration procedure in their area of refuge may be in a language that they do not speak.[867] There could also be barriers against foreigners and refugees registering births under regulations of the host country, discrimination by local authorities against foreigners that in effect restricts access to registration, or limited access to authorities responsible for birth registration due to restrictions on freedom of movement or the encampment of refugees or IDPs where such administrative services are unavailable. In countries where registration processes for children in displaced situation are available, many potential beneficiaries do not come forward because they have not been properly informed about the procedure, or because they fear that the registration process may involve an eventual obligation to return to unsafe places of origin.[868]

Many who are forcibly displaced will either not take their documents with them or may lose them during their movements. Documents may also be intentionally confiscated or even destroyed.[869] The absence of an effective civil registration system in the area hosting a displaced population can heighten the risk of new cases of statelessness. In the Central African Republic, for example, there has been a deliberate strategy of destroying the archives and civil registries by those involved in the current conflict.[870] Similarly, though Somalia's civil registry is generally lacking, the lowest birth registration rate is among IDPs living in rural and conflict zones.[871]

Some countries may have restrictive laws that affect access to birth registration for children in displacement situations. For instance, IDPs in Uganda face challenges in registering the

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before the law: resolution adopted by the Human Rights Council (2017) A/HRC/RES/34/L14.

[866] Articles 32, 71 and 72, and Annex 1, article 5(f) UN General Assembly, New York Declaration for Refugees and Migrants, A/RES/71/1, (2016).

[867] IDMC, Getting on the list: the registration of children born to IDPs (2015) available at https://www.internal-displacement.org/publications/getting-on-the-list-the-registration-of-children-born-to-idps (accessed 13 February 2021).

[868] *Ibid.*

[869] Immigration and Refugee Board of Canada 'Somalia: Birth registration, including the issuance of birth certificates; the registration of children attending school; title deeds; whether the owner of a home or business must obtain a title deed' (2013) available at https://www.refworld.org/topic,50ffbce582,50ffbce5112,52ab0e3d4,0,IRBC,,SOM.html (accessed 13 February 2021).

[870] NRC *Statelessness and Displacement* (2016) 21.

[871] Immigration and Refugee Board of Canada (n 869 above).

birth of their children, as the procedure has to take place in the district where the child was born.[872] Similarly, in the DRC, the law stipulates that births have to be registered in one of the parents' place of residence.[873] As the CRC Committee notes, some registration procedures may not be discriminatory in and of themselves, but they may impose burdens that affect children in displaced situations disproportionally.[874] In Kenya, as is the case in many other African countries, registration is free only if it takes place immediately after birth.[875] Such requirements may restrict registration. This is particularly relevant to children in displacement situations, given that any delay in registering is likely to be the result of a crisis rather than a choice. To overcome such challenges, it is imperative that countries review their domestic normative frameworks so that they respond to the particular needs of children in displacement situations.

The following passage illustrates of how displacement and lack of proof of nationality are linked to statelessness, particularly in the context of historic migrants and their descendants:

> Around 1935-1940, the Pemba, inhabitants of an island off Tanzania that forms part of the Zanzibar archipelago, came to Kenya looking for employment; a second wave of Pemba followed them between 1963-1970, fleeing violence related to the Zanzibar revolt in 1964; and a new generation sought refuge again after election violence in 2000. The Pemba who arrived before 1963 took advantage of the free movement agreement that existed at the time between the Kenyan coastline and Zanzibar, the so-called '10 Mile Strip'. They were able to come to Kenya without any form of travel or identification documentation. However, the majority of the Pemba, Shona,[876] people of Rwandan and Burundi descent, and others who arrived in Kenya during the colonial period carried travel permits from their country of origin and were subsequently issued with identity cards in Kenya, called 'DC cards' at the time because they were issued by the District Commissioner. DC cards were issued until 1978 when amendments were made to the Registration of Persons Act under the regime of President Moi. Between 1915 and 1947, all males living in Kenya were in principle issued with identity cards. From 1947, DC cards were restricted to African males. From 1978, identity cards were reserved for Kenyan citizens, including women, and alien cards were introduced for foreigners. The change in legislation in 1978 denied Kenyan identity cards to certain groups of historical migrants and obliged them to obtain alien cards that had to be renewed every year and did not permit them to seek employment. Even the early arrivals, many of whom have lived in Kenya for decades, had their identity cards withdrawn and were faced with deportation orders in the 1980s and 1990s. Many of these people became and remain stateless. In general, they lack birth registration as well, because they have no documentary

[872] Article 7 of Uganda's Birth and Death Registration Act of 1973.
[873] Article 116 of DRC Family Code of 1987.
[874] CRC Committee, General Comment no. 11: Indigenous children and their rights under the Convention, CRC/C/GC/11 (2009), para41 and 43.
[875] Article 8 of Kenya's Births and Deaths Registration Act of 1990.
[876] The Kenyan government recognised the Shona community in 2020 and issued an identity card accordingly as recently as July 2021.

> evidence to prove they were born and reside in Kenya. Without birth certificates, they cannot establish an entitlement to Kenyan nationality based on birth and residence in the country.[877]

In Ethiopia, more than 70,000 refugee children born there did not have their births registered until 2019, when the country adopted a new Refugee Law which allowed birth registration for refugee children born in the territory.[878] Children born before the new law can also now obtain a birth certificate retroactively.[879] In fact, most countries hosting a sizeable refugee population have very low rates of birth registration. These include Ethiopia (7 per cent), Chad (16 per cent) and the Democratic Republic of the Congo (28 per cent). The rate is even lower among children in forced displacement situations.[880]

It is also important to examine the emerging challenge around digitalising birth registration systems and legal identity and how that might interact with children on the move and statelessness. To explain how the right to nationality of children on the move is particularly affected in the context of digitalisation of birth registration systems, it is necessary to discuss the background to and challenges around the concept of legal identity.

Since the introduction of Target 16.9 of the SDGs which aspires 'to provide legal identity for all, including birth registration', globally there has been a significant boost to initiatives for strengthening civil registration and identification systems. This thesis recognises how digitalising the system could contribute to increasing the rate of birth registration. Evidence is available about the gains countries have achieved in the digitalisation of birth registration systems. In Namibia, for instance, where digitalisation is well advanced, birth registration coverage is close to 80 per cent. Mozambique likewise has made significant progress in digitalising registration services at decentralised levels. In Ghana, a scaled-up mobile birth registration system increased birth registration from 63 per cent in 2016 to 80 per cent in 2019.[881]

On the basis of these benefits, international organisations, such as the AU, the World Bank and the UN, actively encourage states to provide citizens with proof of their legal existence in an effort to combat challenges including statelessness. For instance, the AU and UNICEF have launched the 'No Name Campaign' which aims at accelerating children's right to legal identity and enhancing digital access to birth registration services.[882] The UN Statistics Division published a new draft set of guidelines on a legislative framework for CRVS in

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[877] UNHCR, Good Practices Paper (n 864 above) 20.

[878] UNHCR, In a historic first, Ethiopia begins civil registration for refugees, available at https://www.unhcr.org/news/briefing/2017/10/59f2f4757/historic-first-ethiopia-begins-civil-registration-refugees.html (accessed 10 November 2021)

[879] Ethiopia's Refugee Proclamation No. 1110/2019, adopted 17 January 2019.

[880]UNHCR, Statistical Year Book (2014) 72 available at https://www.unhcr.org/statistics/country/566584fc9/unhcr-statistical-yearbook-2014-14th-edition.html (accessed 15 February 2021).

[881] *Ibid.*

[882] See UNICEF, NoNameCampaign: For Every Child, a Legal Identity (2020) available at https://www.unicef.org/wca/nonamecampaign-every-child-legal-identity (accessed 27 October 2021).

January 2019, updating the 1998 version and expanding the scope in order to take SDG Target 16.9 into account and provide a 'holistic and integrated approach to civil registration, vital statistics, and national identity management'.[883]

Yet, in the context of prevention of statelessness, as Manby writes, SDG Target 16.9 is 'both an opportunity and a threat'.[884] This thesis argues that the way Target 16.9 is formulated could actually be misleading. The fact that international law is silent on the definition of legal identity allows the concept to be interpreted in a manner which does not necessarily align with contemporary understanding of human rights. The UN provides an operational definition of legal identity as below:

> Legal identity is defined as the basic characteristics of an individual's identity. e.g., name, sex, place and date of birth conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth. In the absence of birth registration, legal identity may be conferred by a legally-recognized identification authority. This system should be linked to the civil registration system to ensure a holistic approach to legal identity from birth to death. In the case of refugees, Member States are primarily responsible for issuing proof of legal identity. The issuance of proof of legal identity to refugees may also be administered by an internationally recognized and mandated authority. [885]

Such an understanding of the concept makes a rather risky presumption that someone will have a legal identity if his or her birth is registered. This is not always the case. First, as discussed in Section 3.7 of this thesis, birth registration does not itself confer nationality: rather, it provides the required details to prove the same. Secondly, there are cases where many are left stateless even if their births are registered, mainly due to discriminatory provisions and cases of conflict of laws. It is submitted that it would have been more accurate if Target 16.9 had read, 'to provide legal identity for all, including nationality'. Birth registration by itself is not a legal identity; it is but a way to prove someone's legal identity.

Universal birth registration is necessary, but prevention of statelessness and ensuring the right to nationality for children require a holistic review of nationality legislation. Universal birth registration is insufficient unless the right to nationality is ensured to children of unknown parents; children on the move, including those separated from their parents, trafficked children or orphans, and those with neither a birth certificate nor any other documentation; children who cannot acquire nationality from one of their parents, due to gender discrimination in the law; children whose rights to nationality depend on legal recognition of the parents' marriage both in the state where the marriage took place and in the state of the

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[883] Guidelines on the Legislative Framework for Civil Registration, Vital Statistics and Identity Management; Second Draft(2019) available at https://unstats.un.org/unsd/demographic-social/Standards-and-Methods/files/Handbooks/crvs/CRVS_GOLF_Final_Draft-E.pdf(accessed on 16 October 2022).

[884] B Manby 'Legal identity for all and statelessness: opportunity and threat at the junction of public and private international law' *World Development* (2021) 270.

[885] UN legal Identity Agenda, available at https://unstats.un.org/legal-identity-agenda/ (accessed 16 October 2022).

child's birth, where these documents are missing or considered invalid; and children whose parents' nationality is unknown or undocumented, or whose identity documents are out of date or rejected as fraudulently acquired.[886]

Beyond the challenge of the way that the terminology is formulated, current initiatives around digitalisation of birth registration systems could be discriminatory and exclusionary, particularly for children on the move. It is with regard to the potential exclusionary role that digital and mobile registration procedures could play when it comes to refugees and displaced children that the CRC Committee requires Burundi to 'create institutional structures that are accessible and free, for example, by introducing mobile units, especially in rural and remote areas and for internally displaced persons and refugee camps'.[887] In Africa, where there is a large digital divide with very few people having access to digital services, unexamined transit to digitalisation of birth registration is a recipe for exclusion from the start. It will affect not only those on the move, but also those in rural areas and other marginalised communities. Target 16.9 will only advance the SDGs commitment to leave no-one behind if it applies to all, without direct or indirect discriminatory provisions.

The ruling by the Kenyan High Court is instructive in this regard.[888] The case involves the constitutionality of the National Integrated Identity Management Scheme (NIIMS), which is a biometric database of the Kenyan population which has been established with a view eventually to give every person in the country a unique identity for accessing services. In its ruling, the High Court notes:

> [A]ll the parties are agreed that the use of digital data is the way of the future. The challenge is to ensure, among other things, that no one is excluded from the NIIMS and the attendant services. This may occur due to lack of identity documents, or lack of or poor biometric data, such as fingerprints. In our view, there may be a segment of the population who run the risk of exclusion for the reasons already identified in this judgment. There is thus a need for a clear regulatory framework that addresses the possibility of exclusion in NIIMS. Such a framework will need to regulate the manner in which those without access to identity documents or with poor biometrics will be enrolled in NIIMS. [889]

As Olivier De Schutter, the United Nations Special Rapporteur on extreme poverty and human rights, notes in his global report on the problems and missed opportunities around social protection, alternative forms of identification, including passports, driving licenses, voter identities or birth certificates should be accepted until all individuals receive digital identity cards (Non-take-up of rights in the context of social protection, April 2022). Digital systems can pass the test of child-rights consideration if they are safe and accessible, especially for children in marginalised communities including those in remote areas or

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[886] Manby (n 884 above).

[887] Manby (n 8884 above).

[888] High Court of Kenya, *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.

[889] High Court of Kenya, *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] para 1039.

uprooted by conflicts or natural disasters. For people who find themselves excluded from the digital age, including children on the move, untrammeled digitalisation of birth registrations could leave them under the shadow of statelessness.

The thesis argues that systems of birth registration should be informed by child protection principles, which advocate for the birth registration of all children everywhere without any form of discrimination. African states need to take positive measures to ensure that all displaced children under their jurisdiction have access to registration procedures without discrimination and in a way that does not increase their vulnerability. Given the exceptional circumstances that displacement involves, states should ensure that documentation requirements and administrative procedures do not prevent displaced parents from registering themselves and their newborn.

The author of the thesis further argues that birth registration systems need to see children in their own right, regardless of the status of their parents. This should apply particularly in the case of those that countries consider 'illegal' migrants. Children of parents who entered a given country 'illegally' and are themselves undocumented should be able to register the births of their children. For this to happen, reforms are required in the entire orientation of migration polices of states, with a view to making them migrant-friendly. In cases where mass deportation and migration detentions take place, it is less likely that undocumented parents will bring their children to the authorities for registration.

Hence, the thesis argues that benefitting from the blessings of one's birth registration in nationality matters can be exercised only if the migration policies pass the test of child protection principles. Policies and practices that facilitate the issuance and replacement of documents such as birth certificates, without unnecessary administrative burdens also need to be in place. The laws should be revised to ensure that documentation procedures are fast, flexible, simple and effective. This may include the recognition of official records and acceptance of unconventional proof of the displaced person's identity and legal status, regardless of the language they were issued in. They should also assist the displaced in replacing documents lost during their displacement that prove their age, marital status and previous place of residence, and support their citizenship claims.

iii. Conflict of laws and statelessness among children on the move

Conflict of laws may result in statelessness in situations where the nationality legislation of different states is inconsistent. For example, in some countries, nationality may only be acquired through familial ties or *jus sanguinis*, and even this is sometimes on a restricted, discriminatory basis through paternal ties only. Other countries confer nationality through birth on the territory, or *jus soli*, and there are various combinations of these two practices. Such differences between the laws of different jurisdictions mean that displaced populations may fall through gaps and be rendered stateless.

The risk of this happening is particularly present in the context of displacement across an international border because it implicates the nationality laws of at least two countries. If stateless persons are forcibly displaced there is a risk of 'intergenerational' statelessness for

children born in the host country unless an effective safeguard exists and is applied to the children born of stateless refugees.[890] In fact, this thesis argues that intergenerational statelessness is a flawed phenomenon which happens due to failure to implement a child-rights based approach to nationality laws. Children's rights to a nationality should be examined in their own right and not (necessarily) according to the status of their parents. It is deprivation of children's agency in nationality matters that results in intergenerational statelessness. Hence, addressing conflict of laws in nationality matters should go hand in hand with implementation of a child-rights-based approach to the right to a nationality.

The following paragraphs examine some of scenarios that may expose children in displacement situations to statelessness in the context of conflict of laws.

Residence abroad: Nationality laws worldwide differ in how they deal with the connection to their nationals who reside abroad. If legislation takes a restrictive approach to residency abroad, it may prescribe loss of nationality on the basis of a certain period of absence from the country of nationality. Where a person has become forcibly displaced outside of his or her country of origin, there is the possibility that such clauses relating to loss of nationality may be applied to him or her. Moreover, the frequent condition of regular reporting to the country's consular services to pre-empt loss of nationality may be difficult for many refugees due to the risks involved in approaching an embassy or consulate.

Limits on *jus sanguinis* or *jus soli*: Most countries use a combination of *jus sanguinis* and *jus soli* in their nationality laws, but the exact conditions set can differ greatly from one state to another. Often the laws include exceptions or limits that exclude certain categories of children from acquiring nationality. A *jus soli* regime may contain exceptions for people of a particular migration or displacement status. For example, children of irregular migrants or refugees may not qualify for nationality solely through birth on the country's territory, even if that child would also be unable to acquire nationality through *jus sanguinis* if the parents are stateless. Some states that generally apply *jus sanguinis* have limitations for children born outside the country of origin, which heightens the risk of a conflict of laws and leads to statelessness for displaced populations.

5.2.5 Statelessness and the special cases of refugee children in Africa

i. Refugee and statelessness – the legal analysis

Owing to the gravity of the problem and the legal intricacies around refugee children, this section examines their particular vulnerabilities to statelessness and provides arguments in support of possible solutions. For refugees, the fundamental premise is the notion that

> those who are either legally excluded from, or in practice cannot access, the rights of citizenship in their countries of origin as a result of persecution are given a surrogate form of protection – but one that is temporary until such times as they

[890] Van Waas (n 37 above) 169.

> can meaningfully re-assert the bonds of citizenship.[891]

But in reality, as Hovil writes

> too often this re-nationalization does not happen: while the 1951 Convention enjoins State Parties to facilitate the naturalisation of refugees in their countries as far as possible, in practice this seldom happens, leaving return as the only viable means to reassert citizenship.[892]

If, in addition to not being considered a national by any state, individuals also meet the definition of 'refugees' according to the relevant instruments, they are also considered both 'stateless' and 'refugees'. As mentioned above, regulating matters of refugee laws globally, the UN has adopted the 1951 Convention relating to the Status of Refugees, as amended by its 1967 Protocol, which remains the universal and primary legal protection instrument for refugees. The 1969 OAU Convention is another legal instrument governing refugee protection in Africa. The 1951 Convention defines a refugee as someone who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[893]

The 1969 OAU Convention incorporates the 1951 Convention definition of a refugee and elaborates on its application in different contexts. The principal purpose of the 1969 OAU Convention is to provide refugee protection in specific humanitarian situations, including large-scale arrivals of people fleeing situations or circumstances in their country of origin that fall within the Convention's article I(2) criteria:

> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[894]

When draft work began on the OAU Convention in 1964, Africa was in the process of decolonisation. As early as 1957, a surge of independence movements would see much of the continent enter into anti-colonial struggles which led to the displacement of hundreds of thousands of people.[895] Between 1963 and 1966, the number of refugees in Africa nearly

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[891] M Foster & H Lambert *International refugee law and the protection of Stateless Persons* (2019) 91.

[892] L Hovil *Refugee, conflict and the search for belonging* (2016) 74.

[893] Article 1(A) of the 1951 Convention.

[894] Article I(2) of the 1969 OAU Convention.

[895] B Rutinwa, Asylum and refugee policies in Southern Africa, Presented at Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria (2002) 50 available at https://sarpn.org/EventPapers/april2002_imp/rutinwa/rutinwa.pdf (accessed 13 August 2021); see also EO Awuku 'Refugee Movements in Africa and the OAU Convention on Refugees' 39 (1996) *Journal of African*

doubled, from 300,000 to 700,000 people.[896] These massive displacements were not unprecedented but placed a burden on the fragile order developing on the continent. This burden was only compounded by Africa's continued exclusion from an international refugee regime limited to events occurring in Europe prior to 1951.[897] These events led OAU member states to establish a separate framework, which then resulted in the creation of the OAU Refugee Convention.

There is no definition provided in either convention specifically of a 'refugee child'. Hence, the definitions are expected to be applied to all individuals regardless of age and gender. Applying a child-rights lens to the elements of the definitions provided both under the 1951 and the 1969 conventions, one may note significant legal gaps particularly in relation to proving 'persecution'. Children, particularly those fleeing without their families, face major legal challenges in proving that the human rights violations they face amount to 'persecution'. The 1951 Refugee Convention identifies five elements as reasons for persecution: race, religion, nationality, membership of a particular social group, or political opinion. The OAU Convention, in addition to the five elements, adds 'external aggression, occupation, foreign domination or events seriously disturbing public order' as elements that constitute persecution.

Child-specific forms of persecution traditionally have been excluded from the ambit of the five grounds of the basis of possible persecution. Bhabha distinguishes three different forms of persecution of children.[898] The first has no particular relationship to its subject's age – a child may, for example, be persecuted for his or her political opinion just like an adult. The second is persecution specific to children, such as infanticide, hazardous child labour, or child soldiering, or to girls in particular, such as child marriage or FGM. The last type of persecution of children is conduct that might not be sufficient to constitute persecution for an adult but gives rise to a well-founded fear of persecution for children, for example, family separation following war, forced displacement, or homelessness.

There are growing cases of movements of children due to child-specific harms, particularly those related to harmful practices such as FGM and child marriage.[899] Some states have responded to the gaps in international law by expanding the definition in such a way that it recognises child-specific harms that constitute persecution.[900] Hence, it is the opinion of the

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Laws 80.

[896] D Gallagher 'The Evolution of the International Refugee System' 23 (1989) *International Migration Review* 583.

[897] MB Rankin 'Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on' Working Paper, available at https://www.refworld.org/docid/4ff168782.html (accessed 18 August 2021).

[898] J Bhabha *Child Migration and Human Rights in a Global Age* (2016) 229–233.

[899] For instance, the UNHCR has estimated that 18,500 of the 25,855 women and girls from FGM-practising countries seeking asylum in the EU in the first three quarters of 2014 may have been survivors of FGM; see Forced Migration Review focuses on Female Genital Mutilation and asylum in Europe (2015) available at https://ecre.org/forced-migration-review-focuses-on-female-genital-mutilation-and-asylum-in-europe/ (accessed 17 August 2021).

[900] *Ibid.*

author of this thesis that the definition of refugees under international and regional laws does not respond to the specific needs and challenges of refugee children. In line with child protection systems and procedures, informed by the four underlying principles, there is a need to expand the current definitions or introduce a separate definition that caters for the needs of children in refugee situations.

As can be inferred from the phrase 'not having a nationality' in the above-mentioned definitions, a person does not need to possess a nationality in order to benefit from refugee protection. The question is what 'not having a nationality' means. Answering this requires making reference to the relationship between the 1951 Convention and the 1954 Convention. The history of the two conventions is intertwined. When stateless persons fear persecution, they will be protected as refugees, while other stateless person may turn to the 1954 Convention for protection. These are not, however, designed to be mutually exclusive categories since stateless refugees theoretically could enjoy protection under both regimes. Hence, it can be concluded that the notion of stateless persons was intended to be understood in the same way in both treaties, notwithstanding a difference in expressions. In other words, 'not having a nationality' means 'not considered as a national by any state'. As Foster and Lambert note, 'there is no logical reason, nor any that can be found in the drafting history, to suggest that these were intended to have a different meaning in international law'.[901]

The definitions explicitly allow for the possibility of stateless persons to be recognised as refugees where they face persecution in their country of origin. Although, as discussed in the previous chapters,[902] many stateless communities are *in situ* (they remain in the country of birth or ancestry), there are many stateless persons who have been forcibly displaced across an international border and who receive protection as refugees. As the UNHCR states:

> [R]efugees … may also, and frequently do, fall within article 1(1) of the 1954 Convention. If a stateless person is simultaneously a refugee, he or she should be protected according to the higher standard which in most circumstances will be international refugee law, not least due to the protection from refoulement in Article 33 of the 1951 Convention.[903]

However, assessing the claim of a stateless person pursuant to the 1951 Convention is not a straightforward exercise. It would be beyond the scope of this thesis to go into detailed discussion on this matter, but it would inform future studies and investigations to mention some of the questions around the intertwined nature of refugee-hood and statelessness. Questions that need further investigation may include whether a stateless person is required to establish a well-founded fear, or whether an alternative and more straightforward test is appropriate; whether a stateless person can ever meet the criteria for refugee status where he or she is unable to return to their country of former habitual residence; and whether denial

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[901] Foster & Lambert (n 891 above) 106.

[902] See the discussions in section 2.3.1.4 of this thesis.

[903] UNHCR 'Commemorating the Refugee and Statelessness Conventions: a compilation of summary conclusions from UNHCR's experts meeting' (2012) 12.

and withdrawal of nationality amount to persecution.[904]

ii. Legal responses to cases of statelessness among refugee children in Africa

The UNHCR suggests three 'durable solutions' to the situation of individuals who have crossed an international border seeking refuge from persecution or from civil war: voluntary repatriation, local integration in the country of first asylum, or resettlement in a third country.[905] Although voluntary repatriation to their home country has generally been viewed by national and international agencies as the best outcome for refugees, the reality is that for many refugees, repatriation may not be possible due to continued insecurity in their home countries. Resettlement in a third country is only ever going to be possible for a small minority of those affected.

The 1951 Convention provides that State Parties 'shall as far as possible facilitate the assimilation and naturalisation of refugees by such measures as expediting proceedings and reducing the costs of naturalisation'.[906] The 1969 OAU Convention does not include a similar provision on naturalisation, though the fact that it requires that countries of asylum should use their best endeavours to 'secure the settlement'[907] of refugees who are unable to return home could be interpreted in the same way. Both conventions require countries of asylum to issue travel documents to refugees. In the 2015 ECOWAS Ministerial Conference in West Africa, it was noted that 'refugees are particularly vulnerable to the risk of losing proof of their identity' and the heightened risk of statelessness in the context of protracted refugee situations.[908]

Many people in Africa are living in protracted refugee situations without immediate prospect of durable solutions. After generations abroad, a displaced community's ties with the country of origin may be lost entirely, and that country may cease to consider them as nationals, yet access to nationality of the host country is not necessarily guaranteed. For instance, Burundian refugees, who have fled ethnic conflict since the 1970s face problems with respect to return and reintegration precisely due to the protracted nature of the conflict. They have spent most, if not all, of their lives in exile, mainly in Tanzania. Their prolonged absence has

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[904] With regard to the withdrawal of nationality, there are limited circumstances where deprivation of nationality is lawful under international law. The 1961 Convention outlines circumstances in which a state may withdraw nationality, although most are conditional upon their possession or acquisition of another nationality. As stated in article 8(1) of the 1961 Convention, 'a Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless'. However, where denationalisation results in statelessness, an assessment would then be made of the legitimacy of this measure. Where the instance of denationalisation cannot be justified in international law, a finding of persecution may be appropriate; in this case, withdrawal of nationality may well constitute persecution in and of itself.

[905] UNHCR, Solutions of Refugees available at https://www.unhcr.org/50a4c17f9.pdf (accessed 25 August 2021).

[906] Article 34 of the 1951 Convention.

[907] Article II.1 of the 1969 OAU Convention.

[908] See Ministerial Conference on Statelessness in the ECOWAS Region, Conclusion and Recommendations of the Ministerial Conference on Statelessness in the ECOWAS Region, 23-24 February 2015, at para 58, available at: http://unhcr.org/ ecowas2015/E-Conclusions.pdf (accessed 25 August 2021).

meant that they have lost key rights such as the right to land, and have also, to a large extent, lost their family and cultural ties. Except for a few cases, such as Tanzania's offer to naturalise long-term Burundian refugees,[909] there is often no possibility of converting refugee status into a more permanent legal status, whether that of permanent residence or nationality.

Breaking such cases where intergenerational disconnection causes perpetual statelessness requires a durable solution which responds well to the child-rights approach, and calls for the application of the best-interests-of-the-child principle. As Willie and Mfubu write, '[T]rue child protection can only be achieved by considering the best interests of the child from childhood and beyond. An approach which fails to take a child's future into account, fails to meet the best interests of the child.'[910] The principle should be employed in practices and procedures of all state institutions in discharging their duties.

Countries which provide very limited rights based on birth in the country, in particular those which provide no access to nationality for those born in the country and resident during their childhood (enabling automatic or optional access to nationality at majority), risk creating large populations of people whose nationality is doubtful or who are stateless. Where this lack of rights based on birth in the territory is at its most acute[911] or racially discriminatory,[912] it can be near-impossible for the children of refugees to become nationals and be integrated into the national community if they do not belong to an 'indigenous' ethnic group.

In particular, there are major normative gaps in the laws of African countries with regard to naturalisation for refugees. Only a few countries provide easier terms of access to nationality for refugees in line with their obligations under international and regional instruments.[913] Others merely provide an implicit right of naturalisation, without an explicitly allowing long-term refugees to apply for naturalisation.[914] Analysing the trend, Manby notes that 'the countries that deal most effectively and humanely with long-term refugees are those with most liberal naturalisation regimes for foreigners in general'.[915]

Having a clear understanding of the concept of acquisition of nationality through naturalisation, and the position of most of African laws on this concept, would lead the reader to answer the theme that this thesis attempts to cover, namely the prevention of statelessness

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[909] UNHCR 'Tanzania grants citizenship to 162,000 Burundian refugees in historic decision' (2014) available at https://www.unhcr.org/news/latest/2014/10/5441246f6/tanzania-grants-citizenship-162000-burundian-refugees-historic-decision.html (accessed 27 August 2021).

[910] N Willie & P Mfubu, *No Future for our Children: Challenges faced by foreign minors living in South Africa* 2 *(*2016) African Human Mobility Review 441.

[911] For instance, cases in Côte d'Ivoire, Gambia, and Nigeria; see the discussion in section 4.2.1 of this thesis.

[912] For instance, cases in Liberia and Sierra Leone; see the discussion in section 4.2 of this thesis.

[913] Countries that explicitly allow refugees to acquire nationality through naturalisation include Ghana, Refugee Law No. 305D of 1992, s 34(2); Guinea-Bissau, art 34, Refugee Law No. 6/2008, art 34; Lesotho, art 4 Refugee Act of 1983; Mozambique, Refugee Act 1991; and Nigeria, National Commission for Refugees Act of 1989, art 17.

[914] For instance, article 23 of Sierra Leone's Refugees Proclamation Act 6 of 2007 provides 'facilitation of lasting solutions and local integration of refugees'.

[915] Manby (n 55 above) 168.

among children. In this regard, with a view to preventing statelessness among children, states should consider reviewing their laws on naturalisation, and making the requirements less restrictive and the procedures more predictable. Among other measures, states could reduce periods of residence in accordance with the internationally acceptable number of years. Particularly in cases where the person would otherwise be stateless, as prescribed in the Draft Protocol on Nationality and Statelessness, countries should not require that residence be lawful and continuous.[916]

It is one thing to provide laws on naturalisation with regard to the application and effect of the acquisition of nationality by adults through naturalisation on their children, but beyond that states should note that their laws and provisions on naturalisation need to take into consideration the rights of the child. In particular, rules which prevent children, particularly refugee children and others in migration situations, from applying for naturalisation in their own right, or do not give them an opportunity to be heard if the naturalisation of a parent would affect their status, might be problematic.

5.2.6 Searching for solutions

In responding to the challenges of children on the move and statelessness, the UNHCR has deployed various approaches to solutions and adopted documents, which include papers on new approaches to solutions; resilience and self-reliance from a protection and solutions perspective; updates on the comprehensive refugee response framework; updates on the UNHCR's engagement with IDPs; and the note on international protection.[917] The 2016 New Approach to Solutions, in particular, proposes a stronger focus on comprehensive and progressive responses that simultaneously address four interrelated dimensions solutions: legal, socio-cultural, civil-political and economic. The approach recognises the possibility that without taking into consideration the interactions among these dimensions, solutions will not be durable. Mechanisms to prevent statelessness among children in situations of migration and forced displacement could be applied at different stages. Hence, solutions need to exert stronger focus on prevention and on the entire spectrum of forced displacement and statelessness, recognising that many states can be the home country of the internally displaced, returnees and stateless persons, while at the same time a host country for refugees and other foreigners, as well as a country of origin for citizens in exile.

Another way of addressing statelessness among children on the move, particularly in a migration context, is adoption of an inclusion and social cohesion policy in regulating migration. In an increasingly globalised world, the growth in the absolute number of migrants over the past 50 years, and the diversification of migrants' origins, socioeconomic backgrounds and reasons for migrating, have led to more social, cultural, ethnic and religious diversity in receiving societies. As a result, the impact of migration and diversity on social

[916] Article 7 of the Draft Protocol on Nationality and Statelessness. See also section 4.3 of this thesis.

[917] UNHCR, Solutions: ending displacement and statelessness, Executive Committee of the High Commissioner, UNHCR, EC/69/SC/CRP.10/Rev.1 (2018) available at https://www.unhcr.org/5b2b71d47.pdf (accessed 25 August 2021).

cohesion has become an important concern.[918] These inclusion policies have taken multiple forms over time in different countries, reflecting societal values, including attitudes on immigration and diversity. Despite migrants' important social and economic contributions, anti-immigration sentiment has resulted in instances of intolerance, discrimination, racism, xenophobia and even acts of violent extremism towards migrants, especially in countries where nationalism, patriotism and populism have been on the rise. Inclusion policies should inform the laws of states in framing the relationship between migrants and receiving communities and preserving social cohesion. At the global level, states have recently reaffirmed the centrality of migrants' inclusion and social cohesion by making this a stand-alone objective in the Global Compact for Safe, Orderly and Regular Migration.[919] The Global Compact on Refugees likewise promotes the inclusion of refugees in the receiving country through durable solutions, such as local integration.[920]

The absence of inclusion policies may be costly, not only for migrants who may face discrimination and be marginalised, but also more broadly for social cohesion, with a heightened risk of tensions, riots and civil unrest.[921] As part of migration or stand-alone policies, migrants' inclusion can take different forms when framing how it should take place in a particular country according to its own values. The most prevalent national policy models regarding social inclusion of migrants are the model of (differential) exclusion, the model of assimilation, the multicultural model and the integration model.[922] In countries following the (differential) exclusion model, migrants are for the most part excluded from membership in a state. Assimilation considers diversity as a risk for social cohesion and requires the highest degree of adaptation by migrants and a low degree of accommodation by the receiving society. It consists of a one-way policy where migrants must fully embrace the receiving society's national identity and values, to the detriment of their original ones. By contrast, multiculturalism 'values diversity and expects a low degree of adaptation by migrants, who can retain their cultural identities, and a high degree of accommodation by the receiving society'.[923]

While assimilation was already the rule in Latin American countries, such as Argentina, during the mass migration of Europeans in the nineteenth century and the beginning of the twentieth century,[924] multiculturalism and integration were particularly prevalent in

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[918] G Appave & I David 'Integration That Values Diversity—Exploring a Model for Current Migration Dynamics' (2017) in M McAuliffe & M Klein Solomon (Eds.) Migration Research Leaders' Syndicate: Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration 165.

[919] Objective 16 of the Global Compact for Safe, Orderly and Regular Migration as adopted by the Intergovernmental Conference held on 10-11 December in Marrakech, Morocco.

[920] The Global Compact on Refugees, paras 97-99.

[921] J Gagnon & D Khoudour-Castéras 'South-South Migration in West Africa: Addressing the challenge of immigrant integration OECD Development Centre Working Paper (2012) 212 available at https://ideas.repec.org/p/oec/devaaa/312-en.html (accessed 30 September 2021).

[922] SC Hein de Haas & MJ Miller *The Age of Migration International Population Movements in the Modern World* (2014) 7.

[923] *Ibid.*

[924] B Sánchez-Alonso 'The age of mass migration in Latin America' 134 (2018) *EHES Working Papers in*

traditional immigration countries during the twentieth. The focus on assimilation shifted to multiculturalism in the 1970s, due to the inability of the assimilationist model to accommodate increasingly diverse societies.[925] Although it is still followed by some states, others have disavowed multiculturalism since the mid-1990s because it has been considered unable to counter migrants' exclusion and is perceived as a threat to national identity and values.[926] As a result, a different model has been embraced to restore a balance between diversity and unity: the integration model. This model stands in between assimilation and multiculturalism. It expects medium degrees of adaptation by migrants and accommodation by the receiving society.[927] Although no commonly agreed definition exists, it is generally accepted to be a two-way process of mutual adaptation between migrants and the societies in which they live.[928] The integration approach entails the idea that diversity is an advantage and aims to create mutual understanding and a culture of diversity to combat discrimination and inequalities.

The approach countries follow in framing their key policy areas of inclusion in various sectors such as language, education, health, housing, labour market, family reunification, political participation and nationality laws, often shows the level of compliance with their human rights obligations. In this context, and in line with the issues that this thesis discusses, the choice that countries make in adopting their social inclusion policies is at the core of prevention of statelessness among children in displacement situations. Hence, the laws and polices concerning naturalisation of migrants in general and migrant children in particular become determinant. As a process towards acquisition of nationality by a non-national, naturalisation is often considered a milestone for migrants' inclusion in the receiving country. From the social inclusion point of view, naturalisation is not an end in itself because inclusion remains an ongoing process. Forming part of broader social inclusion policies, it does, however, effectively prevent statelessness.

As discussed above, in most African countries, naturalisation can be a politically delicate issue, particularly in countries with large flows of migrants, including refugees. In most countries, naturalisation is subject to specific restrictive conditions.[929] These requirements commonly include a minimum duration of legal residency, knowledge of national language(s) and, sometimes, culture, evidence of good character and the payment of fees for the naturalisation process. The length of residence required differs from one state to another. While it averages at 7 years, it goes as high as 35 years in the case of the Central African Republic.[930]

Moreover, countries need to align their nationality laws and policies, in so far as they apply to

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Economic History, No. 134, European Historical Economics Society (EHES) 29.

[925] S Castles 'Multicultural citizenship: A response to the dilemma of globalisation and national identity?' 18 (1997) *Journal of intercultural studies* 10.

[926] W Kymlicka 'Multiculturalism: Success, Failure, and the Future' (2012) *Migration Policy Institute papers* 4.

[927] IOM *World migration report* (2020) 189.

[928] *Ibid.*

[929] See the discussion in section 4.3 of this thesis.

[930] *Ibid.*

children in displacement situations, with child protection principles and the ongoing policy direction of the AU regarding political and economic integration. In particular, the review of provisions in laws that discriminate on the grounds of race, religion, ethnicity or belonging to an indigenous group is required to ensure that they follow international and African standards on non-discrimination.

Finally, laws and policies should challenge the intergenerational approach in the protection of children's rights. The principle of non-discrimination entails that children's rights should stand independently: independently of parents' nationality (or lack of it), and independently of parents' migratory status. Children from migrant communities need to be treated in their own right. No distinction between 'migrant children' and 'native children' can pass the test of the cardinal principles. Hence, laws and policies which prohibit, or provide additional requirements, in matters regarding access to birth registration and conferral of nationality to those who would otherwise be stateless should not apply to children, regardless of the required duration of stay in generations. The author of this thesis argues that the concept of 'intergenerational' statelessness is the result of such gap in child protection responses in migration policies. If child protection mechanisms without any form of discrimination are in place, countries will not be encountering an *intergenerational statelessness*. However, for this to be achieved, a country's response to migrant children has to be revised in a manner that does not encourage the migrant or native children dichotomy.

The ACERWC's position, in this regard, presents a way forward. The Committee in its recommendations to South Africa states:[931]

> While appreciating the legislative measures taken by the State Party to accommodate the principle of non-discrimination in national laws and policies, and the very commendable refugee friendly laws and policies in the State Party, the Committee notes with concern that access to basic services by asylum seeking, migrant, and refugee children and their parents/care givers is mostly dependent on being in possession of valid refugee/asylum-seeker documentation issued by the Department of Home Affairs (DHA). Reported community xenophobia, and at times attack, is also a serious concern that needs a concerted and effective legislative, administrative and other appropriate response. Thus, the Committee urges the State Party to take all the necessary measures to ensure that these groups of children are not discriminated against, and in particular undertake measures to avoid unnecessary barriers to accessing basic education, healthcare, child protection services, and birth registration services, and guarantee among others the rights of asylum seeking, migrant, and refugee children.

Any differential treatment should be in pursuit of a legitimate purpose and in accordance with the best interests of the child as well as normative international human rights standards.[932] Differential treatment should be allowed only in exceptional circumstances. In this regard, the

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[931] ACERWC, Concluding Observations and Recommendations on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child, 2015, para 22.

[932] CRC Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration CRC/C/GC/14 (2013), para41.

ACERWC, in *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v The Republic of Mauritania*, states that

> for a differential treatment to be justified the reason for possible limitations must be founded in a legitimate state interest and limitation of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.[933]

5.3 Deprivation of nationality as a counter-terrorism measure and statelessness among children

The second issue with which this thesis engages in the context of old-new dynamics of statelessness in children relates to deprivation of nationality as a counter-terrorism measure. Deprivation of nationality[934] as a counter-terrorism measure is a relatively new discovery in citizenship scholarship. The interest is driven mainly by legislative changes introduced by European states, which then led to normative debates on the legitimacy and compatibility of citizenship deprivation powers with the principles that underpin liberal democracies.[935]

As discussed in Chapter four of this thesis,[936] in the contemporary human rights regime, deprivation of nationality is not *per se* arbitrary, since states are entitled to withdraw nationality against the wishes of the person concerned, provided that certain legal safeguards are respected. These safeguards stem from a variety of sources adopted at international, regional and national levels. They include human rights obligations, such as the prohibition of arbitrary deprivation of nationality, avoidance of the creation of statelessness, and respect for private life. The central point of the legal framework prohibiting arbitrary deprivation of nationality stems from article 15 of the UDHR.

As discussed in Chapter four of this thesis, the term 'arbitrary' goes beyond its dictionary meaning as it is understood to mean more than 'illegal'. Since 'deprivation can be arbitrary when it is discriminatory, it results in statelessness among children or it is carried out in order to avoid conferral of rights which according to international human rights law are enjoyed only by citizens'.[937] The general standards of necessity, proportionality, and reasonableness, as established by the Human Rights Council, which need to be fulfilled for deprivation of nationality, avoid arbitrariness and should also be taken into consideration in counter-

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[933] ACERWC, *Minority Rights Group International and SOS-Esclaves v Mauritania, Communication* No. 007/ Com/003/2015, available at https://acerwc.africa/table-of-communications/ (accessed on 08 February 2019), para6.

[934] For the purposes of this thesis, deprivation of nationality refers to 'any loss, withdrawal or denial of nationality that was not voluntarily requested by the individual. This includes where a state precludes a person or group from obtaining or retaining a nationality, where nationality is automatically lost by operation of the law, and where acts taken by administrative authorities result in a person being deprived of a nationality'. See the discussion in section 4.6 of this thesis.

[935] Mantu (n 784 above) 28.

[936] See the discussion in section 4.6 of this thesis.

[937] *Ibid.*

terrorism measures.[938] The protections under article 13 of the UDHR and article 12(2) of the ICCPR, which proclaim the right to enter and leave one's own country and prohibit arbitrary deprivation thereof, have particular importance to matters of deprivation of nationality in a counter-terrorism context. The UN Human Rights Committee defines the concept of 'own country' broadly, and views state actions as arbitrary where they strip a person of nationality or expel him or her to another country with a view to preventing that person from entering his or her own country.[939]

Referring to the provisions of the 1961 Convention, one may argue that deprivation of nationality leading to statelessness is not per se arbitrary and contrary to international law and *jus cogens* norms. Article 8 of the 1961 Convention allows for loss of citizenship followed by statelessness, inter alia, in situations where the citizen has shown allegiance toward another state or cases where the person conducted him- or herself in a manner seriously prejudicial to the vital interests of the state. Defining the phrase 'behavior that is seriously prejudicial to the vital interests of the State', the UNHCR's Guidelines refer to behaviours threatening 'the foundations and organization of the State' in question.[940] It could then be argued that acts of terrorism may be covered in this definition, as what is sanctioned is behaviour inconsistent with the duty of loyalty; thus, 'terrorist' citizens can be deprived of nationality and made stateless.[941]

With growing scholarship around the deprivation of nationality in the context of counter-terrorism, the legitimacy of the measure has been questioned, not only in the context of statelessness and children's rights, but generally as an option applying to all. Questions, including whether deprivation of nationality as a national security measure meets the proportionality element, whether the use of such a measure serves the purpose of protecting national security, and its disproportionate impact on individuals in vulnerable situations, such as children, are subjects of discussion.

On the basis of the general approach to prevention of statelessness in children as result of deprivation or loss of nationality, the sections below discuss particular cases of counter-terrorism measures and their possible impact on the right to nationality of children. In doing so, they present a brief account of counter-terrorism measures at continental level, focusing on Africa, and the trends in African states. The thesis attempts to answer whether counter-terrorism policies and legislation, both at the continental and national level, limit state discretion and take into consideration principles such as prohibition of arbitrary deprivation of nationality, avoidance of statelessness, non-discrimination, and ensuring the best interests of the child as the primary consideration in decisions or actions affecting children.

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[938] UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, A/HRC/25/28 9 (2014), paras 12-13.

[939] Human Rights Committee, general comment No. 27 (1999) on freedom of movement, para. 20.

[940] UNHCR, Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, HCR/GS/20/05 (2020), para61.

[941] Mantu (n 784 above) 30.

5.3.1 Continental counter-terrorism frameworks in Africa

The continued terrorism threat in Africa – in particular that of Al-Qaida in the Islamic Maghreb (AQIM), the Movement for the Oneness and Jihad in West Africa (MOJWA), Boko Haram and Ansaru in Nigeria and Cameroon, Al-Shabaab in East Africa, the Lord's Resistance Army (LRA) in Central Africa, and Ansar Al-Sharia groups in some countries of the North African region – have created a continental dilemma, as they threaten greater African political, social and economic security.[942] The threat of terrorism in Africa is influenced by a number of factors. These relate to radicalisation and violent extremism, transnational organised crime, kidnapping for ransom, the proliferation of arms, weapons and ammunition, mercenary activities, and the consequences of political instability.[943] In response to these challenges, continental, regional and national efforts have been under way as long ago as 1992.

From 1992 onwards, the OAU adopted various counter-terrorism frameworks that focused on efforts of cooperation and the recognition of terrorism and violent extremism as criminal acts. Frameworks included the resolution on the Strengthening of Cooperation and Coordination among African States[944] and the declaration on the Code of Conduct for Inter-African Relations, which rejected all forms of discrimination, injustice, extremism and terrorism, and unequivocally condemned as criminal all terrorist acts, methods and practices.[945] These efforts resulted in the adoption of a legally binding instrument – the Convention on the Prevention and Combating of Terrorism[946] and its 2004 Protocol.[947] These frameworks were refined and expanded after the transition of the OAU into the AU. In 2002, the AU adopted the Plan of Action on the Prevention and Combating of Terrorism, which embraces practical measures that substantially address Africa's security challenges. The Plan of Action takes into consideration measures in areas such as police and border control, legislative and judicial measures, the financing of terrorism, and the exchange of information.[948] Through the Action

[942] Report of the Chairperson of the Commission on Terrorism and Violent Extremism in Africa at the Peace and Security Council 455th Meeting at the Level of Heads of State and Government, Nairobi, Kenya, available at https://au.int/fr/node/25397 (accessed on 20 September 2020).

[943] *Ibid.*

[944] OAU, Assembly of Heads of State and Government, adopted during its 28th Ordinary Session, held in Dakar, Senegal, from 29 June to 1st July 1992, AHG/Res.213(XXVIII).

[945] The Assembly of Heads of State and Government, adopted during the 30th Ordinary Session, held in Tunis, Tunisia, from 13 to 15 June 1994, AHG/Decl.2(XXX).

[946] The Convention on the Prevention and Combating of Terrorism, adopted by OAU Assembly of Heads of State and Government adopted in Algiers, Algeria, on 14 July 1999.

[947] The Protocol was adopted by the 3rd Ordinary Session of the Assembly of the Union, held in Addis Ababa, from 6 to 8 July 2004 [Assembly/AU/Dec.36(III) Rev.1], in pursuance of article 21 of the Convention. Its main purpose is to enhance the implementation of the Convention and to give effect to article 3(d) of the Protocol Relating to the Establishment of the Peace and Security Council of the AU on the need to coordinate and harmonize continental efforts in the prevention and combating of terrorism in all its aspects.

[948] The Plan of Action was adopted by the first AU High Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa, held in Algiers, from 11 to 14 September 2002 and endorsed by the 2nd Ordinary Session of the Executive Council held in Ndjamena, Chad, from 3 to 6 March 2003 [EX.CL/Dec.13(II)].

Plan, the African Centre for the Study and Research on Terrorism (ACSRT) was also established to serve as a structure to centralise information, research and analyses concerning terrorism and terrorist groups, and to develop training programmes for AU member states.[949]

Moreover, the AU's Dakar Declaration Against Terrorism takes cognizance of the links between terrorism, drug trafficking, transnational organised crime, money laundering, and the illicit proliferation of small arms and light weapons.[950] The AU Commission has also developed the African Model Anti-Terrorism Law to assist member states in their efforts in fighting terrorism and to inform their national legislatures.[951] Building on these frameworks, instruments and decisions, and in response to the continued challenges encountered by states in the fight against terrorism, the AU has made a number of other decisions, resolutions, declarations and initiatives.[952]

In its approach to counter-terrorism, much of the focus is on facilitating and promoting cross-border coordination against terrorism; establishment of counter-terrorism legal frameworks and credible criminal justice systems that adequately sanction and deter the commission of terrorist acts; and strengthening member states' capacity to effectively police and control their borders to curb the illegal passage of terrorist elements, illicit arms and goods, and to deny terrorists safe havens. The link between the protection of human rights and counter-terrorism measures has not been engaged adequately in the AU's approach to fighting terrorism. Beyond the mere references with respect to the rights of a person accused of

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[949] See the website of the Centre, available at https://caert.org.dz/3389-2/ (accessed 20 September 2020)

[950] AU Dakar Declaration Against Terrorism adopted in 2004, Dakar, Senegal.

[951] The Model Law was developed following a decision of the AU Assembly, Assembly/AU/Dec.311(XV), adopted by the 15th Ordinary Session of the Assembly of the Union, held in Kampala, Uganda, from 25 to 27 July 2010, which underscored the need for renewed effort and increased mobilisation to combat the scourge of terrorism. The Model Law was endorsed by the AU Assembly, Assembly/AU/Dec.369(XVII), during its 17th Ordinary Session, held in Malabo, in July 2011.

[952] Such activities include: Decision on the Elaboration of a Code of Conduct on Terrorism, Assembly/AU/Dec.14(II), and Decision on Terrorism in Africa Assembly/AU/Dec.15 (II), ASSEMBLY OF THE AFRICAN UNION Second Ordinary Session, 10 – 12 July 2003 Maputo, MOZAMBIQUE; ASSEMBLY OF THE AFRICAN UNION Second Ordinary Session, 10 – 12 July 2003 Maputo, MOZAMBIQUE; Decision to Combat the Payment of Ransom to Terrorist Groups, Assembly/AU/Dec.256(XIII) assembly of the African Union, Thirteenth Ordinary Session 1 – 3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya; Decision on the Terrorist Attack against the Togolese National Football Team, Assembly/AU/Dec.273(XVI) ASSEMBLY OF THE AFRICAN UNION, fourteenth Ordinary Session 31 January – 2 February 2010, Addis Ababa, Ethiopia; decision on the prevention and combating of terrorism, Assembly/AU/Dec.311(XV), Fifteenth Ordinary Session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda; Declaration of Solidarity with the Republic of Kenya following the Terrorist Al Shabab / Al Qaeda Attack on the Westgate Shopping Mall in Nairobi, Kenya, Ext/Assembly/AU/Dec.1(Oct.2013) extraordinary session of the assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia; Declaration of Solidarity with the Federal Republic of Somalia following the Terrorist Al Shabab / Al Qaeda Attack on a Market in Mogadishu Ext/Assembly/AU/Decl.4(Oct.2013), extraordinary session of the assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia; available at https://caert.org.dz/?page_id=1252, accessed on 21 September 2020.

terrorism, particularly in the African Model Anti-Terrorism Law,[953] the AU has not provided detailed principles and guidance to member states on the protection of human rights during counter-terrorism measures.

It was only in 2015, when the ACHPR developed the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (the Principles and Guidelines) that the first comprehensive attempt was made to unpack the essentials of lawful state action in countering terrorism measures.[954] The Principles and Guidelines provide a set of general principles, such as non-discrimination and the obligation to provide reparations, and guidance on specific issues that the Commission regarded as being relevant to the protection of human rights while combatting terrorism.

Directly relevant to matters which this thesis discusses, the Principles and Guidelines include provisions on 'citizenship and statelessness'. These prescribe safeguards against loss of nationality and statelessness during transfers such as deportation, expulsion, and extradition of individuals accused of terrorism.[955] The Principles and Guidelines expressly require states to ensure that

> no one is exposed to statelessness solely as a form of punishment, in a discriminatory manner, or on the basis that an individual is suspected of, accused or charged with, convicted of, or otherwise determined to be a terrorist or involved in terrorist-related activities.[956]

It further prohibits the arbitrary deprivation of nationality, requiring states, in all nationality matters, to accord 'due process in line with international human rights standards and protect stateless individuals within their national territory in line with international law, including international human rights law'.[957] Though the Principles and Guidelines do not triangulate, at least in clear terms, counter-terrorism, deprivation of nationality, and their impact on the rights of children, they generally require states to consider the special status, distinct needs and particular vulnerabilities of children in terrorism and counter-terrorism measures. Hence, from a child protection point of view, there is indeed a policy gap at the continental level, as the AU and its institutions, including the ACERWC, have not in clear terms prescribed the strong link between deprivation of nationality as a counter-terrorism measure, on the one

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[953] See, for instance, article 51 of the African Model Anti-Terrorism Law: 'A person against whom measures referred to in the preceding section are taken is entitled to the protection of his/her rights of fair trial and due process, including the right to legal counsel, as recognized under applicable provisions of international law, including international law of human rights.'

[954] The Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, adopted by the African Commission on Human and Peoples' Rights during its 56th Ordinary Session in Banjul, Gambia (21 April to 7 May 2015), available at https://www.achpr.org/legalinstruments/detail?id=9 (accessed on 21 September 2020).

[955] ACHPR, The Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 5(A).

[956] ACHPR, The Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 9(A).

[957] *Ibid*.

hand, and statelessness among children, on the other.

Lack of adequate guidance at the continental level means that policies permitting deprivation of nationality as a counter-terrorism measure without giving due regard to child protection principles in general and safeguards against statelessness in particular may run unchecked. The growing trend of deprivation of nationality as a national security measure adds to the already existing challenge, as most countries do not have provisions safeguarding children against statelessness in cases where states revoke the nationality of the child concerned, or of his or her parents, guardians or caregivers.

5.3.2 Counter-terrorism laws and human rights in African states

Assessing the human rights compliance of anti-terrorism laws and their orientation to human rights helps one get a better understanding of the link between counter-terrorism and deprivation of nationality. This thesis argues that there is indeed a direct link in application of the provisions on deprivation of nationality, which in most cases are prescribed in nationality laws, and legislation that countries establish to counter terrorism. In the absence of the necessary safeguards, the interaction between these legal regimes may then lead to statelessness among children.

In the past two decades since 2001, many African countries have adopted counter-terrorism laws or modified national legislation to include counter-terrorism provisions.[958] While the objective of these laws is to counter terrorism, they sometimes contain provisions that seriously undermine human rights and fundamental freedoms. For instance, some of the laws mention the death penalty as a possible punishment,[959] while others set the pre-detention period beyond the time limit prescribed by law,[960] and limit freedom of association and assembly.[961] Countries also use broad legal definitions of terrorism that could enable the abuse of counter-terrorism laws against legitimate (non-violent) political opposition and human rights defenders.[962] For instance, citing Amnesty International's report criticising some of the provisions of Nigeria's Terrorism Prevention (Amendment) Act 2013, Ford

[958] ACHPR, Resolution No. 368 on Implementation of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa – ACHPR/Res.368(LX)2017.

[959] For instance, in Uganda the death penalty can be imposed for not only terrorist acts but for aiding and abetting terrorism contrary to the Anti-Terrorism Act No. 14 (2002). (See especially terrorist offences provided for in sections 7(1)(a) and (b), 8, 9(1) and (2)).

[960] For instance, in Niger, according to Law No. 2010-05 (2010) on combatting terrorism funding, in terror-related cases, individuals may be detained without charge for 10 days, extendable once for an additional 10 days, in contrast with the 48-hour deadline for 'ordinary' crime.

[961] For instance, regarding developments in Egypt, the OHCHR expresses its concern, noting that 'tougher new regulations under Egypt's sweeping anti-terrorism law further erode fundamental human rights and could result in more arbitrary detentions, enforced disappearances and allegations of torture, and a wider crackdown on freedom of expression, thought, association and of peaceful assembly …'. Egypt's updated terrorism law opens the door to more rights abuses, says UN expert (2020) available at https://www.ohchr.org/en/press-releases/2020/04/egypts-updated-terrorism-law-opens-door-more-rights-abuses-says-un-expert (18 September 2021).

[962] J Ford *African Counter Terrorism Legal Frameworks a decade after* (2001) 34.

points out:[963]

> Key provisions of the Act are incompatible with Nigeria's human rights obligations. Many of the provisions of the Act use terms and definitions that are imprecise and unduly broad in scope, violating the 'legality' requirement for criminal offences, and/or unlawfully restricting a range of rights such as freedom of thought, conscience, and religion, freedom of opinion and expression, freedom of association and freedom of assembly – by failing to adhere to the requirements of demonstrable proportionality. Some provisions relating to investigation, detention, and trial are not consistent with various provisions of human rights law; some administrative provisions lack any provision for meaningful access to effective legal remedies and procedural safeguards consequently infringing the rights of due process in a fair hearing.

There is also legislation which empowers law enforcement agencies to intercept correspondence, tap phone lines and conduct terrorism-related search and seizure, without giving due regard to due process of law, procedural safeguards and human rights standards.[964] In Mali, for instance, the Law on Suppression of Terrorism[965] has been used to justify human rights violations, including extrajudicial executions, arbitrary arrests, torture and enforced disappearances committed by the Malian defence and security forces in the context of counter-terrorism operations between January 2016 and June 2017.[966] Inadequate judicial oversight of compliance with counter-terrorism laws and human rights obligations protections against *refoulement* also remain a challenge.[967] In addition, there are incidents where counter-terrorism measures involving cross-border cooperation are implemented without due regard to human rights norms.[968]

Counter-terrorism polices and anti-terrorism legislation in many countries on the continent, particularly those facing the highest threat of terrorism, have focused on a securitised

[963] UW Nwosu 'Anti-terrorism legislation and human rights – an appraisal of the Nigerian terrorism (prevention) act' 5 (2011) *International Journal of Peace and Conflict Studies*, 87.

[964] See, for instance, Côte d'Ivoire's Law No. 2015-493 (2015) on the repression of terrorist activities, where the detention of suspected terrorists without formal charges is extended from the usual 48 hours to up to 96 hours. See also ISS Report, Counter-Terrorism, Human Rights and the Rule of Law in West Africa, (2019) 15, available at https://issafrica.s3.amazonaws.com/site/uploads/war-24.pdf (accessed 04 October 2020)

[965] Mali's Law No. 08-025 (2008) on the Suppression of Terrorism.

[966] See the UN Secretary-General's report on Mali in December 2017; see also the MINUSMA Human Rights Division (HRD) report on the documented human rights violations committed between January 2016 and June 2017, available at https://minusma.unmissions.org/sites/default/files/executive_summary_english.pdf (accessed 04 October 2020).

[967] Ford (n 962 above) 35.

[968] Human Rights Watch (HRW) has documented human rights violations by Burkinabe soldiers in counter-terrorism operations on the border with Mali, including unlawful detention and interrogation, beatings and the destruction of property. As ISS report states, 'In May and June 2017, soldiers from Mali and Burkina Faso captured dozens of people, 17 members of the community have disappeared but people are terrified to talk about it … Burkinabe soldiers have reportedly also taken Malian residents across the border into Burkina Faso for interrogation.' ISS Report, Counter-Terrorism, Human Rights and the Rule of Law in West Africa (2019) 14 available at https://issafrica.s3.amazonaws.com/site/uploads/war-24.pdf (accessed 4 October 2020)

approach.[969] This securitised approach to countering terrorism has resulted in challenges for the rule of law and human rights protections in these countries, including

> establishments of legislation that codify exceptional or emergency measures; human rights violations committed with impunity by security agents in the context of counter-terrorism operations; disregard for due process in the investigation, arrest, prosecution and adjudication of terror suspects; and lengthy pre-trial detention periods.[970]

This approach is contrary to global commitments on protecting the rule of law and human rights in counter-terrorism measures, as prescribed in various resolutions of the UN.

For instance, UN Security Council Resolution 1456 (2003) declares that '[s]tates must ensure that any measure taken to combat terrorism comply with all their obligations under international law … in particular international human rights, refugee, and humanitarian law'.[971] Similarly, in 2006, the policy framework governing counter-terrorism was formalised in the UN Global Counter-Terrorism Strategy, which crucially recognises that 'development, peace and security, and human rights are interlinked and mutually reinforcing'.[972] The fourth pillar of the strategy urges states to:

> make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations.

The most significant part of the global legal frameworks is, of course, UN resolution 1373 of 2001, adopted in the aftermath of the 11 September 2001 attacks on the US. This was a particularly significant instrument, being open-ended (or not time-limited) and universal in application, while imposing significant legal obligations on states. The executive directorate of the UNSC's Counter-Terrorism Committee (CTED) explains that the intent behind UNSC resolution 1373 is that states establish

> a clear, complete and consistent legal framework that specifies terrorist acts as serious criminal offences, penalizes such acts according to their seriousness and

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[969] To address this challenge, there is a need, as Mantu writes, for 'judicialisation' of counter-terrorism measures. This could encourage state authorities and national courts to take internationally agreed nationality standards more seriously at a time when citizenship-deprivation powers are inscribed within national security and counter-terrorism policies; See Mantu (n 784 above) 39.

[970] ISS Report, Counter-Terrorism, Human Rights and the Rule of Law in West Africa (2019) 2 available at https://issafrica.s3.amazonaws.com/site/uploads/war-24.pdf (accessed 04 October 2020).

[971] UN Security Council Resolution 1456 (2003) adopted by the Security Council at its 4688th meeting, on 20 January 2003.

[972] The United Nations Global Counter-Terrorism Strategy was adopted by General Assembly Resolution 60/288 in 2006.

> helps the courts bring terrorists to justice. This framework should in turn provide the basis for the development of a domestic counter-terrorism strategy that is rooted in a legal approach, ensures due process of law in the prosecution of terrorists and appropriately protects human rights, while combating terrorism as effectively as possible.[973]

Contrary to these international standards, the development of counter-terrorism policies and legislation continues to unfold without a clear human rights dimension in general and children's rights one in particular, and so states are increasingly introducing wider definitions of what constitutes a terrorist act, thereby expanding in number the types of behaviour that may lead to loss of nationality.

Most of the anti-terrorism laws in Africa do not include deprivation of nationality as a measure to counter terrorism. It is only in Nigeria, where the Terrorism (Prevention) Act of 2011, amended in 2013, while protecting citizenship by birth, leaves a citizen by either registration or naturalisation liable to forfeit or be deprived of his or her citizenship in the event that he or she is declared a suspected international terrorist by the President.[974] This provision in the Nigerian Terrorism Prevention Act is not only a regressive measure, judged by international human rights standards, but it also contravenes section 28(1) of the 1999 Constitution, which provides the condition for forfeiting of Nigerian citizenship by naturalisation or registration, where a person of that status 'acquires or retains the citizenship or nationality of a country, other than Nigeria, of which he is not a citizen by birth'.

Such trends of disregarding human rights standards and lack of due process of law in the anti-terror policies and legislation, coupled with the pre-existing challenges in nationality laws of most African countries, could be a recipe for cases of statelessness in children on the continent. As discussed in chapter four of this thesis,[975] although most African states have legislation which prohibits deprivation of nationality against a person's will from those who are nationals from birth, those who have acquired nationality later in life are not protected from statelessness, as only a few countries provide clear safeguards against statelessness in cases of deprivation of nationality.[976] As mentioned above in this section, among the permissible grounds for deprivation of nationality, according to the 1961 Convention, are cases where the person has conducted him- or herself in a manner seriously prejudicial to the vital interests of the state. The phrase 'behaviour that is seriously prejudicial to the vital interests of the State' could easily fall within the usually broad definitions that states provide in their anti-terror policies and legislation. Laying the grounds for deprivation of nationality for naturalised citizens, African laws uses general phrases such as 'disloyalty', 'against the

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[973] OHCHR, Human rights, terrorism and counter-terrorism, factsheet 32 available at https://www.ohchr.org/sites/default/files/Documents/Publications/Factsheet32EN.pdf (accessed 20 October 2020).

[974] Nigeria, Terrorism (Prevention) Act of 2011, amended in 2013, s 9(3).

[975] See the discussion in section 4.6 of this thesis.

[976] The countries are Lesotho, Mauritius and Zimbabwe. Countries such as Namibia, Rwanda, Senegal and South Africa provide partial protection, allowing statelessness to result in some circumstances, or providing a rather vague guarantee. See the discussion in section 4.6 of this thesis.

public good', 'prejudicial to the interest of the country' or 'incompatible with the status of a national'.[977] In different situations and countries, such terms could easily be interpreted as constituting acts of terror, and so form the basis for deprivation of nationality, with no regard to the national status of the individual concerned. Moreover, the fact that most anti-terror laws in Africa hardly fulfill the requirements of due process of law and procedural guarantees, revocation of nationality on the basis of terrorism would definitely subject the person to arbitrary deprivation of nationality, which is prohibited under the international and regional instruments discussed in this thesis. The growing trend of deprivation of nationality as a measure for counter terrorism adds to an already existing challenge, as most countries do not have provisions safeguarding children against statelessness in cases where states revoke the nationality of the concerned child or of his/her parents, guardians or caregivers.

As a backdrop to the above discussions, and in the context of the main focus of this thesis, there is a need to discuss the implication of the intricacies around counter-terrorism, the denial of children's right to nationality, and the prevention of statelessness. The following section explores how denial of nationality, of children or their parents, as a national security measure in the context of counter-terrorism relates to children's right to nationality and the prevention of statelessness.

5.3.3 Ensuring security without making children statelessness

Deprivation of nationality as a counter-terrorism measure could impact on the right to nationality of children in two ways. First, there could be direct deprivation of the nationality of the concerned child or group of children, mainly based on the fact of their association, real or imagined, with terrorism and extremist groups. Secondly, there could be instances which allow for the loss of nationality by children whose parents also lose that nationality, which is referred to as derivative loss of nationality. The second instance, the derivative loss of nationality, is discussed in chapter four of this thesis, where it is argued that children are autonomous rights-holders and that their rights are, in principle, not dependent on anyone else or on any relationship; thus, depriving someone of nationality should not affect his or her children in any instance.[978] International and regional human rights laws recognise the independent right of children to acquire a nationality, as well as to preserve this nationality. Preserving the child's right to a nationality is particularly important in this regard, as prescribed in article 8(1) of the CRC, which requires states to 'respect the right of the child to preserve his or her identity, including nationality'.

Hence, focusing on direct deprivation of nationality, the section below presents arguments on the legal safeguards that need to be in place against deprivation of nationality to prevent statelessness among children associated with terrorism in the context of counter-terrorism measures.

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[977] For detailed discussion of terminology used in African nationality legislation regarding deprivation of nationality on the basis of the permissible grounds in article 8 of the 1961 Convention, including the difference in approach between Commonwealth and francophone countries, see Manby (n 246 above) 172.

[978] See the discussion in section 4.6 of this thesis.

i. Children associated with terrorism and violent extremist groups

Children who are considered as 'terrorists' by the state concerned could be deprived of their nationality, particularly in countries where no restrictions exist in the relevant laws regarding the age of those who could lose nationality. While this issue can be slightly mitigated by the requirement of a minimum age of criminal responsibility, the issue nevertheless continues to exist for children above the prescribed age, which is already very low in many African countries. Moreover, even if the minimum age of criminal responsibility is set relatively higher, as mentioned above, in most countries in Africa, counter-terrorism proceedings are not subject to the ordinary criminal justice administration system, which could then put all children at risk of losing their nationality regardless of their age. It has already been sufficiently discussed in the previous chapters of this thesis that depriving the nationality of the child, particularly where statelessness ensues, is generally inimical to the best interests of children; hence, it should be prohibited in all instances. However, considering the growing trend of deviations from the general human rights standards in counter-terrorism measures, it would be important to look into the particular cases of children associated with terrorism and violet extremist groups. Child protection is at the centre of the argument of this thesis; thus, any measure involving the right to nationality of children associated with terrorism should accordingly be informed by child-rights principles.

The current discourse on violent extremism focuses largely on young adults, and so overlooks key drivers, influences and causal pathways that are specific to children. Children can be drawn into violence or be exposed to the messages of extremist groups through a range of means. These include children's biological tendency towards risk-taking and heightened vulnerability to polarised message content. As the 2019 report of the Office of the Secretary General Special Representative on Violence against Children (SRSG-VAC) states:

> [W]hen children become associated with violent extremist groups, this can reflect an age-specific psychological response to their surroundings or circumstances … for example, where children grow up being exposed to chronic marginalization, violence or social injustice, joining an extremist group can represent an act of agency, or a means to feel connected, assert power or exact revenge.[979]

Reports show that many members of violent extremist groups in Africa fall between the ages of 15 and 35.[980] According to the SRSG-CAC, more than 2,500 boys were recruited and over 1,600 children abducted by al-Shabaab in 2018.[981] There are also cases of child trafficking for the purpose of radicalisation.[982]

There is now growing scholarship in violent extremism that goes beyond the traditional idea of 'push' and 'pull' factors[983] and identifies the personal, contextual and situational drivers

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[979] SRSG-CAAC 'A Child-Resilience Approach to Preventing Violent Extremism' (2019) 6.

[980] ISS 'To prevent further radicalisation and abuse, juvenile terrorist suspects need special attention, separate from adults' (2019).

[981] Report of the Secretary-General, Children and armed conflict A/73/907–S/2019/509 (2018), para 10.

[982] ACERWC, Continental study on the impacts of conflicts and crises on children in Africa' (2016).

[983] According to the UN Secretary General's Action Plan on Violent Extremism, 'push factors' refer to 'the

behind the phenomenon. Such inquiries should also allow for more nuanced linkages to be examined in counter-terrorism measures and the way they respond to the cases of children and their association extremist groups. First, it is important to note that when children become affiliated with extremist groups, it is not always because they are pushed or pulled. They may be forced, or sometimes follow their family or existing group; in some cases, their engagement reflects a child-specific response to their surroundings or circumstances.[984]

It is in consideration of this fact the ACERWC in its General Comment No. 6 on article 22 of the ACRWC states that children associated with armed groups, including all non-state armed groups, such as those designated as terrorist groups, should be considered primarily as victims.[985] Understanding children as victims in this regard requires examination of not only the legal regime, but also other disciplines, such as scholarship on developmental psychology, which provide answers to underlying questions in juvenile delinquency, including violence, criminality and gang membership. Children's involvement in acts of terrorism results from an interaction of risk and protective influences across multiple domains, including the individual, family, peer group, school and community,[986] and the antecedents usually come into play during early childhood. Hence, responses need to be multidimensional and long-term, which requires policies supporting establishment of a comprehensive continuum of programmes targeting the community, home and school levels, with tools for prevention, intervention and suppression of terrorism, radicalisation and violent behavior among children.[987] As a report by the SRSG-VAC puts it:[988]

> The policy discourse on violent extremism needs to pay greater attention to key drivers, influences and causal pathways that are specific to children. These include their biological tendency towards risk taking, and heightened vulnerability to polarized messaging. Policy-making also needs to take into account that extremism can reflect a child-specific psychological response to chronic marginalization, social injustice and/or violence.

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conditions conducive to violent extremism and the structural context from which it emerges. These include lack of socio-economic opportunities; marginalisation and discrimination; poor governance; violations of human rights and the rule of law; prolonged and unresolved conflicts; and radicalisation in prisons.' 'Pull factors' relate to 'the individual motivations and processes, which play a key role in transforming ideas and grievances into violent extremist action. These include individual backgrounds and motivations; collective grievances and victimization stemming from domination, oppression, subjugation or foreign intervention; distortion and misuse of beliefs, political ideologies and ethnic and cultural differences; and leadership and social networks.' See General Assembly Report A/70/674 (2016) paras. 23 and 32-37.

[984] Office of the SRSG on Violence against Children 'A Child-Resilience Approach to Preventing Violent Extremism' (2020) 9.

[985] ACERWC, General Comment No. on Article 22 'Children in situations of conflict' (2020), para 58.

[986] JD Hawkins, RF Catalano, & JY Miller 'Risk and protective factors for alcohol and other drug problems in adolescence and early adulthood: implications for substance abuse prevention' 112 (1992) *Psychological Bulletin* 65.

[987] JC Howell & A Egley 'Moving Risk Factors into Developmental Theories of Gang Membership' 3 (2005) *Youth violence and criminal justice* 334.

[988] SRSG-CAAC 'Office of the SRSG on Violence against Children 'A Child-Resilience Approach to Preventing Violent Extremism' (2020) 6.

If children associated with terrorism and extremist groups are to be considered as victims, measures involving deprivation of nationality, with or without statelessness, would not pass the test of the best-interests requirement. It is the view of this thesis that deprivation of the nationality of a child, as a counter-terrorism measure, fails to meet the requirements of a child-friendly justice system, which primarily considers children as victims. Hence, the thesis concludes, deprivation of a child's nationality as a national security measure in the context of counter-terrorism should be outlawed entirely – even if it does not leave the child stateless.

5.4 Conclusion

The chapter examines the old-new dynamics of statelessness among children in Africa. Focusing on two major factors – children on the move and deprivation of nationality as a counter-terrorism measure – the chapter presents arguments on how these instances interact with statelessness in children. The chapter identifies significant gaps in normative responses that result in gaps in the prevention of statelessness among children. Regarding children on the move, the biggest challenge lies in gaps in naturalisation laws. The chapter examines the highly restrictive and discretionary naturalisation procedures in Africa, which do not respond positively to matters of nationality and prevention of statelessness among children on the move. The fact that most laws and policies do not consider children in their own right allows intergenerational statelessness to prevail, a phenomenon, the chapter argues, resulting from gaps in child protection responses in migration policies. The chapter proposes development of migration responses informed by child protection mechanisms in a manner that does not entertain the migrant-native children dichotomy.

Reaching this conclusion, guided by child protection principles and pan-African initiatives on regional integration and free movement of people, the chapter examines gaps in international and regional instruments. In relation to counter-terrorism measures, the chapter examines statelessness in children as part of the bigger discourse on human rights and terrorism. The challenges in the right to nationality and prevention of statelessness in children in the context of counter-terrorism measures emanate primarily from the lack of a clear human rights dimension in counter-terrorism policies and legislation. Such a disconnect allows states to introduce an arbitrary definition of a terrorist act, so enlarging the types of behaviours that may lead to loss of nationality. Considering both the direct and derivative impact of deprivation of nationality on children, the chapter argues that children associated with terrorism and extremist groups should be considered as victims; hence, measures involving deprivation of nationality, with or without statelessness, do not pass the test of the best-interests requirement. The thesis concludes that deprivation of a child's nationality as a national security measure in the context of counter-terrorism should be outlawed entirely, even if it does not leave the child stateless.

Chapter Six: Conclusion

6.1. Major issues discussed in the thesis

The thesis examines the problem of statelessness among children by assessing the normative measures that African states have taken to ensure the right to nationality for all children and the prevention of statelessness. The thesis sets out the history, philosophy and politics of nationality and statelessness in Africa, and how they relate to cases of statelessness among children on the continent. Adopting a child-rights approach to the prevention of statelessness, the thesis examines the particular vulnerabilities of children and identifies the scale and impact of statelessness on children. Various factors that may lead to statelessness at birth, such as conflict of laws relating to the attribution of nationality to a newborn child and discrimination in nationality laws, are discussed in the context of Africa. The laws and policies of countries regarding attribution of nationality to children of unknown parents, children born to migrant or refugee parents, children born to indigenous communities, children involved in international adoption, and the role of birth registration have been examined comprehensively. Considering historical and political debates on state formation in Africa, the thesis identifies common trends of statelessness among children in the context of old and emerging dynamics. Since the nationality of a dependent child often remains linked to the nationality of his or her parents, the thesis also discusses the threat of statelessness where the loss or deprivation of the nationality of the parent automatically affects the child's nationality. References are made to relevant provisions of international and regional laws and their effectiveness in preventing statelessness among children is critically analysed. One may ask, then, "what is new in all of this?"

The thesis recognises that it deals with old problems. Statelessness and its particular impact on children is an old problem; but the gaps in laws which create statelessness among children are indeed existing challenges, and the unfinished debates on state formation, borders and belonging and their link to statelessness are not alien to governments, scholars and policy-makers in Africa. In recognition of the challenges of statelessness among children in Africa, attempts to address the issues have been made at national, regional and continental levels. Measures ranging from enactment or amendment of legislation and development of policies to launching campaigns have been taken by various countries. Regional blocs like ECOWAS have introduced action plans to prevent statelessness in their respective regions. Responding to the UNHCR's global campaign to end statelessness by 2024, most African countries have demonstrated high-level political commitment to addressing matters of statelessness at the country level. The AU and its mechanisms, such as the ACERWC, ACHPR, AfCHPR and AUC, are increasingly engaging statelessness in their activities. The introduction of the draft protocol on specific aspects of nationality and eradication of statelessness in Africa, with provisions dealing with children's rights, clearly demonstrates the continent's growing attention to matters of statelessness among children.

Despite all these efforts, statelessness continues to be a significant problem adversely affecting children and their rights in Africa. The continent is still facing intergenerational statelessness, which is driven by the interaction of existing (old) factors and emerging (new)

trends in regard to the right to nationality.

Examining the gaps in international and regional instruments, the thesis argues that, to the extent that the enjoyment of the right to nationality entails avoiding statelessness, the international legal definition of 'statelessness' is too narrow to accommodate the practical extent of the crisis of statelessness that endangers the aspirations enshrined in international laws. The definition of a stateless person in article 1 of the 1954 Convention is a purely technical one that ignores the power of states to politically manipulate citizenship in both law and practice. The thesis argues that international protection should be enhanced to develop elaborated principles that set out the circumstances under which a state's failure to safeguard the rights of individuals leaves them without national protection and therefore in effect makes them stateless. Without having a better understanding of what constitutes effective nationality, it would be difficult to promote the promise in contemporary international and regional human rights standards.

Moreover, the thesis also identifies gaps in protection, under the nationality provisions in the general human rights instruments and the provisions in the 1961 Convention, and proposes mechanisms that should be adopted, including through a purposive reading and holistic application of child-rights principles. Mapping trends in African laws and policies on matters of nationality and the prevention of statelessness in children, the thesis identifies significant gaps in the child-rights based approach to nationality matters. Such lack of a *child-rights based* approach in nationality matters is attributable primarily to the fact that nationality laws are mostly drawn from the colonial era, when there was a limited discourse on human rights in general and children's rights in particular. Guided by the four cardinal principles in the child-rights discourse, and drawing inspiration from pan-African responses to continental integration, the thesis identifies interlinked challenges that hamper the legal responses of states to children's rights to nationality and thus aggravate the perpetual cases of statelessness among children on the continent.

From the cases and arguments presented in the previous chapters, the thesis identifies two major factors that need to be discussed. The two factors are (i) the general lack of a pan-African orientation on matters of nationality, and (ii) gaps in legislative measures including discriminatory provisions. Focusing on these two factors, the author presents the conclusion of the thesis. The reader should note, however, that each chapter in the thesis includes detailed reflections on the matters discussed and conclusions are accordingly provided. Hence, without going into the details and repeating the thematic conclusions, this chapter attempts to engage with grand-level matters which need to be addressed through legal responses for ensuring the full realisation of the right to nationality of children and the prevention of statelessness.

6.2 Failure to build on African values to resolve statelessness: The quest for a pan-African notion of nationality

For legislation to play a role in preventing statelessness in general and among children in particular and to ensure a contextual legal response to the problem, the narratives and

presumptions around African states and their nations should be revisited. As discussed in chapter one of this thesis,[989] the debates on nationality and *who belongs where* in Africa are primarily linked to the history of colonialism and the manner in which pre-colonial Africa is perceived; and how that influences, among others, political decisions, literature, laws and policies in the postcolonial era. In chapter one, there is comprehensive discussion of how the postcolonial conception of *states* shapes the legal approach to nationality in Africa.[990] The debates around *inclusion* and *exclusion*, the responses of states to the politically contested issue of *undocumented migrants*, states' categorisation of *desirable* and *undesirable* flows of human labour and capital in an era of globalisation – these all result from the notion of nation-states and nationality in postcolonial Africa. Such a notion is particularly relevant to the formation of nation-states in Africa, where colonial powers framed themselves as the archetypes of *modernity.* For them, pre-colonial Africa was considered as lacking, or lagging behind. This assumption needs to be interrogated further. The author argues that it directly affects legal responses to nationality and statelessness in children, and so the author presents evidence and arguments to substantiate that conclusion.

The concept of nation-states and nationality as we see it today in postcolonial Africa is influenced by what theorists call the 'relational theory of postcolonialism and imperialism'. Because the formation of African nation-states was forged in the historical context of colonial and postcolonial interdependence, understanding the relational theory of nationality would help in explaining the debates around nationality. At the core of its formation is the imposition of Eurocentric ideologies and imperatives.[991] Referring to the nature of nation-states in the era of post-colonialism and imperialism, this theory argues that the nation-state achieved global dominance as a political and cultural form in the context of European colonial expansion.[992] As Hall and Gay write, the nation-state emerged in the wake of 'the whole process of expansion, exploration, conquest, colonisation, and imperial hegemonisation which constituted the "outer face," the constitutive outside, of European and then Western capitalist modernity after 1492'.[993] Theorists of postcolonialism and imperialism focus on the nation as a product of these broader flows. The nations that were forged in this process were thus constructed in relations of both cultural and political-economic interdependency, a relation which also shapes their legal regimes.

It is this unexamined application of such a Eurocentric ideology in state formation that creates the dichotomy of what pan-African scholars call *legal citizenship* and *community citizenship, citizens* and *subjects,* which in turn exacerbates the politics of *othering* in nationality legislation.[994] These particular historical and political formulations define the way

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[989] See the discussion in section 1.1.3.

[990] See the discussion in section 1.2.2.

[991] Wiley (n 187 above) 68.

[992] T Mark 'Berger, The Nation-State and the Challenge of Global Capitalism' 22 (2001) *Third world quarterly* 889.

[993] S Hall & P Du Gay *Questions of cultural identity* (1996) 249.

[994] Explaining this historical factor in nationality matters, Mamdani argues that colonialism in Africa created two categories of people: citizens and subjects. While the subjects, constituting the native population, 'were bound to their rural "ethnic groups" and spoke the language of tradition and custom, citizens were usually those living in urban areas and ruled by rights, duties, and privileges'; see M Mamdani 'Citizens and Subjects:

citizenship/nationality is perceived in postcolonial Africa. The imposed legal regime mostly disregarded the role of customary laws and how African societies regulate matters of belonging: on the one hand, African central states are governed by civil law and formal institutions, while, on the other, the local state or native authorities enforce laws based on custom. Legal responses to the right to nationality of children should then take into consideration the historical and political impacts of dual citizenship/nationality which causes considerable numbers of people to be excluded from legal citizenship, and leaves many at risk of statelessness on the continent. If the notions of nationality associated with the postcolonial state are of Western origin, their operationalisation in Africa should be influenced by local ideas, values and circumstances, most of which are based on the notion of *indigeneity*.[995] Borrowing the historian Parkinson's claim, the author argues that it would be a mistake to believe that all political ideas have been thought out in Europe and North America.[996] The thesis argues that the notion of attachment to one's community, and through it, to the soil of the ancestors or the homeland, should inform normative responses to the right to nationality and the prevention of statelessness in Africa.

In addition, the references to pre-colonial Africa and how nationality/citizenship is defined plays a role in settling the *inclusion-exclusion* debates. What it meant to be a citizen in a given polity in pre-colonial Africa was defined through a notion referred as 'civic character of citizenship'. It implied civic activity, public spiritedness and active political participation by members of a political community. In pre-colonial Africa, these three types of activity consisted of participation in the deliberative or judicial activity through lineage councils or the village palaver, paying tribute and going to war.[997] With respect to entitlements, the main benefits of citizenship were access to land and collective security in the form of protection of life and property against criminality and/or external threats. Although Africans did not develop elaborate systems of law comparable to those of modern polities in the West, the concept of the consent of the governed was an integral part of the customary legal framework. This aspect of citizenship in the pre-colonial Africa is well explained by Max Gluckman in his study of the Bantu kingdoms of Central and Southern Africa.[998] Unlike the liberal model of citizenship and its individualistic focus, it is this tradition of social democracy with its emphasis on the common good that comes closest to the political values

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Contemporary Africa and the legacy of late colonialism' (2018).

[995] Explaining the ontological conception of citizenship, Nzongola-Ntalaja discusses 'indigeneity' as a ground and condition of membership in a theoretically timeless kinship community defined by identification with a specific homeland or collection of ancestral lands in Africa; Keynote Address by Georges Nzongola-Ntalaja, Professor of African Studies at the University of North Carolina at Chapel Hill, available at http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/CDD_Citizenship_and_Indegeneity_Conflicts_in_Nigeria.pdf (accessed 02 August 2022).

[996] CN Parkinson *The Evolution of Political Thought* (1958) 7.

[997] Keynote Address by Georges Nzongola-Ntalaja, Professor of African Studies at the University of North Carolina at Chapel Hill, available at http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/CDD_Citizenship_and_Indegeneity_Conflicts_in_Nigeria.pdf (accessed 02 August 2022). CN Parkinson 'The Evolution of Political Thought' (1958) 4.

[998] M Gluckman *Custom and Conflict in Colonial Africa* (1955).

of precolonial Africa.

Another aspect of citizenship in pre-colonial Africa is the case of multiethnic and multicultural societies where individuals had multiple identities, with the importance attached to any of them varying depending on circumstances. As Berman points out, 'pre-colonial political and socio-cultural boundaries were marked by fuzziness and flexibility; and Africans existed within a reality of multiple, overlapping and alternative collective identities'.[999] This shows that Africa had experienced *statehood* of its own prior to the arrival of Europeans. The territory of present-day Nigeria, for instance, was made up of many different political entities. They included the Yoruba kingdoms of today's south-west Nigeria, the Hausa-Fulani cities and emirates of the north, the Nupe kingdom centred on the Niger River, the Edo (later Benin) kingdom in the south, and other numerous small states, as well as non-centralised communities such as the Igbo society of today's south-east Nigeria. As Manby and Momoh write, 'these different polities operated with a variety of political structures and concepts of nationhood.'[1000]

The case of the Kuba kingdom of the Congo, for example, illustrates how multiple individual identities in multiethnic and multicultural pre-colonial societies in Africa shaped the contemporary notion of citizenship. In his authoritative history of the Kuba people, Vansina presents them as a multiethnic society consisting of five ethnic groups:[1001]

> The Kuba kingdom consisted of one nation – a Kuba nation – relying heavily for its identity on the central Kuba chiefdoms led by the Bushoong as its core group, and supported at different levels of attachment by the peripheral Kuba chiefdoms, which shared a common culture with the core group, and by four ethnic minorities (Kete, Coofa, Cwa, Mbeengi), which were for the most part oppressed minorities. If all of these peoples recognized themselves in a common ancestry as the 'children of Woot', the minorities were clearly less integrated in the political system than the Kuba proper, who were at the same time differentiated between the central and the peripheral groups. For each of the five ethnic groups, there were at least two different levels of citizenship, at the level of the chiefdom and that of the kingdom. Obviously, the intensity of allegiance to one or the other citizenship was a function of circumstances. Today, five centuries since the formation of the kingdom, a Kuba has three additional identities: as a Kasaian, a Congolese and an African. As a Congolese citizen, a Kuba individual could still be a victim of ethnic cleansing and expelled from the Congolese province of Katanga in 1992-94, on the account that his/her parents or grandparents had settled there from the Kasai province.

Despite some widely held presumptions, historians and archaeologists argue that there is evidence of organised political order and state in the pre-colonial Africa, in its own context.

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[999] BJ Berman 'Ethnicity, Patronage and the African State: The Politics of Uncivil Nationalism' 97 (1998) *African Affairs* 310.

[1000] B Manby & SO Momoh 'Report on Citizenship Law Nigeria, Global Citizenship Observatory' (GLOBALCIT) (2020) 2.

[1001] J Vansina *The Children of Woot: A History of the Kuba Peoples* (1978).

The Nubian Civilisation in the Central Nile Valley, the Axumite in Ethiopia, ancient Egypt, the Luba Kingdom around the Congo Basin, the Buganda in the Great Lakes region, the rise of Mali in the 13th-15th century, the Housa State of Northern Nigeria, the Soninke kingdoms in Ghana and the Yoruba Land in the Niger Basin, and others, show ample evidence of the existence of organised political order in pre-colonial Africa. The chieftancies, kingdoms and sultanates demonstrate aspects of various institutions that define a *state* as is the case in European countries; these signs of a state range from sovereignty, territoriality, administration of land, to trade exchange and military engagement.

Similarly, archaeological evidence shows that, in the pre-colonial era, African political entrepreneurs drew from a diverse set of local and exotic cultural materials in crafting organised political power, resulting in an equally diverse array of state forms across the continent. For instance, ancient Egypt provides what archaeologists call clear material evidence for the emergence of a social hierarchy and centralised state in Africa.[1002] In the same way, archaeologists produce evidence of statehood, including the long-distance trade in antiquity in the ancient Ethiopia, the structures and trade exchanges at Adulis on the Eritrean coast, and the ancient intensified trade on the Swahili coast.[1003] Although identifying the exact time of emergence of states' political institutions is difficult to do, archaeological data and evidence provide valuable insights into the social processes of power associated with state formation and the notion of national belonging in pre-colonial Africa.[1004]

The author argues that, in order to ensure the right to nationality and prevent statelessness among children, African countries need to undertake comprehensive legal reform processes. However, these comprehensive legal reforms can be effective only if they challenge the presumptions around the nature of states and the notion of nationality/citizenship not only in contemporary Africa but also in pre-colonial Africa. However, it should be noted that the thesis does not recommend re-draw the boarders of the continent. Rather, the claim that organised political power did not exist in Africa before colonisation, or if it did exist it came from the Western world, should be challenged, as it does not reflect the reality of the various kingdoms and chieftancies in the pre-modern era. Moreover, the presumption that considers the colonial period as the very beginning of organised political power, law and order on the continent should also be challenged, as it deviates from the historical facts of many African countries and their civilisations. Such an approach informs legal responses to speak to the contextual realities of African communities and their understanding of inclusion in a particular polity. It would particularly enable states to address the challenges of statelessness among children on the move and those trapped in intergenerational statelessness, and the challenges around the restrictive and discriminatory laws on naturalisation. Moreover, as discussed in chapters three and four, most of the discriminatory laws in nationality matters target particular groups of communities in a given polity. Revisiting such presumptions would also address the discriminatory provisions in national legislations.

[1002] For detailed discussion of archaeological evidence regarding nation-states, see JC Monroe 'Power and Agency in pre-colonial African state' 42(2013) *Annual Review of Anthropology* 17-35.
[1003] *Ibid*.
[1004] *Ibid.*

6.3 Compliance with states obligations in legislative measures

As discussed in chapter three, the primary child-rights instruments at the global and African levels, the CRC and ACRWC, place an obligation on state parties to undertake legislative and other measures to ensure the effective implementation of the rights contained within them. Broadly speaking, the obligations require State Parties to undertake all appropriate legal, policy, budgetary, administrative, and other measures for the implementation of the rights recognised in the respective instruments.

The general measures of implementation that states are required to undertake for the fulfilment of their obligations under the CRC and the ACRWC may include establishment of national mechanisms for coordination implementation; law reform and judicial enforcement of the rights of children; awareness-raising, training and education, resource allocation and making children visible in budgets; participation of civil society; international cooperation; and ratification and application of relevant international standards.

As part of their general obligations, the ACRWC also require states to recognise the rights, freedoms and duties enshrined in the Charter. As the ACERWC states, recognising implies a level of formal recognition of these rights, by law or in constitutions.[1005] The Charter rights, freedoms and duties referred to in this part of article 1 are those which follow throughout the remainder of the Charter, including the right to nationality. In observing their obligations, article 1 of the ACRWC requires state parties to undertake necessary steps in accordance with Constitutional processes, and to harmonise their legislation with the ACRWC.

The reference to 'legislative measures' should be interpreted broadly, as it includes timely enactment and continuous review of national legislation and related administrative guidance to ensure their compatibility with relevant international norms and related standards on the rights of the child. As the UNHCR Handbook on Protection of Stateless Persons puts it, 'the reference to "law" … should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice'.[1006] As the ACERWC states, the review needs to consider the Charter holistically, as well as article by article, recognising the interdependence and indivisibility of human rights. It must at the same time be borne in mind that other human rights conventions, standards and principles which also impact on the rights of the child require legislative enactment.[1007] Such measures include changes in policy frameworks that have an impact on the enjoyment of rights under the Charter.

Effective legislative measures would also answer major related questions such as whether or not the provisions of the Charter can be invoked in courts of law; the nature and extent of legal remedies available for violations of children rights; and the regulation of customary laws and practices which have an impact on the enjoyment of child rights within the

[1005] ACERWC GC No. 5 on State Party Obligations under the ACRWC (2018), para 1.2.
[1006] UNHCR 'Handbook on Protection of Stateless Persons under the 1954 Convention on the Status of Stateless Persons' (2014), para 22.
[1007] ACERWC GC No. 5 on State Party Obligations under the ACRWC (2018), para 5.3.

country's jurisdiction. Addressing these questions would enable states to tackle the legislative and institutional challenges that this thesis has discussed in the previous chapters, including the lack of judicial review in nationality cases, the absence of agency of the child in decisions affecting their nationality, and the discriminatory provisions in nationality legislation.

Despite their obligations and notwithstanding considerable progress, many countries are yet to comply with their obligations to undertake legislative measures in that they either lack consolidated child-rights instruments, or fail to undertake legislative reforms and harmonise all their laws and policies with international and regional child-rights instruments. In line with state parties' obligations to take legislative measures, Aspiration 2 of Agenda 2040 projects that 'by 2020 Member States of the African Union should have considered the adoption of a single, comprehensive and accessible children's rights statute, complying with the ACRWC'.[1008] Indeed, some countries did proceed to enact child-rights statutes in past years, even before the adoption of Agenda 2040.[1009] There are also those that enacted legislative frameworks on child-rights issues after the adoption of Agenda 2040 in 2015.[1010] Countries that are yet to adopt comprehensive legislation include Cameroon, Central African Republic, Chad, Comoros, Congo Brazzaville, Côte D'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Guinea Bissau, Libya, Niger, São Tome and Principé, and Senegal.[1011]

Most countries in Africa have indeed ratified international and regional instruments relating to children's rights, and some have embarked on enacting consolidated laws to regulate matters of children's rights. However, ratification of child-rights instruments and consolidation of children's laws do not always mean full harmonisation with international and regional standards, as some gaps remain even after adopting consolidated statutes on children. Indeed, some countries have revised their consolidated children's statutes to align them with recent developments at regional and international levels. Notably, Kenya revised the Children Act of 2001 in 2022, Uganda effected a comprehensive amendment to its Children's Act of 1997 in 2016, and South Africa amended its Children's Act of 2005 in 2010. Yet such measures do not pass the full test of legislative measures if there are gaps in various laws applicable to children's rights. Gaps in nationality laws and discriminatory provisions resulting in statelessness among children constitute major drawbacks in many

[1008] Aspiration 2 of Agenda 2040 states that '[a]n effective child-friendly national legislative, policy and institutional framework is in place in all Member States'.

[1009] Examples include Angola (2012), Mozambique (2008), South Africa (2005 and 2008), Nigeria (2007), Eswatini (2012), Botswana (2009), Tanzania (2009), Zanzibar (2011), Egypt (2006), DR Congo (2009), Djibouti (2015), Gambia (2005), Guinea (2008), Liberia (2011), Madagascar (2007), Mali (2011), Mauritania (2005), Mauritius (1995 and 2008), Rwanda (2011), Sierra Leone (2007), South Sudan (2008), Sudan (2010), Togo (2007), and Tunisia (1995 and 2010); see ACERWC, the first five years' assessment on implementation of the Agenda 2040 (2020) P 58-59.

[1010] Benin enacted a Child Code in 2015, Algeria finalised a Child Protection law in 2015; Namibia's comprehensive Child Care and Protection Act 3 of 2015 came into effect in 2016 with the promulgation of extensive regulations to underpin implementation of the Act; the DRC passed a new law in 2016; and Ghana's parliament passed the Children's (Amendment) Bill, 2016 into law. See ACERWC, the first five years' assessment on implementation of the Agenda 2040 (2020) P 57-59.

[1011] ACERWC, the first five years' assessment on implementation of the Agenda 2040 (2020) 57-58.

African countries.

For instance, as discussed in chapter four, safeguards to protect children born in their territory from statelessness are incomplete or entirely lacking in most nationality laws. Most African countries, contrary to what is prescribed under international and regional instruments, fail to provide for an explicit right to nationality for children born on the territory who would otherwise be stateless.[1012] It is also important to note that the application of the provisions regarding children who would otherwise be stateless shows some discrepancies among these countries. For instance, some provide an automatic attribution of nationality to children who would otherwise be stateless, while others attribute nationality through application.[1013]

Similarly, gaps in legislation are noted in laws regulating nationality of children through the principle of *jus sanguinis*. Indeed, the majority of countries grant nationality to children born in the country of one parent who is a national, whether that parent is the father or the mother, and whether the child is born in or out of wedlock; most of these countries extend this to those born outside the territory.[1014] For children born abroad, though nationality may be transmitted, there are laws which make additional requirements either to take positive steps to claim the right to nationality or to notify the authorities of the birth.

Contrary to the provisions on non-discrimination, which is one of the cardinal principles in the child-rights discourse based on the ACRWC and CRC, there are still laws which discriminate by giving only a national father the unequivocal right to pass nationality to his child. In addition to gender, there are laws which consist of provisions that discriminate based on other grounds, including whether the child is born in or out of wedlock, or on the basis of race, ethnicity or religion.

Legislative gaps in nationality matters and the prevention of statelessness in children are also common in relation to children of unknown parents and to foundlings.[1015] Though cases of intercountry adoption can result in problems of statelessness, the laws in most of the countries lack sufficient detail when dealing with the effect of adoption on the nationalities of the children concerned. In particular, they do not explicitly rule out loss of nationality leading to statelessness. The laws fail to take into consideration the possible challenges that children could face in the country of the adoptive parents in securing a nationality for the child.

The above-mentioned cases demonstrate only a few examples and areas where countries fail to take legislative measures to address matters of the right to nationality and the prevention of statelessness in children. Of course, the thesis goes beyond these cases, and detailed analysis is made in the previous chapters with regard to gaps in nationality laws that could result in statelessness. The thesis examines gaps in laws as they relate to various scenarios, including

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[1012] Only a few African countries explicitly provide such protection to children who would otherwise be stateless: Angola, Burkina Faso, Cameroon, Cape Verde, Chad, Guinea Bissau, Lesotho, Malawi, Namibia, São Tomé and Principe, South Africa and Togo. See the discussion in sections 3.7 and 4.2.2 of this thesis.

[1013] In Malawi and Angola, attribution of nationality for children who would otherwise be stateless is not automatic; rather, it is by application. See the discussion in section 4.2.2 of this thesis.

[1014] See the discussion in section 4.2.3 of this thesis.

[1015] See the discussion in section 4.4. of this thesis.

the acquisition of nationality by application (including naturalisation), gaps in laws in the context of deprivation, loss and withdrawal of nationality, gaps in laws in relation to children in a particular vulnerable situation, children in a state-succession context, the case of children associated with terrorism, and the special cases of children in migration and forced displacement contexts. Such gaps in laws entail that much needs to be done with regard to African countries' compliance with their obligation to undertake legislative measures under international and regional instruments. Beyond enacting consolidated child-rights statutes and national laws, a systematic and comprehensive undertaking is required to harmonise all the laws and policies of the respective states with provisions, standards and guidance provided in international and regional laws. Harmonisation of national laws requires a comprehensive review of legislation affecting children that involves amending or replacing provisions that do not meet the state party's treaty commitments and introducing new legislation as appropriate to fulfil those elements of children's rights not covered by existing measures.[1016] It may also entail alignment of the provisions of various national laws, for example, provisions of customary or religious laws with international laws, in order to eliminate inconsistencies, contradictions or gaps.[1017]

The alignment needs to cover all sectors and themes of children's rights as they relate to matters of nationality and statelessness. For instance, in reviewing laws governing intercountry adoption, it is important for states to put a procedure in place that monitors whether the nationality laws of the receiving state are in alignment with international standards, so that children are not exposed to statelessness even temporarily. In line with this, reference could be made to the Concluding Observation of the CRC Committee in the case of Switzerland, where the Committee recommends that the state party 'accelerate the assessment procedure and ensure that a child adopted from abroad is not stateless or discriminated against during the waiting period between his or her arrival in the State Party and formal adoption'.[1018]

Although there is no internationally prescribed method for the harmonisation of national laws, the process should start with a comprehensive review of domestic legislation and related administrative guidance to ensure full conformity with the provisions and principles of the applicable treaties in relation to the right to nationality and prevention of statelessness. Secondly, the author argues, legislative measures concerning matters of children should pass the test of 'a child-rights based approach'. Moreover, as underscored by both the ACERWC and CRC Committee, review of all domestic legislation and related administrative guidance to ensure full compliance with treaty obligations needs to be a continuous process, covering both proposed and existing legislation.[1019] Focusing on the need for legislative audits and a

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[1016] J Doek *Harmonisation of national laws with the Convention on the Rights of the Child: Some observations and suggestions* (2007) 2.
[1017] *Ibid.*
[1018] CRC Committee, Concluding observations on the combined second to fourth periodic reports of Switzerland (2015), para 47.
[1019] CRC, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, 6), CRC/GC/2003/5, para 18; ACERWC, General Comment No. 5, para 5.3.

child-rights approach to legislative measures, the paragraphs below discuss how these two factors are relevant to the subject matter of this thesis.

First, there needs to be an analytical and in-depth review of existing legislation on children as it relates to the right to nationality and prevention of statelessness to identify provisions that do not conform with international and regional treaties. When doing so, it will be essential to investigate the normative sources where one may find nationality concerns in a given country. Such a legislative audit should cover various laws, policies, and administrative guidance, ranging from constitutions to child-rights acts, nationality laws, family laws, criminal laws, child care laws and policies, migration laws and policies, education and health policies, social welfare and security policies and to customary/religious laws.

In their attempts to regulate matters of nationality, countries establish rules on nationality in a variety of laws, in most cases either in specific nationality legislation or in their constitutions. However, issues affecting children's access to their fundamental rights and welfare are scattered in laws and policies regulating various sectors; hence, review of laws in nationality matters should identify all possible areas of this legislation. Moreover, as is the case in some countries, contradictory provisions in domestic legislation should be identified.

Secondly, a child-rights based approach to the right to nationality and statelessness should be at the centre of legislative measures. If statelessness is a global problem affecting millions of men and women, it would be valid to ask: Why talk about a child-rights based approach to statelessness? Beyond the particular vulnerabilities that children face, this thesis argues that preventing statelessness in children is an important measure in halting the spread of statelessness in general. The primary source of new cases of statelessness in any given year is the denial of the child's right to a nationality, particularly through the inheritance of statelessness from parent to child. While many situations of statelessness have become entrenched, making it difficult to achieve a wholesale remedy in the short term, taking measures to prevent new generations from being affected will contribute at least to managing such a situation and may help pave the way to broader solutions in the longer term. It would also be easier to address cases of statelessness immediately at birth or during early childhood than to resolve them later in life. Children usually have clear and strong connections to just one or two countries, through the place of birth and parentage, which should allow for a straightforward and uncomplicated pathway to nationality. The thesis further argues, in the instances where the age of a young person cannot be conclusively determined, it would be in line with a child-rights based approach to the right to nationality and statelessness that states adopt a practice of assuming the young person to be below the age of 18 than above the age of 18.

Taking a child rights-based approach to legislative reviews goes beyond identifying violations and citing provisions from the relevant instruments. It requires any law or policy to see each child as a complete human being worthy of respect and dignity. Applying a child-rights based approach in this regard involves an examination of current notions of childhood, social policy that results from these notions, and the socio-historical context from which children's rights have evolved. As discussed in previous chapters, historically children have been seen as passive beneficiaries of charitable assistance rather than as active participants in

their own development or as worthy citizens. A child-rights-based approach always puts the needs and rights of children, and their opinions and participation at the centre of all activities. A child-rights-based approach to legal responses to nationality and statelessness requires laws to incorporate child rights principles and mechanisms, informed by the general measures of implementation and the four general principles.

Generally, as explained in Section 1.1.3, when applying a child-rights-based approach to legislative measures in ensuring the full realisation of the right to nationality and effectively preventing statelessness in children, the child, as a rights-holder, should be at the centre of legislative measures by creating synergy between nationality determination and child protection systems. Such synergy requires examining nationality determination procedures in line with the principle of the best interests of the child and the principle of non-discrimination. As discussed under section 3.8.1.1 of the thesis, nationality determination procedures should take the time factor in to consideration when it comes to children. Hence, children who would otherwise be stateless should be automatically granted nationality at birth. Requirements of degree and burden of proof required to determine the child's nationality should also be done in line with the general principles of children's rights, taking the specific circumstances of the child involved. Moreover, legislation should ensure children's participation and engagement in nationality matters, including matters of nationality-determination procedures. Legislation should also apply the theory of intersectionality in nationality matters to understand the layers of vulnerabilities in children. Such approach helps to address the misguided one-size-fits-all approach to preventing statelessness among children. Particularly, as discussed in Section 4.2.3, ensuring comprehensive response to statelessness in children requires examination of general discriminatory provisions that directly or indirectly discriminate against children on the basis of prohibited grounds.

In the context of the 'not-so-future cases' of statelessness in children, it is noted that matters of migration and forced displacement, counter-terrorism measures and digital identity initiatives all pose challenges to the right to nationality and prevention of statelessness. A child-rights-based approach to legislative measures in this regard requires states to put in place or review legislation that is required to deal with emerging challenges in nationality matters. Ensuring that all aspects of both existing and emerging aspects of children's rights to nationality need to be explained and contained in legislation in line with international and regional standards and good practices.

6.4 Final note

Legal responses form only part of the solutions to the challenges of statelessness among children in Arica. A range of actions and initiatives are required to ensure every child's right to a nationality and to eradicate statelessness. Actions and initiatives include political commitment, partnerships and ensuring the sharing of information, developing information strategies to promote registration and documentation, developing community-based

initiatives to raise awareness of statelessness, developing multi-partner strategies, and strengthening state-civil society dialogue and cooperation among states. Identifying stateless children by using national population censuses to capture information on statelessness and undertaking specific surveys on statelessness is also required for a comprehensive and integrated response to the problem. These actions and initiatives will not achieve their targets without enabling normative frameworks. Hence, the author concludes that legal responses guided and informed by child-rights-based approaches and pan-Africanism play a major role in ensuring the right to nationality and preventing statelessness among children in Africa.

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