UNIVERSITY *of the*
WESTERN CAPE

University of the Western Cape
Faculty of Law

Statelessness and the rights of Children in Kenya and South Africa: A Human Rights Perspective

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Mini-thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws (Legum Magister)

Prepared under the Supervisor

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2018

DECLARATION

I declare that *Statelessness and the rights of Children in Kenya and South Africa: A Human Rights Perspective* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Nikeeta Louise Joan Sutton

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Date: 4 July 2018

Supervisor: Prof. Benyam Dawit Mezmur

Signature:

DEDICATION

This research is dedicated to my loving parents Mr Arthur Dennis Mark Sutton and Mrs Julaine Ann Sutton. You have been my support and strength from the day I started my education and have profoundly sacrificed a part of your life to support my studies. I am blessed to have you in my life and I dedicate all my achievements to you.

ACKNOWLEDGEMENTS

I have travelled this journey to complete my thesis in order to obtain my Master's degree and the submission thereof marks the end of this journey. I have travelled this journey with the love and support of many, including family, colleagues and my friends.

Firstly, I would like to thank our almighty and all-powerful God for granting me the strength, wisdom and perseverance to complete my research and guiding me to never give up.

It is of great appreciation that I would like to thank my supervisor, Professor Benyam Mezmur, who has agreed to work with me in completing my thesis, who has guided me through each step of the way and providing me with constructive criticism as well as explaining all aspects of my thesis in a clear and precise manner. Without your support in these aspects this research would not have been a success. I thank you.

I will never able to explain the gratitude I have to my parents, Mr Arthur Sutton and Mrs Julaine Sutton who sacrificed so much so that I could complete my studies. I thank you for the great parents that you are and I would not be the person I am today without your guidance and love. Every day I thank God for blessing me with you in my life. Thank you for everything.

I would also like to thank everyone that has supported me through this path that I have travelled and for always motivating me to achieve my best. To Natasha Sutton, Dean Sutton, Nadia Sutton, Melissa De Waal, Zain Ross, Musavengana Machaya, all the friends I met along the way, the Sutton family as well as the New Apostolic Church Steenberg Congregation, thank you for your unconditional love and support throughout my academic years.

Finally, I would like to thank the Graduate Lecturing Assistant group of 2014 and 2015. We became a family and looked out for each other all the time. Thank you for all your support and guidance throughout my research to complete my thesis.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
BDRA	Birth and Death Registration Act
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees

KEY WORDS

- Statelessness
- Nationality
- Human Rights
- *Jus soli*
- *Jus sanguinis*
- South Africa
- Kenya
- Birth registration
- Deprivation
- Naturalization

Table of Contents

CHAPTER 1: INTRODUCTION

1.1. Introduction

Stateless children and those at risk of becoming stateless has been an ongoing issue both on a domestic level as well as internationally. In many African countries children face discriminatory and arbitrary nationality laws as a result of which they are not registered and granted citizenship in their country of birth or where they are found or undocumented.

Thus, children continue to be stateless and will not be able to register their own children once they become parents. As a result, this creates an issue of transgenerational statelessness which will continue indefinitely and as such, requires attention and action both on a domestic and international level as a matter of urgency. While laws have been enacted in the aim to protect stateless children or children at risk of becoming stateless, the lack of guidelines in the implementation thereof creates a difficulty for children to acquire a nationality. States in this regard have the responsibility to create mechanisms to facilitate the implementation of laws especially when dealing with vulnerable groups such as stateless children.

In this regard, this paper seeks to address the issue of statelessness in two African countries, namely South Africa and Kenya, whose nationality laws require scrutiny and room for change. Kenya and South Africa are countries that have inscribed laws protecting stateless children within its constitutions. However when analyzing them in line with their international human rights instruments these laws fail to meet the standards of the international human rights conventions ratified by them in relation to statelessness. In this regard, this paper will discuss and analyze the international human rights instruments that relate to statelessness that have been ratified by Kenya and South Africa as well as the domestic laws pertaining thereto in order to determine whether or not the latter is in line with the former.

1.2. Background to the study

Through no fault of their own, stateless infants, children and youth inherit circumstances that limit their potential and provide at best an uncertain future.[1] Statelessness is a problem that affects, on conservative estimates, approximately 10 million people worldwide.[2] Among them, there are an estimated six million stateless children around the world who are children without a nationality who do not belong to any country and whose lives are insecure.[3] Apart from the ways in which any person can become stateless, a child in particular can become stateless when a family migrates away from a country where citizenship is conveyed by *jus sanguinis.* This provides that a child has the right to citizenship of the parents' country of origin.[4] However, children cannot always access it and may instead become *de facto* stateless in the country where they were born.[5]

In South Africa, which had the highest number of asylum-seekers in the world in 2008, stateless migrants are inevitably present.[6] There are many people born in South Africa's territory that are unable to access nationality in any nation.[7] Even though South Africa has to date not signed or ratified the two conventions on statelessness, namely, the 1954 Convention relating to the Status of Stateless Persons[8] and the 1951 Convention on the Reduction of

[1] Herson M, Couldrey M (2009) *Forced migration review: No legal identity. Few rights. Hidden from society. Forgotten. Stateless* Refugees Studies Centre, 31.
[2] UNHCR, The UN Refugee Agency, "Statelessness Around the World: available at: http://www.unhcr.org/statelessness-around-the-world.html [accessed on 24 April 2018]; Manby B (2011) *Statelessness in Southern Africa* Briefing paper for the UNHCR Regional Conference , Mbombela (Nelspruit) , South Africa, 1.
[3] Plan SA (2012) *Under the Radar and Under Protected: The urgent need to address Stateless Children's rights* UNHCR , United Kingdom, 5.
[4] Manby B (2015) *"Nationality, Migration and Statelessness in West Africa – A study for UNHCR and IOM"* The UN Refugee Agency and International Organization for Migration, 5 http://www.unhcr.org/ecowas2015/Nationality-Migration-and-Statelessness-in-West-Africa-REPORT-EN.pdf [accessed 28 June 2017]; Herson M, Couldrey M (2009: 31): See note 1.
[5]The UN Refugee Agency (2014) *"Handbook on protection of stateless persons under the 1954 Convention Relating to the Status of Stateless Persons"*, Geneva.
[6] Elphick R, George J (2013) *Statelessness and Nationality in South Africa* Lawyers for Human Rights UNHCR, 8.
[7] Elphick R, George J (2013:8): See note 6.
[8] UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, 117.

Statelessness,[9] it has numerous legal instruments that protect the right to nationality generally. The Constitution of the Republic of South Africa protects the right of each child to a name and nationality from birth as well as the right not to be deprived from one's nationality.[10] In addition thereto, the South African Citizenship Act[11] provides for citizenship by birth to children born on the territory who have no other nationality or no right to another nationality.[12] However, in the absence of ratification or signature of the two statelessness conventions, dealing with or assisting a person who is stateless could be a daunting task. Therefore, it requires creative use of a combination of international customary law or *jus cogens*, South African constitutional law, citizenship and immigration law and administrative law as well as human rights law and principles.[13]

South Africa has also ratified a number of international instruments that protect the right to acquire nationality. These are the Universal Declaration of Human Rights, the 1989 Convention on the Rights of the Child, the 1957 Convention of the Nationality of Married women, the 1965 Convention on the Elimination of all Forms of Racial Discrimination and the 1989 International Covenant on Civil and Political Rights.

Despite the domestic and international instruments, there are many legal gaps and challenges that bar this country from fully preventing children becoming stateless, children being born stateless or not being able to access nationality in any nation. Stateless children still have difficulty with the present laws on nationality in South Africa and this need to be addressed in order to close the gaps in South Africa's law and remain in line with the international instruments ratified by South Africa.

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[9] UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175.

[10] Constitution of the Republic of South Africa Act 108 of 1996, http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf [accessed on 30/09/2015] section 28 and 20.

[11] South African Citizenship Amendment Act 17 of 2010 http://www.gov.za/sites/www.gov.za/files/a17_2010_0.pdf [accessed on 01/10/2015]

[12] South African Citizenship Amendment Act: See note 10.

[13] Elphick R, George J (2014) *Promoting citizenship and preventing statelessness in South Africa: A Practitioners Guide*, Lawyers for Human Rights : Pretoria University Law Press, 2.

Although the number of stateless persons in Kenya is unknown, after the registration of the Makonde as further discussed below, an estimate of 18 500 stateless persons in Kenya are being used.[14] Despite various amendments to provisions providing for the right to a nationality, many of Kenya's domestic laws on nationality are discriminatory and infringe greatly on the fundamental human rights of children. This could result in potentially increasing the number of children that become stateless or those who are stateless remain that way indefinitely.

Kenya has to date not ratified the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 Convention on the Reduction of Statelessness. Nevertheless, the discriminatory nationality laws and the administration thereof have repeatedly been brought to the attention of the international human rights community. The grounds thereof are based on Kenya's national laws being inconsistent with Kenya's international human rights obligations. In order to make an adequate assessment of Kenya's national laws, it should be noted that the causes of statelessness in Kenya can be divided into two broad categories, namely, administrative and legal, which illustrates the gap between law and practice.

The administrative causes of statelessness in Kenya such as the faulty operation or under-regulated nature of Kenya's administrative practices concerning citizenship puts individuals, especially children, at risk of becoming stateless.[15] This is evinced in the fact that there are no adequate regulations that guide the vetting process that certain ethnic groups in Kenya are subjected to. This includes registration offices retaining discretion to request from individuals' documentary proof before issuing documents, including birth certificate and various additional documentation which require repeated trips to various government buildings causing additional travel costs and a prolonged

[14]Abuya E (2010) Out Of The Shadows Towards Ensuring The Rights Of Stateless Persons And Persons And Risk Of Statelessness; Blitz B & Lynch M (2009) *Statelessness & the Benefits of Citizenship* : A Comparative Study Oxford: Oxford Brookes University, 40

[15] UNHCR, The UN Refugee Agency, "Stateless Persons", Kenya. Available at http://www.unhcr.org/ke/stateless-persons [accessed on 19 April 2018]; Abuya E (2010) *Out Of The Shadows Towards Ensuring The Rights Of Stateless Persons And Persons And Risk Of Statelessness*, 6

intimidating process.[16] As will be discussed in detail in Chapter 3, it is my submission that should Kenya enact laws that provide regulatory guidelines to those dealing with the registration process including those mandated with the task, the opportunity for abuse of the system may be minimised. The legal developments embedded in the citizenship laws attended to remedy various discriminatory laws and practices which the previous 1963 Constitution allowed. However, it is to my belief that without the aforesaid regulatory guidelines, the change in law will be rendered fruitless to those in need thereof.

While Article 90 and 91 of the old Constitution of Kenya 1963[17] was discriminatory on the basis of gender and in contravention of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), the new Constitution of Kenya 2010[18] eliminates the said discrimination. However, the laws contain gaps that can be misused or exploited by use of arbitrary administrative actions in order to undermine these nationality rights.

The Constitution as well as the Kenyan Citizenship Act does not provide sufficient and effective protections against statelessness and more importantly for this paper, protection of stateless children.[19] Stateless children born on the Kenyan territory are struggling to attain citizenship due to lengthy administrative procedures and continued discriminatory conduct towards them while under the vetting process. Kenya's Acts of Parliament contain provisions relating to the deprivation and renunciation of citizenship that do not include safeguards to protect children from being rendered stateless.[20] These safeguards have been urged and recommended by various human rights communities, however unfettered discretion by government offices remain a daunting issue for stateless children.

[16] Open Society Justice Initiative, Rupert Skilbeck, Briefing Paper: Implementation of Nubian Minors v Kenya, (2014)
[17] *Kenya Citizenship Act, Cap 170*, 12 December 1963, Article 90 and 91.
[18] *Constitution of the Republic of Kenya 2010*
[19] *Kenya Citizenship Act 170*
[20] Abuya E (2010): See note 14.

In this regard the research questions that follow will be addressed throughout this paper in order to ascertain the legal and administrative protection of stateless persons in Kenya and South Africa.

1.3. Research Question

The main question raised in this paper is whether South Africa and Kenya are honouring their international obligations to safeguard and protect the rights of children that are either stateless or at risk of becoming stateless.

In order to answer this question, the following sub-questions are raised:

- What are the legal frameworks put in place to address statelessness in the selected jurisdictions?
- Do the selected jurisdictions afford enough protection to stateless children as per the international and African human rights instruments they are a party to?
- What are the legislative, administrative and other measures to remedy the gaps in Kenya and South Africa's national laws to address the issue of statelessness among children?

1.4. Literature review

There are a number of sources, in the form of literature that discuss the issue of statelessness. Some of these are general in nature while others are either jurisdiction specific or focus on specific groups of persons.

In the article *'Out of the shadows towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya'*,[21] Edwin Abuya discusses statelessness and nationality problems in Kenya on particular groups that may be at risk of statelessness. He argued that the national laws of Kenya are in contravention of its international obligations and calls up the government

[21] Abuya E (2010: 5): See note 14.

of Kenya to provide enough comprehensive measures to reduce and prevent the incident of statelessness and those at risk of statelessness in Kenya. This paper shall be taking the view of Abuya but will be focusing on this issue based on children facing statelessness and providing recommendations to prevent and protect the fundamental human rights of such children in Kenya and South Africa.

Samuel Bizen Abraha, in *'The Protection of stateless persons in the African Human Rights System'*,[22] argued that there are gaps in the African human rights system concerning stateless persons. Additionally, he wrote on the causes of statelessness in Africa and analysed these causes in comparison with the protection under the 1954 and 1961 Statelessness Conventions. This paper will be focused on the causes, status, protection and prevention of statelessness in Kenya and South Africa in relation to their international human rights obligations.

With regards to the South Africa legal literature on stateless children, report written by Jessica P George and Rosaline Elphick, for the Lawyers for Human Rights non-profit organisation, *'Stateless and Nationality in South Africa'*[23] and a report published by Plan SA in support of the United Nations Commission for Refugees *'Under the Radar and under protected: The urgent need to protect stateless children's rights'*,[24] will be utilised in this paper. The basis thereof is to analyse the causes, legal literature and protection of stateless children in South Africa. This paper shall attempt to provide input to the legal literature on stateless children specifically in South Africa and provide recommendations that would be useful in the attempt to prevent statelessness among children as a whole.

The impact of international law on statelessness was assessed by Mark Manly in his paper *"Statelessness: The impact of International law and current*

[22] Abraha S (2012) *The protection of stateless persons in the African human rights System :* University of Venda
[23] Elphick R, George J (2013): See note 6.
[24] Plan SA (2012): See note 3.

challenges".[25] In his paper he explores the impact of international law on the treatment of stateless persons as well as the prevention thereof. In this regard, the impact of international law as assessed by Mark Manly, will be used in this paper to assess whether or not the national law of Kenya and South Africa is in line with the countries' international obligations.

"Nationality Rights for All: A progress report and global survey on statelessness"[26] written and compiled by Katherine Southwick and M Lynch provides that a small number of countries have taken steps to reduce statelessness within their borders, one of which is Kenya. It provides that Kenya has made some progress with regards to its administrative laws and processes in relation to birth registration and identity documentation concerning the nationality of children. Though some change is being made, discriminatory nationality laws in Kenya still exist. In this regard, this paper will therefore acknowledge the improvements made by Kenya in its attempt to prevent statelessness and take the view of identifying all the national laws that are discriminatory in the attempt to provide recommendations that would add to those improvements already implemented.

The paper *"Out of the shadows: The treatment of Statelessness under International law"*[27] by Ruma Mandal and Amanda Grey provides an overview of how international human rights law treats situations of statelessness, both in guarding against statelessness and in the protection of the rights of stateless persons. The authors explain how the Galjeel community of Somali originally lived in Kenya and its members traditionally held Kenyan identity cards, voted in elections, owned businesses and enjoyed access to government services. However, measures introduced to screen for irregular migrants resulted in many people including children losing their forms of identity and becoming stateless which resulted in severe discrimination with limited livelihood

[25] Manly M (2014) *Statelessness: The Impact of International Law and Current Challenges:* Chatham House.
[26]Southwick K, Lynch M, (2009) "Nationality Rights for All: A progress report and global survey on statelessness".
[27]Mandal R, Grey A (2014) *"Out of the shadows: The treatment of Statelessness under International law",* 15.

opportunities and education for the children. They further argue that the non-discrimination principle under international human rights law does not preclude the distinction between citizens and others but that differentiation is permissible as long as there is a legitimate objective and sits within the bounds of proportionality. This begs the question to what extent does the 1954 Convention on Statelessness add to the protection of stateless persons through human rights instruments? Thus, this paper will discuss these issues with regards to Kenya and South Africa national laws in terms of nationality respectively and determine how the 1954 Convention if ratified by these countries will contribute to the prevention and protection of stateless children in the respective countries.

Bronwen Manby in *"Statelessness in Southern Africa"*[28] states that gender discrimination is one of the most common causes of statelessness, especially in the case of children who cannot obtain their mother's nationality, who cannot otherwise acquire the nationality of their State of birth or due to inadequate civil registration procedures. This paper will be discussing this problem in relation to the issues discussed by Bronwen Manby including the various other causes in the attempt to determine whether or not or to what extent Kenya's nationality laws violate its international obligations.

The paper *"Towards Universal Birth Registration in South Africa: A Briefing Paper"*[29] by Lawyers for Human Rights, Pretoria, discussed the aim of achieving universal birth registration in South Africa. It provides that those who are most likely to be registered are children whose parents cannot produce a passport or South African identity card. This means that refugees, asylum seekers, undocumented migrants and stateless persons may be unable to obtain birth registration for their children. As a result, the child may be unable to claim a parent's nationality or his or her rights to South African nationality neither at birth nor potentially at a later date under South Africa's Citizenship Act. In relation to this, this paper will take the view of the above mentioned briefing paper with regards to the issues surrounding birth registration in South Africa

[28] Manby B (2011): See note 2.
[29] Lawyers for Human Rights (2011), '*Towards Universal Birth Registration in South Africa: A Briefing Paper Drafted by Lawyers for Human Rights'.*

in order to establish remedies that are in line with the international human rights instruments ratified by Kenya and South Africa.

Bronwen Manby in "*Struggles for Citizenship in Africa*"[30] discusses the discriminatory citizenship laws and the struggle of obtaining citizenship in Africa. Her discussion is based more on the political struggles of those persons that are unfairly discriminated on the grounds of citizenship in Africa as well as the political rights these persons possess or are supposed to possess. This paper will be dealing with the issues of children who are stateless or at risk of becoming stateless and this will be assessed by using a human rights approach.

1.5. Research methodology

In determining whether the national laws relating to the nationality and citizenship of stateless children in Kenya and South Africa are in line with the two country's international obligations, this study will use a qualitative and secondary research method. Domestic laws in the two countries will also be explored. In addition, secondary sources such as books, journal articles, newspaper articles and reports serve sources.

1.6. Choice of Jurisdictions

This study will focus on two jurisdictions namely, South Africa and Kenya.

South Africa hosts a large number of children who have migrated to the territory and are currently unaccompanied by a parent or guardian as well as asylum-seekers, which are stateless or at risk of becoming stateless. In South Africa, the law does protect vulnerable children such as those who are stateless or at risk of becoming stateless and this is shown by a number of legislation that provides for the protection of children. The Children's Act[31] is a significant

[30]Manby B (2009) *Struggles for Citizenship in Africa*: Zed Books.
[31] South Africa: Children's Act 38 of 2005 (adopted on 19 June 2006).

document that refers to such vulnerable children as they are in need of care. The fact that the South Africa has a Children's Act brings about the inspiration to realise the rights embedded in this Act with regards to children's rights and the phenomenon of statelessness among them. Other instruments such as the South African Citizenship Amendment Act[32], the Constitution of South Africa[33] as well as the ratification of international instruments such as the Convention on the Rights of the Child (CRC)[34] and African Charter on the Rights and Welfare of the Child ("ACRWC") shows that South Africa is fighting the on-going struggle of preventing and protecting children who are stateless and those at risk of statelessness. Thus, an analysis of the domestic instruments of South Africa as well as the international instruments ratified by South Africa with regards to statelessness and children will bring about a closure to the gaps in law causing or potentially causing the risk of statelessness.

In Kenya there are a large number of members of ethnic minority groups that are stateless. These are groups such as the Kenyan Nubians, the Coastal Arabs and Kenyan Somalis that all struggle with statelessness and discriminatory citizenship laws and practices of the Kenyan national laws.[35] As a result, a large percentage of the population is unable to fully participate in the social, economic and political life of the country. Kenya's laws remain discriminatory and ineffective in addressing issues of statelessness and citizenship discrimination. In addition, children who are found in Kenya without evidence of nationality are not protected by the nationality laws of Kenya. Kenya's citizenship laws are governed by the Constitution of the republic of Kenya, the Kenya Citizenship and Immigration Act as well as the Children's Act that has additional citizenship implications.[36] Thus, an analysis of Kenya's domestic laws and international obligations with regards to statelessness and

[32] South African Citizenship Amendment (adopted on 3 December 2010): See note 10.
[33] Constitution of the Republic of South Africa (adopted on 10 December 1996) See note 9.
[34] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html [accessed 5 November 2018]
[35] Statement Submitted by the Open Society Justice Initiative for Consideration by the United Nations Human Rights Council at its Eighth Session, on the occasion of its Universal Periodic Review of Kenya (2010) *Citizenship Discrimination and the Right to Nationality*, 2
[36] Constitution of Kenya 2010 (adopted 27 August 2010); Kenya Citizenship and Immigration Act No. 11 of 2011 (adopted on 30 August 2011); Children's Act 38 of 2001 (adopted on 1 April 2010).

children is needed in order to provide useful recommendations to remedy the discrimination laws.

1.7. Scope to this study

The scope of this paper will extend to stateless children and children at risk of becoming stateless in the selected jurisdictions, namely South Africa and Kenya. In this regard, the causes, prevention and protection of stateless children in these jurisdictions will be discussed as well as the impact of international instruments governing statelessness on the application of the national laws of the selected jurisdictions. In addition, recommendations with regards to remedying the problem of stateless children and those at risk of becoming stateless will be provided. This will include administrative, legislative and other remedies that are applicable to the discussion and analyses. This paper will strictly be analysing the above mentioned research question in the light of human rights standards and will not be dealing with issues or situations other than those with regards to the human rights of stateless children (as opposed to politics or economics, etc.) and those at risk of becoming stateless.

Since this paper is only focussed on two jurisdictions, its relevance with a view to get a bigger picture of the challenges faced by and opportunities available for other countries on the African continent will be limited.

CHAPTER 2: INTERNATIONAL AND REGIONAL INSTRUMENTS RELEVANT TO NATIONALITY AND STATELESSNESS

2.1. Introduction

As established in various literature in Chapter 1, the right to acquire a nationality is a fundamental right under international law. Therefore, the absence thereof creates the potential for states to abuse their power by discriminating against stateless persons indefinitely. While many states fail to realise the importance of a right to a nationality and its responsibilities coupled thereto, citizenship is an ever-present issue and often a major obstacle. This is because recognition of nationality serves as a key to a wide range of other rights, such as health care, education, employment and equality before the law.[37] In this respect, it is clear that persons and especially children who are stateless are some of the most vulnerable groups in the world.

Each state has the sovereign responsibility to determine under national law who are its citizens and who are not or who can qualify or who cannot qualify to be a citizen but that role is subject to international principles. While international law principles may be ratified by states, there are no international enforcement mechanisms in place should such states fail to adhere to the said principles. However, once a state has ratified an international treaty, its principles are incorporated into the domestic law of the state by which failure to adhere to such principles would amount to domestic sanctions.

There are a number of international and regional instruments that affirm the right to nationality or the right to acquire a nationality which will be discussed below in order to give one an understanding of these instruments and its relevance in the jurisdictions chosen.

[37] Herson M, Couldrey M (2009: 4): See note 1.

2.2. International and regional instruments relating to statelessness

The right to nationality is enshrined in the *Universal Declaration of Human Rights* (UDHR)[38] and many other international instruments. International law and in particular, international human rights law, has increasingly recognized an individual's right to a nationality. The right to nationality generally requires appropriate states to grant nationality to individuals who would otherwise be stateless.[39]These international laws are essential in the protection and prevention of statelessness among children and thus, important in attending to the purpose of this paper.

This chapter will be dealing with the protection and prevention of statelessness under international law. In dealing with the prevention of statelessness we are going to employ the *1961 Convention of the Reduction of Statelessness,* the *1954 Convention relating to the Status of Stateless Persons* and other international and regional instruments relating to statelessness, with particular focus on children who are stateless or who are at risk of becoming stateless. This chapter will be divided into two sections namely; international instruments and regional instruments. In this way the paper will give an overview of the instruments relating to statelessness and provide a sense of what can or should be done to protect and prevent statelessness among children.

2.2.1. International instruments

2.2.1.1. Universal Declaration of Human Rights (UDHR)

While no international consensus has been reached on the definition or classification of statelessness, in order to alleviate the suffering of persons at risk of statelessness, multiple legal instruments have been adopted at an international and regional level. These efforts to formally protect stateless

[38] Universal Declaration of Human Rights 1948 , Article 15 available at http://www.un.org/en/documents/udhr/index.shtml

[39] Lowenstein A (2007), Before the African Commission on Human and Peoples' Rights, *Friendly Communication In Support Of Communication 317/2006 – The Nubian Community In Kenya/Kenya*, International Human Rights Clinic Yale Law School New Haven, Connecticut, U.S.A, 4.

persons can be traced back to 1948 at the promulgation of the UDHR.[40] An example that lays this foundation is Article 15 of the UDHR which provides that *"Everyone has the right to a nationality"* and that *"No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality"*[41]. The inclusion of the right to nationality in Article 15 of the UDHR, like the UDHR as a whole, was motivated by the impulse to respond to the atrocities committed during the Second World War, among them the mass denationalisations and huge population movements.[42] There were hundreds of thousands of Jews who survived the Nazi-perpetrated genocide and fled their home countries, while millions of ethnic Germans were expelled from eastern European states, and millions of Poles, Ukrainians, Byelorussians and other minority populations of the Soviet Union either were forcibly expelled or fled for their safety.[43]

In 2005, the Commission passed a resolution reaffirming Article 15 of the UDHR, emphasizing that the right to nationality of every human person is a fundamental human right.[44] The United Nations Special Rapporteur on the situation of human rights in the Democratic Republic of Congo (DRC) has also based findings on the right to nationality. For example, in 1996, the Special Rapporteur found that the government of DRC had violated the Banyarwanda and Banyamulegue people's right to nationality guaranteed in the UDHR as well as the customary international law prohibition against statelessness.[45]

These changes in law provided a great foundation to the increasingly recognised and protected right to nationality in which other international

[40] Kenya National Commission on Human Rights in partnership with the United Nations High Commissioner for Refugees (2010), *Out Of the Shadows towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, 3.
[41]Universal Declaration of Human Rights 1948 , Article 15 available at http://www.un.org/en/documents/udhr/index.shtml
[42] Herson M, Couldrey M (2009:4): See note 1 above.
[43] Herson M, Couldrey M (2009:5) See note 1 above.
[44] Human Rights and Arbitrary Deprivation of Nationality, U.N. Comm'n Hum. Rts. Res. 2005/45, U.N. Comm. Hum. Rts, 61st Sess., 57th mtg., U.N. Doc E/CN.4/RES/2005/45 (2005)], *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-45.doc
[45] Report on the situation of human rights in Zaire, prepared by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission Resolution 1995/69, U.N. Doc. E/CN.4/1996/66, ¶ 85, Jan. 29, 1996, *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/f247c38438f0ddcdc12569910037e669/25efd35ea2cd5fc0802566f200592db2?

instruments have based their nationality laws upon. In addition to recognising the general right to nationality, international law has emphasized the right of children to a nationality as the degree of vulnerability in children as opposed to adults is considerably greater and requires special protection.[46]

In many instances, children who are unable to prove nationality or citizenship lack access to critical benefits such as health care, shelter or education. In recognising this fact, many human rights instruments specifically address children's right to nationality and the right to register their birth.[47] These specific provisions in the various international instruments will now be discussed below, providing a greater understanding as to the importance of the right to nationality of children and the protection thereof by states such as Kenya and South Africa.

2.2.1.2. The Statelessness Conventions

The 1954 Convention relating to the Status of Stateless Persons ("1954 Convention") and the 1961 Convention on the Reduction of Statelessness ("1961 Convention") specifically addresses the issue of stateless persons. While the 1954 Convention establishes a definition of a stateless person[48] and a set of minimum rights which protect those who are currently stateless, the 1961 Convention is grounded on the aim to prevent statelessness. Both the 1954 Convention and the 1961 Convention have a different purpose but combined they are an important contribution to eradicate statelessness.

[46] Lowenstein A (2007: 6): See note 40.
[47] United Nations High Commissioner For Refugees, Refugee Children: Guidelines On Protection And Care 40, 44 (Geneva, 1994), *available at* http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf ; UNICEF, Implementation Handbook For The Convention On The Rights Of The Child 108 (2002).
[48] The Convention gives a definition of stateless person but not what statelessness actually means, see van Waas L (2008), *Nationality Matters, Statelessness under International Law*, School of Human Rights Research Series, Vol. 29, 44; also, Part Three of the UNHCR *Handbook*, 21.

2.2.1.3. 1954 Convention relating to the Status of Stateless Persons (1954 Convention)

The 1954 Convention provides for the identification, documentation and protection of the rights of stateless persons.[49] It additionally provides an internationally recognised status for stateless people and a framework for States to protect stateless people, including children.[50] The 1954 Convention confirms that stateless persons retain fundamental rights and freedoms without discrimination.[51] These fundamental rights include free access to courts, primary education, public relief on par with what the state's nationals receive and property rights, access to employment and housing at least as favourable as those afforded foreign persons and more specifically with regards to children, safety and physical well-being of such children who are stateless or at risk of becoming stateless.[52]

The definition of a stateless person is established under Article 1 of the 1954 Convention which provides that a stateless person is someone who is not considered as a national by a State under the operation of law.[53] In order to establish whether or not a person is a national under the operation of a state's law, it requires a careful analysis of how the State applies its national laws in practice.[54] If and when persons satisfy the definition of a stateless person, such persons are entitled to certain rights and must comply with certain duties contained in the 1954 Convention.[55] It is important to note that the 1954 Convention does not cover so called *de facto* stateless persons for whom no universally accepted definition exists in international law.[56] However, despite

[49] UN General Assembly, Convention Relating to the Status of Stateless Persons, Preamble (1954:117): See note 8.
[50] Southwick K, Lynch M, (2009:4): See note 26.
[51] ACPF (2011) *The Best Interests Of The Child*: Harmonising Laws on Children in West and Central Africa. Addis Ababa: The African Child Policy forum, 39; Southwick K, Lynch M, (2009:4): See note 26.
[52] Southwick K, Lynch M, (2009: 5): See noted 26.
[53] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article 1 (1954: 117),: See note 8.
[54] Mandal R , Gray A (2014), *"Out of the shadows: The treatment of Statelessness under International law"*,2.
[55] The UN Refugee Agency (2014) *Protecting the Rights of Stateless Persons:* The 1954 Convention relating to the Status of Stateless Persons, 4.
[56] The UN Refugee Agency (2014: 4): See note 54.

the fact that *de facto* stateless persons are not covered by the 1954 Convention definition, such persons are entitled to protection under international human rights law. For example, Stateless refugees are covered by the 1951 Convention relating to the Status of Refugees and should be treated in accordance with international refugee law.[57]

Article 2 sets out categories of people to whom the convention 'shall not apply'. These include persons enjoying rights equivalent to nationals and individuals who have committed war crimes or serious non-political crimes.[58] As such, the definition of a stateless person in terms of Article 1 arguably frames the concept of a stateless person for the purposes of international law generally as there is no other definition in any multilateral treaty.[59] In spite of its apparent simplicity, there have been issues that arose with the interpretation of the definition, in which regard it entails an apparent requirement that a negative be proven in relation to every country.[60]

In order to address this particular difficulty, an appropriate standard of proof can be applied. However, there is an absence of case law to assist with interpreting the definition consequently causing an indefinite grey area that creates the possibility for states to manipulate its contents. Thus, it is my submission that this grey area should be considered as a gap in law and remedied in a manner that states are requires to apply certain set factors on a case by case basis. This should be done to establish whether an individual falls within the definition but limited to the extent that discrimination cannot be manoeuvred into the process. For example, while a state has the power to limit the acquiring of its nationality, such limitation cannot be based on discriminatory grounds such as gender or ethnic origin. Thus, the prohibition of various discriminatory acts by state officials during the administration process of applying their nationality laws

[57] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
[58] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article 2 (1954: 117): See note 8.
[59] International Law Commission, *Articles on Diplomatic Protection with Commentaries*, 2006, 49. Note the Council of Europe Convention on Avoidance of Statelessness in Relation to State Succession, which includes a definition of 'statelessness', essentially replicating the Article 1(1) definition in the 1954 Convention.
[60] Mandal R, Gray A (2014:3): See note 53.

must be expressly provided and strictly monitored. I do however note that this is a strenuous process to maintain as states often do not adhere to their international obligations and without enforcement mechanisms in place, securing compliance is futile.

The 1954 Convention is based on a core principle that no stateless person should be treated worse that any foreigner who possesses a nationality.[61] With the human rights system being grounded on the concept of universality, lack of nationality should not act as an automatic barrier to enjoyment of its guarantees.[62] However, the reality thereof is significantly different. This is due to the fact that there are practical difficulties of accessing rights without identity documents or proof of lawful residence in a country as well as certain key rights are reserved explicitly for nationals. For example, the right of political participation, the right to work and the right of entry in a country.[63] Additionally, the underlying principle of non-discrimination in international human rights law does not preclude any distinction between citizens and others.[64] Instead of preventing such distinction, differentiation is permissible so long as it furthers a legitimate objective and sits within the bounds of proportionality.[65]

This therefore begs the question, to what extent does the 1954 Convention (which includes guarantees in relation to education, healthcare and the right to work) add to the protection afforded to stateless persons through human rights instruments? The question can be answered by stating that while many of the convention's rights are also founded in international human rights law; in some cases the 1954 Convention's standards are more generous.[66] It therefore provides for a series of special measures for stateless persons and unlike certain provisions in other human rights treaties, its provisions cannot be

[61] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article 7 (1954: 117): See note 8.
[62] UN Economic and Social Council, *Final Report of the Special Rapporteur to the Sub-Commission on Prevention of Discrimination, The Rights of Non-Citizens*, E.CN.4/Sub.2/2003/23, 2003, http://www.refworld.org/docid/3f46114c4.html
[63] Mandal R , Gray A(2014:3): See note 53.
[64] See, for example, Article 2(3) of UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[65] Mandal R , Gray A (2014:3): See note 53.
[66] van Waas L (2008: 323): See note 47.

derogated from in times of public emergency.[67] This creates an important protection structure especially with regards to children, as children need to be protected on a greater level as they are particularly more vulnerable than adults. The best interest of a child principle is of paramount importance and must be taken into consideration at all times when dealing with any decisions or matters concerning a child.[68] Thus, the special measures provided for by the 1954 Convention act as a tool of protection as well as prevention of statelessness among children and in the same breath, takes into consideration the best interests of such children.

In order to understand the special measures provided for by the 1954 Convention, a brief explanation of each of these provisions will be discussed with particular attention to its application to children. The 1954 Convention guarantees stateless persons a right to administrative assistance in terms of Article 25, a right to identity and travel documents in terms of Article 28 and exempts them from reciprocity requirements as provided for in Article 7.[69] These ideal provisions are designed to deal with the particular difficulties faced by stateless persons especially for the protection of the most vulnerable due to the lack of any nationality. For instance, by providing for a mutually recognised travel document to function in lieu of a passport.[70] These provisions and issues thereof are not regulated elsewhere in international law and are among the core legal benefits for stateless persons under international human rights law.

In considering the predicament faced by stateless persons, the Convention stipulates that they must be treated like nationals of the State in respect of certain rights such as freedom of religion or elementary education.[71] It must be stressed that the Convention pursues a nuanced approach in which it specifies

[67] The UN Refugee Agency (2014: 4): See note 54.
[68] The Convention on the Rights of the Child, Article 3: See note 34.
[69] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article 25, 27, 28, 7 (1954: 117): See note 8.
[70] For example, international human rights law does not explicitly set out a right to a passport. However, Article 28 of the convention places a clear obligation on states to provide stateless persons lawfully in their territory with a travel document, the validity of which is to be respected by other parties to the treaty.
[71] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article 22 (1) (1954: 117): See note 8.

that some guarantees apply to all stateless persons while others are reserved to stateless persons who are lawfully present or lawfully staying in the territory.[72] Thus, the 1954 Convention echoes human rights standards contained in other international instruments and provides guidance on how such standards are to be implemented for stateless persons. In this regard, stateless persons have the duty to obey the laws and regulations of the country in which they find themselves in as set out in Article 2.[73]

2.2.1.4. 1961 Convention on the Reduction of Statelessness (1961 Convention)

Subsequent to the enactment of the 1954 Convention, the 1961 Convention focuses on avoiding statelessness from birth and prevents the creation of statelessness as a result of loss, deprivation or renunciation of a nationality.[74] The 1961 Convention contains rules implemented through nationality laws to ensure that everyone enjoys the right to nationality in practice.[75] There are four main areas in which the 1961 Convention provides concrete and detailed safeguards to be implemented by States in order to prevent and reduce statelessness. The 1961 Convention does, however, allow for limited but significant exceptions to these obligations and prohibitions.[76] This is due to the fact that its provisions have been supplemented by the subsequent implementation of international human rights law in relation to nationality.[77] In order to determine the scope and implementation of the 1961 Convention, the four categories will be discussed along with the limited exceptions provided in respect of these categories.

The first category deals with measures to avoid statelessness among children which can be considered the most important category in respect of this paper.

[72] The UN Refugee Agency (2014: 5): See note 54.
[73] UN General Assembly, Convention Relating to the Status of Stateless Persons, Article 2 (1954: 117): See note 8.
[74] Elphick R, George J (2013: 56): See note 6.
[75] Plan SA (2012: 11) See note 3.
[76] For example, exceptions in relation to preventing 'loss' are found in Articles 7(4) and (5), while circumstances in which deprivation may occur are set out in subparagraphs (2), (3) and (4) of Article 8.
[77] Mandal R , Gray A (2014*:* 5): See note 53.

These measures are provided for in terms of Article 1, 2, 3 and 4 of the 1961 Convention which concerns the prevention of statelessness among children from birth.[78] In terms of these provisions, States shall grant their nationality to children who would otherwise be stateless and have ties with them through either birth in the territory or descent. [79] As briefly provided in Chapter 1, the distinction between these ties are made in order to encompass the various circumstances of stateless persons, especially children whose nationality is often dependent upon their parents' nationality. States are additionally required to grant their nationality to any child, who would otherwise be stateless, born in a non-contracting state where one parent is that State Party's national.[80]Thus, where children are born in the territory but acquire the nationality of a foreign parent, there is no obligation on a State to grant nationality. [81]

However, the obligations set out in the aforesaid said provisions allow States some flexibility in which the State can choose to make the acquisition conditional on satisfaction of requirements set out in the treaty.[82] These requirements include prescribed periods of habitual residence for a certain period of time and a lack of serious criminal convictions.[83] In addition and specifically important, Article 2 provides that States shall grant nationality to foundlings, which are people or children found on the States territory.[84] Thus, these provisions must be read in accordance with international human rights law, in particular the CRC as it governs the protection of children rights on an international scale.

[78] UN General Assembly, Convention on the Reduction of Statelessness, Article 1-4 (1961: 175) See note 8. See also Kanyinga K (2014) Kenya Democracy and Political Participation: A review by AfriMAP, Open Society Initiative for EASTERN Africa and the Institute for Development Studies, University of Nairobi, *Open Society Initiative for Eastern Africa*, 74.
[79] The UN Refugee Agency (2010) *Preventing and Reducing Statelessness*, The 1961 Convention on the Reduction of Statelessness, 5.
[80] Mandal R , Gray A (2014:6): See note 53.
[81] UN Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, 19 December 2013, A/HRC/25/28, para 3, http://www.refworld.org/docid/52f8d19a4.html
[82] Mandal R , Gray A (2014:6): See note 53.
[83] UN General Assembly, Convention on the Reduction of Statelessness, Articles 1(5) and 4(2) (1961: 175) See note 8.
[84] UN General Assembly, Convention on the Reduction of Statelessness, Article 2 (1961: 175) See note 8.

The second category deals with the measures to avoid statelessness due to loss or renunciation of nationality. Articles 5, 6 and 7 prevent statelessness for the future by requiring prior possession of or assurance of acquiring another nationality before a nationality can be lost or renounced.[85] There are two exceptions provided for this rule, namely, the States may withdraw nationality from naturalized persons who subsequently take up long-term residence abroad and from nationals who are born abroad and are not resident in the State when they attain majority, provided certain other conditions are met.[86]

The third category consists of measures to avoid statelessness due to deprivation of nationality. Article 8 and 9 of the 1961 Convention deal with the deprivation of nationality in which it provides that States may not deprive any person of their nationality on racial, ethnic, religious or political grounds.[87] These provisions apply the notion of non-discrimination based on the various categories mentioned and provides a barrier for States to refrain from depriving children on the basis of their status or origin.

The final category provides for measures to avoid statelessness in the context of State succession, such as the cession of territory by one State to another and the creation of new States. This can lead to statelessness unless proper safeguards are in place.[88] In the event of state succession, many children are put at risk of becoming stateless and are often rendered stateless. In this regard a safeguard against statelessness caused by state succession is provided by Article 10 and provides a safety net for children in order to protect their rights. This provision specifically addresses the context of State succession and requires States to include provisions to ensure the prevention of statelessness in any treaty dealing with the transfer of territory.[89] In the absence of such provisions a contracting State to which the territory is transferred or which

[85] Elphick R, George J (2013: 56): See note 6; UN General Assembly, Convention on the Reduction of Statelessness, Article 5-7 (1961: 175) See note 8.
[86] UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, Article 7(4) and (5).
[87] UN Human Rights Council (2009) paragraph 25: See note 85.
[88] The UN Refugee Agency (2010: 5): See note 83.
[89] UN General Assembly, Convention on the Reduction of Statelessness, Article 10(1) (1961: 175) See note 8.

otherwise acquires territory shall confer its nationality on such persons as they would otherwise become stateless as a result of the transfer or acquisition.[90] This article can be said to have the best interest of the child principle imbedded in its meaning because when States cede or transfer territory, nationality is transferred on them even if they lost their previous nationality.

After discussing all the rights granted to stateless persons by the 1954 and 1961 Convention, it must be noted that no matter how extensive the rights granted to stateless person may be, they are not equivalent to possessing a nationality. All human beings have the right to a nationality and wherever the problem of statelessness arises, the focus should be on preventing and reducing it.[91] These two instruments may provide a foundation in the goal to achieve reduction and prevention of statelessness.

2.2.1.5. Convention on the Rights of the Child (CRC)

There are many international instruments that establish children's rights, the most important being the CRC, which applies to every child within the State's jurisdiction, without discrimination.[92] The CRC provides that every child has the right to acquire a nationality and to be registered immediately after birth. In this respect, states must ensure that children enjoy these rights in practice and where a child is denied his or her identity, State Parties must provide "appropriate assistance and protection".[93] The CRC has been ratified by 196 States and only two States have not ratified as yet. This means that the provisions of the CRC have an almost universal applicability, which includes the articles 7 and 8 of the CRC that explicitly provides for the right to nationality. The importance thereof is that it provides the most global recognition of the right to acquire nationality and that it contains specific provisions not found in others

[90] UN General Assembly, Convention on the Reduction of Statelessness, Article 10(2) (1961: 175) See note 8.
[91]The UN Refugee Agency (2014: 9): See note 54.
[92] Plan SA (2012: 11): See note 3.
[93] The Convention on the Rights of the Child, Article 7: See note 34.

human rights treaties.[94] Although the CRC has not yet clarified precisely what the right to acquire a nationality means in practical terms, it has stressed that states have the obligation to take every appropriate measures to ensure that no children are left stateless and that such implementation of children's right to nationality must be carried out in such a way that the best interests of the child are observed.[95]

The CRC stresses the importance that the child's best interests must be a primary consideration in all state actions concerning children, various limitations in acquiring a nationality are as will be discussed below are arguably contrary to a child's best interest. One may argue that it can never be in the best interest of the child to be left stateless as argued in the case of *Nubian Minors v Kenya*.[96] On the other hand, United Nations High Commissioner for Refugees ("UNHCR") has taken the best interests principle to mean that children are not to be left stateless for an 'extended period'.[97] The reason for this meaning by the UNHCR is that the principle requires 'primary' and not 'paramount' consideration to be given to the best interest of the child.[98]

In my view, this interpretation of the best interests of a child could be argued to be valid but in the same breathe how long could the term 'extended period' be? One could say that primary concern should be interpreted in a way that children who are at risk of becoming stateless should be dealt with at first instance. Therefore, it is my submission that this interpretation of the best interests of a child is left open to be circumvented by states and should be applied in a manner that states attend to protect stateless children at first instance and effectively.

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[94] Doek JE (2006) *The CRC and the Rights to acquire and to preserve a nationality*, Chairperson, UN Committee on the Rights of the Child, Refugee Survey Quarterly, Vol. 25, Issue 3, 26.
[95] Open Society Foundations, *Children's right to a Nationality,* Open Society Justice Initiative, 1 http://www.justiceinitiative.org
[96] African Committee of Experts on the Rights and Welfare of the Child, *Nubian Minors v. Kenya*, 22 March 2011, https://www.opensocietyfoundations.org/litigation/nubian-minors-v-kenya , paragraph 42.
[97] 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*, HCR/GS/12/04, 2012, para 11, http://www.refworld.org/docid/50d460c72.html.
[98] Mandal R , Gray A (2014:7): See note 53.

Article 7 of the CRC follows the wording of the Article 24(3) of the International Covenant on Civil and Political Rights ("ICCPR") and not that of Principle 3 of the UDHR in which it provides that "the child shall be entitled from his or her birth to nationality".[99] The reason for this was that the drafters of the ICCPR felt that a State could not accept an unqualified obligation to accord nationality to every child born on its territory regardless of the circumstances.[100] Thus, Article 7(1) provides every child with the right to acquire nationality and not the right to nationality per se.[101] However, in terms of General Comment No. 17 of the ICCPR; 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.[102]

The effective implementation of the said rights and responsibility of the State lies predominantly on the immediate registration of the child after birth. This is frequently recommended by the CRC Committee to State Parties to take all necessary measures to ensure that all children are registered at birth in order to avoid the life altering status of being stateless.[103] Implementation is key and this can be achieved through a well-managed, universal birth registration that is accessible to all and free of charge.[104]

One of the major concerns of the CRC Committee is the non-registration of some categories of children that are most at risk of becoming stateless, namely; children of minority groups, children born out of wedlock and children of refugee, asylum-seeking or migrant families and children born to parents that work abroad.[105] Non-registration of such children results in statelessness of the said children and even if some form of registration is established, they may not

[99] Declaration on the Rights of the Child 1959, Principle 3 www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf ; Kanyinga K (2014:73): See note 78.
[100] Doek JE (2006: 26): See note 94.
[101] The Convention on the Rights of the Child, Article 7 (1): See note 34.
[102] UN Human Rights Committee (HRC), *CCPR General Comment No. 17*: Article 24 (Right of the Child), 7 April 1989.
[103] ACPF (2011): See note 51; Doek JE (2006: 27): See note 94.
[104] General Comment No. 7 of the CRC Committee (2005) on Implementing Child Rights in Early Childhood, (CRC/C/GC/7), para 25.
[105] Doek JE (2006: 27): See note 94.

be able to apply for an acquisition of a nationality.[106] The CRC Committee has recommended to State Parties to ensure the birth registration of these particularly vulnerable groups of children and where applicable, to take measures such that children can acquire a nationality.[107]

The discrimination of the child's mother is another problem that negatively affects the child's right to acquire a nationality and often arises to children born out of wedlock and in mixed marriages.[108] Such discrimination is in violation of Article 9(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW") which provides that State Parties shall grant women and men equal rights with respect to the nationality of their children as many State Parties do not allow the child to acquire the nationality of their mother.[109]Article 9 (2) thus supersedes Article 1(3) of the 1961 Statelessness Convention as it only focuses on the conferral of nationality by women.[110] The reason for this deduction is because Article 1(3) provides for certain requirements therein before a women/mother is capable of conferring her nationality to her children instead of providing women with the unconditional ability to do so as per Article 9(2).

If one reads Article 2,[111] which is the non-discrimination of children irrespective of the child's birth or other status, in conjunction with Article 7, a child born out of wedlock should acquire the nationality of his or her mother if he or she has not been legally recognised by his or her father.[112] Children born in mixed marriages have no problem with acquisition of a nationality if the father is a national of the State in which the child is born as the child will acquire the nationality of the father.[113] However, if the father has a nationality of another

[106] Boyden J, Hart J (2007) *The Statelessness of the World's Children* Editorial Introduction, Children and Society, Volume 1, 239.
[107] Boyden J, Hart J (2007: 240): See note 106.
[108] Galicki Z (2006) *Nationality of the Child- Feasibility Study* Bereau of the European Committee on Legal Co-operation (CDCJ-BU), 10.
[109] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'), 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13,, Article 9(2)
[110] Kanyinga K (2014: 73): See note 78.
[111] The Convention on the Rights of the Child, Article 2: See note 34.
[112] The Convention on the Rights of the Child, Article 2 and 7: See note 34.
[113] Doek JE (2006: 27): See note 94.

State, the child may acquire the nationality of his or her father depending on the rules of the national law of the father. In this case, the child is a non-citizen of the State he or she was born in and may suffer from discriminatory limitations of his or her rights in such State, such as the right to education and health care.[114] Thus, the non-discrimination principle will potentially curb statelessness among children to a certain extent and effectively provide stateless children with a nationality.

Article 7(2) deals with the reduction of statelessness in respect of which State Parties shall ensure the implementation of the right to acquire nationality in accordance with their national law and their obligations under the relevant international instruments, in particular, when the child would otherwise be stateless.[115] Special attention must be paid to children born and/or living within the jurisdiction of states that are stateless and measures should be taken to facilitate and/or expedite procedures for the acquisition of a nationality. In terms of the CRC Committee, this should be done by State Parties taking measures, when necessary, that allow the child through naturalization or otherwise, to acquire the nationality of that State in which he or she was born and or is living.[116] This does not mean that the CRC is recommending the *jus soli* approach, but if the child is born on the territory of a State Party and is not granted nationality by another State, that State should allow the child to acquire its nationality.[117]

The preservation and re-establishment of a nationality is enshrined in Article 8 of the CRC and is the only provision in an international human rights treaty that explicitly addresses the right to preserve your identity.[118] Article 8 provides that State parties shall 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. In addition, where a child is illegally deprived

[114] ACPF (2011:38): See note 51;Doek JE (2006: 28): See note 94.
[115]The Convention on the Rights of the Child, Article 7(2): See note 34.
[116] CRC Committee's General Comment No. 6 (2005) on Treatment of unaccompanied and separated children outside their country of origin. CRC/GC/2005/6 and published in the UN Document HRI/GEN/1/Rev. 8 (May 2006), p. 407-431.
[117] Doek JE (2006: 28): See note 94.
[118] The Convention on the Rights of the Child, Article 8: See note 34.

of some or all the elements of his or her identity, State parties shall provide appropriate assistance and protection with the view of re-establishing speedily his or her identity.[119] As argued by Detrick, the concept of nationality should be seen as an element of the child's identity.[120]

In light of the above I will be discussing the concept "nationality" as provided for in Article 8. Firstly, the "undertake to respect" implies that a State Party should take specific measures that can contribute to the realization of the child's right to preserve his or her identity, including nationality.[121] The CRC provides that States must grant citizenship to children born in their country if they are not recognised by another country.[122] Thus, under international law, every child is entitled to registration of their birth, including children born to irregular migrants.[123] However, in practice there are many problems in the implementation of this rule due to the lack of procedures guidelines.

The implementation of Article 8 embodies another aspect which is the link of the child's nationality with that of his or her parent. The law of State Parties often allow under specific circumstances that a person loses his nationality either by decision of authority or *ex lege.* However, according to Doek, the State's obligation under Article 8(1) of the CRC with regards to this loss of nationality should not automatically affect the child.[124] In this regard, Article 8(1) should be read in conjunction with Article 7(2) which would interpret that every child should be allowed to preserve his or her nationality particularly if the loss of nationality of the parent would mean that the child becomes stateless.[125] Article 8(2) requires State Parties to provide appropriate protection and

[119] The Convention on the Rights of the Child, Article 8: See note 34.
[120] Detrick S (1999) *A Commentary on the United Nations Convention on the Rights of the Child*, Kluwer Law International/Martinus Nijhoff publishers, The Hague,159- 168.
[121] Doek JE (2006: 29): See note 94.
[122] The Convention on the Rights of the Child, Article 8 (1) read in conjunction with 8(2) : See note 34; Heap S, Cody C (2008) *Children, Rights and Combating Statelessness: Plan's Experience of Improving Birth Registration* Harvard University, Boston , 20
[123] Heap S, Cody C (2008: 20): See note 122.
[124] Doek JE (2006: 30): See note 94.
[125] The Convention on the Rights of the Child, Article 8 (1) and 7(2): See note 34.

assistance with the view to speedily re-establish the child's identity in case he or she is illegally deprived of some or all elements of his or her identity.[126]

In summing up the protection under the CRC, it is clear that Article 7 and 8 provides a child with the legal tools to acquire a nationality coupled with the obligation on the state to preserve such right. [127] Overall, the CRC plays a major role in the protection of children who are stateless as well as those who are at risk of becoming stateless. Thus, the fact that South Africa and Kenya has both ratified the CRC, these tools should be enforced but are not enforced properly, resulting in a flawed system resulting in transgenerational statelessness.

2.2.1.6. Other relevant international instruments relating to nationality and statelessness

There are a few other international instruments that relate to the right to nationality and statelessness. Though these international instruments are not as in depth as the previously discussed instruments, it is important for the protection of children who are stateless or those who would otherwise be stateless in the event that these instruments apply to them.

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for an obligation on States to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law with respect to nationality.[128] It also provides that nothing in CERD may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.[129] These provisions serve a great importance as it prevents

[126] The Convention on the Rights of the Child, Article 8(2): See note 34.
[127] The Convention on the Rights of the Child, Article 8: See note 34.
[128]UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, Article 5: See note 109.
[129]UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, Article 1(3).

discrimination on the ground of national or ethnic origin and this could be said to prevent discrimination of those who are stateless even though they have no nationality as their national or ethnic origin may be deprived from them, lost or unknown completely.

It is important that when dealing with children, protection against statelessness should begin at birth. Thus, Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) states that every child shall be registered immediately after birth and shall have a name and every child has a right to acquire a nationality.[130] In addition to this instrument the International Convention on the Rights of All Migrant Workers and Members of Their Families (Migrant Convention), also provides that every child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.[131]

These international instruments provide a safeguard against children becoming stateless as well as for those who are already stateless. Even though statelessness is still a topic of great concern, the fact that there are many international instruments that have rules protecting stateless children, it serves as a stepping stone to the goal to eradicate childhood statelessness.

2.2.2. Regional Treaties relating to statelessness

Parallel to the development of the corpus of international human rights treaties, several regional bodies adopted regional human rights instruments that also contain norms pertaining to the right to a nationality and the importance thereof to children.[132] In this section of the paper I will be discussing the provisions of a few regional instruments that relate to statelessness and the safeguards against statelessness among children.

[130]UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 24.
[131] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158, Article 29.
[132] Preventing Statelessness among Children: Interpreting Articles 1-4 of the 1961 Convention on the Reduction of Statelessness and Relevant International Human Rights Norms (2011), 17.

Regional treaties, including the European Convention on Nationality[133] and the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession,[134] have been developed to reinforce protection at the regional level. These treaties reflect developments in international law that have occurred since the two universal treaties on statelessness were adopted.

The 1997 European Convention on Nationality of the Council of Europe is ratified by sixteen states to date and seeks to avoid statelessness by regulating the loss and acquisition of nationality.[135] Whereas the 1950 European Convention on Human Rights does not explicitly make reference to nationality rights but citizenship matters are subject to its requirements.[136] For example, Protocol 12 prohibits discrimination with respect to the enjoyment of any right set forth by law and Protocol 4 guarantees freedom of movement and prohibits expulsion of nationals and collection expulsion of aliens.[137] These regional instruments reflect the importance of the right to nationality by incorporating the essence thereof either explicitly or implicitly within its rights which creates guidance and enforcement on a regional level.

The ACRWC which bears a greater significance to Kenya and South Africa as states who have ratified its contents, provides that every child shall have the right to his birth, to a name, to be registered immediately after birth and shall have the right to acquire a nationality.[138] In order to further protect the child, the ACRWC provides *"that State Parties to the Charter shall undertake to ensure that their constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if at the time of the child's birth he is not granted nationality by any*

[133] Southwick K, Lynch M, (2009: 6): See noted 26.
[134] Council of Europe, Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 15 March 2006, CETS 200.
[135] Southwick K, Lynch M, (2009: 6): See noted 26.
[136] Southwick K, Lynch M, (2009: 6): See noted 26.
[137] Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, ETS 177 and Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS, 46.
[138] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 6(1)-(3).

other State in accordance with its law".[139]However, General Comment on Article 6 of the ACRWC provides that all African States must have rules providing for the conferral of their nationality[140]established in their constitutions and/or in other legislation.[141] The national laws of states often do not reflect the state's commitments to avoid statelessness established by Article 6(3) and 6(4) of the ACRWC.[142] In addition, many African nationality laws are in conflict with the basic principles enshrined in the ACRWC and other human rights treaties.[143]Nevertheless, African States are reminded by the Committee to the ACRWC that in establishing rules for the conferral of their nationality they do not possess unfettered discretion as they must do so in a manner consistent with their international obligations.[144]

General Comment on Article 6 opens with a situational analysis of birth registration and the child's right to a nationality in Africa, noting the associated problems of statelessness and discrimination between men and women in the passage of nationality to their children.[145] It also discusses the principles underlying Article 6, the substantive content of the article around the three core rights of name, birth registration and nationality as well as the State's duty to prevent statelessness and includes remedies for violations of the article.[146] These well-structured explanations provided by the said General Comment provides States with an in depth guideline when applying Article 6 to prevent

[139] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, Article 6(1)-(3): See note 138.
[140] Note that the countries with English as an official language often have laws that refer to "citizenship" rather than "nationality".
[141] African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014), available at: http://www.refworld.org/docid/54db21734.html [accessed 18 April 2018]
[142] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, Article 6(3) and (4): See note 138.
[143] General Comment on Article 6 of The African Charter on The Rights and Welfare of The Child: See note 151.
[144] Manby B (2015: 160): See note 4.
[145] The African Children's Charter Project *Promoting the African Charter on the Rights and Welfare of the Child, The Pan African Children's Charter Project, African Union Liaison & Pan African Program Office: Plan International Inc*. http://resourcecentre.savethechildren.se/sites/default/files/documents/final-accp_publication_2014.pdf
[146] , The African Children's Charter Project: See note 155.

and protect statelessness among children. It is important to note that the ACRWC was ratified by both Kenya as well as South Africa.[147]

The African Charter on Human and People's Rights (ACHPR)[148] is another regional instrument that is based on African human rights, but does not have specific terms on statelessness. However, the ACHPR does prohibit mass expulsion of non-nationals on discriminatory grounds and identifies the state's duty to protect and assist the family, 'the natural unit and basis of society'.[149] The Covenant on the Rights of the Child in Islam also ensures nationality rights for children and that State parties shall make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory.[150]

These obligations are complementary to those in the 1961 Convention as well as the other international instruments that have been mentioned above. However, even though these obligations are provided by the said regional instruments, the 1961 Convention remains the only instrument offering common universal safeguards for the avoidance of statelessness.[151] This is so because it addresses nationality problems which may occur within a specific region as well as those problems which require application of common rules by States in different regions.[152] Notwithstanding this, these regional instruments show that the interest of eradicating statelessness on a regional level as well.

2.3. Conclusion

It is no secret that statelessness is a major concern worldwide among many who suffer from statelessness and those who are at risk of becoming stateless.

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147 African Union, *a United and Strong Africa*, Ratification Table, http://pages.au.int/acerwc/pages/acrwc-ratifications-table [accessed on 09/09/2015]

148 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

149 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), Articles 12(5) and 18 (1981): See note 158.

150 Organization of the Islamic Conference (OIC), Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep.Final, Article 7(2).

151 Southwick K, Lynch M, (2009: 6): See noted 26.

152 Preventing Statelessness among Children: Interpreting Articles 1-4 of the 1961 Convention on the Reduction of Statelessness and Relevant International Human Rights Norms (2011), 17.

As a result, a substantial international framework exists, with international human rights law playing a complementary role to both the 1961 and 1954 Conventions.[153]The low levels of ratification of these two instruments are a great concern and States need to realise that action to address the plight of the stateless is clearly an urgent issue from a human rights perspective. Many of the world's stateless persons are children and in every region of the world children are born into statelessness daily which includes children that inherit this status from their stateless parents creating an intergenerational problem.[154] Thus, these instruments provide states with the importance of protecting and preventing statelessness.

In light of the above, one has a brief overview of the international and regional laws relating to statelessness. In this regard, the following chapter will analyse the current status of stateless children in Kenya and South Africa and their national laws in place in order to determine whether it is in line with the instruments ratified by the said countries.

[153] Mandal R , Gray A (2014:7): See note 53.
[154] Institute on Statelessness and Inclusion (2014) *The World statelessness*, Wolf Legal Publishers, 33

CHAPTER 3: STATELESS CHILDREN IN KENYA AND SOUTH AFRICA

3.1. Introduction

In the previous chapter the international and regional instruments that relate to statelessness and how it attempts to protect and prevent statelessness have been discussed. While these instruments are in place, the implementation thereof by states are misinterpreted due to the lack of guidelines in place on a domestic level and as such, left open for state determination. However, some countries have incorporated the international principles within their laws but still require detailed guidance in implementing same. In this regard, the remaining question is whether Kenya and South Africa's national laws are in line with the international human and children's rights instruments that they are party to. In order to answer this question, the national and international laws of both South Africa and Kenya will be discussed in light of its compliance to its international obligations in respect of the protection and prevention of statelessness.

In order to understand statelessness, it is necessary to know the main oaths to citizenship which is by blood, by birth and by naturalization. Citizenship by blood is known as *jus sanguinis* which means that a new born child can obtain nationality through one or both parents.[155] Citizenship by birth is known as *jus soli* in terms of which a new born child obtains nationality from its country of birth regardless of parental citizenship.[156] Lastly, one can obtain citizenship through naturalization, a process by which a state regulates how a person can change from one nationality to another.[157] There are requirements to do so, namely, years of residency in the host country, passing a test or tests, economic status or marrying a person who is a citizen of that country.[158] These different ways to obtain citizenship is vital to those seeking to acquire nationality,

[155] African Union, (2014) "The Right to Nationality in Africa" , African Commission on Human and Peoples' Rights, 25.
[156] Southwick K, Lynch M, (2009: 1): See noted 26.
[157] Abraha S (2012: 11): See note 22; Milbrandt J (2011), '*Stateless' Cardozo Journal of International and Comparative Law*, 90; Walker D,(1981) '*Statelessness: violation or conduct for the violation of human rights'* Human Rights Quarterly, 110.
[158] Lynch M (2008), *'Futures Denied: Statelessness among infants, children and youth',* Refugees International, 4.

especially children, in which regard each country practices either one or a combination of these ways to citizenship which often conflicts either with their own legislation or internationals laws thereto.[159]

These conflicting practices raised are trite in both Kenya and South Africa of which a detailed analyse will be provided below.

3.2. Stateless children in Kenya

3.2.1. Causes of statelessness in Kenya

As briefly discussed in Chapter 1, a large but undocumented number of stateless persons live in Kenya and the numbers are sometimes estimated at about one hundred thousand people including children.[160]These "stateless communities" include the Galjeel Somali, the Nubians, Pemba, Wata, the Mokonde and the Coastal Arabs. [161] However, it is argued that the aforesaid estimate is gravely incorrect as it has been estimated that the Nubians alone amount to over on hundred thousand.[162]As a result, a large percentage of the population are unable to participate fully in the economic, politic and social life of the country. Before the adoption of the New Constitution of Kenya[163] and new Citizenship Act,[164] Kenya's laws relating to nationality were overwhelming discriminatory and deprived thousands of the right to nationality. While the new Kenyan Constitution may have represented a significant change for the better, a series of fundamental problems still exist in achieving equality in the acquisition of the Kenyan nationality by children due to the absence of procedural guidelines.

[159] African Union, (2014: 25): See note 165.
[160] Yash Pal Gai, "Predicament of citizenship and stateless" 22 October 2016 http://.thestar.co.ke/news/2016/10/22/predicament-of-citizenship-and-the-stateless_c1441345
[161] Yash Pal Gai, "Predicament of citizenship and stateless" 22 October 2016: See note 160; Open Society Justice Initiative (2009) '*Citizenship Discrimination and the Right to Nationality in Kenya',* 4.
[162] Yash Pal Gai, "Predicament of citizenship and stateless" 22 October 2016: See note 160.
[163] *The Constitution of Kenya* [Kenya], 27 August 2010, available at: http://www.refworld.org/docid/4c8508822.html [accessed 13 March 2018].
[164] Kenya: The Kenya Citizenship and Immigration Act, 2011 [Kenya], Act No. 11 of 2011.

The causes of statelessness in Kenya can be grouped into two broad categories, namely, legal and administrative. In respect of the legal category, Kenyan national laws pertaining to the acquisition, restoration, retention and loss of citizenship have gaps which fail to prevent statelessness.[165]The Constitution of Kenya and the Kenya Citizenship Act, contain provisions relating to the renunciation of citizenship and deprivation of citizenship that do not include safeguards to protect individuals from being rendered stateless.[166]

While the Constitution has changed to somewhat protect children by granting them with Kenyan nationality if they would otherwise be stateless, certain gaps in the law remain that lead to the risk of statelessness. As Fitzgerald provides, [167]while both the new and old Constitution of Kenya prohibit both direct and indirect discrimination, no definition as to what either form of discrimination means is forthcoming and thus leaves it open to state determination. This is shown below by the way in which administration of nationality laws are implemented.

The administrative causes of statelessness in Kenya demonstrate that there is a difference between law and actual practice. Individuals in Kenya may be at risk of becoming stateless as a result of the faulty operation or under-regulated nature of Kenya's administrative practices concerning citizenship.[168] An example of this is that there are no adequate regulations that guide the vetting process that certain ethnic groups in Kenya are subjected to. In many parts of the world national identification cards or birth certificate in the case of children, is the hallmark of citizenship. Nubians comprise a small, disparate minority group in Kenya and have historically experienced disproportionately lengthy and strenuous processes in obtaining national identity documents.[169]

[165] Abuya E (2010: 5): See note 14.
[166] *The Constitution of Kenya* [Kenya], 27 August 2010, Article 6 & 7: See note 190.
[167]Fitzgerald J (2010) "The Road to Equality? The Right to Equality in Kenya's New Constitution", The Equality Rights Review, Vol, 5, 59.
[168] Abuya E(2010: 6): See note 14.
[169] Odongo G (2012) "Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms", *AHRLJ*, 115; Southwick K, Lynch M, (2009: 21): See noted 26.

A limited amount of public guidelines are available that provide as to when an officer may request additional documentation or what documentation or information may be required by children to obtain Kenyan nationality. As such, registration offices retain discretion to request any form of documentation before issuing birth certificate or identity documents in terms of which Nubians are disproportionately required to provide additional documentation in of applications.[170]

After extensive groundwork, the Open Justice Society Initiative has accessed data which at most portrayed the disproportionate administration of acquisition of nationality based on the ethnicity of children. For example, non-Nubian applicants were not required to provide a parent's birth certificate, religious certificates or letters from their teacher or district chief to obtain a birth certificate as required from Nubians and those of various ethnic origins.[171] As such, these additional requirements result in applicants having to make multiple trips to government building which further result in additional fees, travel costs and a prolonged intimidating process just to obtain a birth certificate. These additional costs may be prohibitive for an individual already living in extreme poverty as many ethnic minorities do.

Despite the profound evidence of discrimination based on ethnic origin, civil registration authorities in Kenya are failing to reach their own targets for issuing birth certificates. By tracking the application process in Kenya, the Kenyan Nubian Rights Forum ("NRF") monitors the implementation of the Nubian case. As a result, over 900 clients have come to the NRF for assistance.[172] While birth certificate applications should be processed in one day, the NRF has established that the average time in processing birth applications was 41 days in respect of NRF clients which is equivalent to the overall processing period.[173]

[170] Open Society Justice Initiative, Rupert Skilbeck (2014): See note 15.
[171] African Committee of Experts on the Rights and Welfare of the Child (2017), Written Comments on Implementation, *Institute on Human Rights and Development in Africa and Open Society Justice Initiative v. Kenya* (Kenyan Nubian Children, Case No.02/2010), 3.
[172] Open Society Justice Initiative, Rupert Skilbeck, (2014): See note 16.
[173] Open Society Justice Initiative, Rupert Skilbeck, (2014): See note 16.

As a result, interference with the right to education as envisaged in the Children's Act, Constitution of Kenya as well as the Basic Education Act, is on-going. Due to lack of birth certificates, children from Nubian descent wishing to enrol for the Kenya certificate of primary education exams were sent away by their schools. It is therefore my submission that generations of children are not only facing the risk of statelessness but also the risk of being uneducated and/or excluded from reaping the benefits of a successful career and potentially being imprisoned by poverty indefinitely.

The situation in Kenya provides a one-country illustration of problems faced in various countries in terms of which the basic administrative processes for birth registration and acquiring nationality are mismanaged. While the enactment of the new Constitution removed various discriminatory clauses regarding the right to nationality, the absence of guidelines in implementing same is crucial. This is evidenced by the stateless communities still suffering under the administrative requirements needed in order to acquire Kenyan nationality.

The Children's Act brought wide-ranging reforms in 2001 as well as the Constitution in 2010 which include providing for every child to have the right to a name and nationality.[174] Despite such reform, children living and/or born in Kenya are still deprived of the Kenyan Nationality. Kenyans who have birth certificates find it difficult to obtain their national identity cards once they reach adulthood because the birth certificates contain a note that explicitly states that they do not have any effect in determining the individual's rights to nationality.[175]

Despite the fact that people are required to furnish additional documentation in order to obtain nationality, prior to submission of their applications, individuals are forced to appear before a vetting committee which results in additional scrutiny. One should bear in mind that this vetting process operates outside of the ordinary application process and is considered as a creature of discretion

[174] The Constitution of Kenya [Kenya], 27 August 2010, Article 53(1)(a): See note 190.; Article 11 of the Children Act 8 of 2001: Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity.
[175] Manby B (2009: 120) See note 30.

which ultimately leaves children in the same position they were before the Nubian case decision and amendment of Kenya's nationality laws.[176] Thus, the lack of implementation of the ACERWC's decision in the Nubian case is a cause for concern.

However, some significant changes have been made due to international co-operation and work on the ground in Kenya. In 2017 these changes have been shown to have made a difference for many people and children living in stateless communities, especially the Mokonde people. These changes will be discussed below in relation to the changes made in the nationality laws of Kenya.

3.2.2. The legislative framework relating to nationality in Kenya

The Citizenship law in Kenya is governed by the *Constitution of the Republic of Kenya* (*Kenyan Constitution*) of 2010,[177] the Kenyan Citizenship and Immigration Act of 2011 ("Citizenship Act")[178] and the Security Law Amendment Act of 2014.[179] The legislative framework that specifically deals with children and their rights is the *Children Act of 2001*[180]("Kenyan Children's Act"). While previously governed by largely discriminative laws, the new 2010 and 2011 nationality laws is greatly welcomed. The *Kenyan Constitution* takes precedence over all Kenyan laws and provides for citizenship on a *jus sanguinis* basis. It must be noted that Kenyan citizenship is primarily based on descent from parents who have Kenyan citizenship and now provides the ability of children to acquire nationality if they would otherwise be stateless.[181]

A framework for restoration of constitutional democracy in Kenya has been established by the new Kenyan Constitution which is argued to strengthen the

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[176] African Committee of Experts on the Rights and Welfare of the Child, Written Comments on Implementation, *Institute on Human Rights and Development in Africa and Open Society Justice Initiative v. Kenya* (Kenyan Nubian Children, Case No.02/2010), (2017:5): See note 170.
[177] *The Constitution of Kenya* [Kenya], 27 August 2010: See note 190.
[178] *Kenya: The Kenya Citizenship and Immigration Act, 2011* [Kenya], Act No. 11 of 2011, 30 August 2011, available at: http://www.refworld.org/docid/4fd9a3082.html [accessed 13 March 2018]
[179] *Kenya: The Security Laws (Amendment) Act, 2014*: See note 205.
[180] *The Children Act, 2001* [Kenya], No. 8 of 2001, 31 December 2001, available at: http://www.refworld.org/docid/47975f332.html [accessed 13 March 2018]
[181] Open Society Justice Initiative (2009:3) See note 161.

likelihood of accountability for past human rights abuses and reparations for victims.[182]However, while Kenya has crossed the hurdle of adopting a new Constitution, the State is now faced with the challenge of *"realizing its promise of more inclusive citizenship through the new devolved system of government; reduced presidential powers and better separation of powers between the three arms of the government; a restructured and vetted judiciary; an expanded, enforceable bill of rights that includes social, economic, and cultural rights; security sector and land reforms; environmental protection; and other key changes".*[183] It has recently been estimated that Kenya houses approximately 20 000 stateless persons as of 2017.[184] These stateless persons are largely composed of ethnic minorities who are considered 'un-Kenyan' due to their origin in other states although being eligible for Kenyan nationality in terms of its laws.[185]

The Citizenship and Immigration Act of 2011 has brought about a welcomed addition to the laws governing citizenship for children in Kenya as it now provides for acquisition of nationality to children found in Kenya, but is ultimately accompanied by certain restrictions.[186]The *Kenyan Children's Act* is responsible for all laws relating to children and explicitly provides for a child's right to a name and nationality.[187]However, while this explicit right to nationality exists for all Kenyan children, children of Somali or Nubian descent still face daunting obstacles in accessing birth registration.[188] Though the Security Law Amendment Act brought the notion of vetting in line with the security framework in Kenya, safeguards as to guide registration authorities' discretion in implementing nationality laws are absent. As such, without establishing transparent, objective and non-discriminatory procedures for implementing the

[182] Manby B (2015: 159): See note 4.
[183] Akech M (2010) "Kenya: Institutional Reform in the New Constitution of Kenya" , International Center for Transitional Justice, 3.
[184]Fitzgerald J (2010) "The Road to Equality? The Right to Equality in Kenya's New Constitution", The Equality Rights Review, Vol, 5, 65.
[185] Institute on Statelessness and Inclusion (2017: 21): See note 245.
[186] Manby B (2016) "Citizenship Law in Africa", Open Society Foundations: African Minds on behalf of Open Society Foundations, 49.
[187] The Children Act, 2001 [Kenya], No. 8 of 2001, 31 December 2001, section 11.
[188] Odongo G (2012:115): See note 196; See further Kenya National Commission on Human Rights (2007) An identity crisis? A study on the issuance of national identity cards, Nairobi, http://www.knchr.org/dmdocuments/Final%20IDsReport.pdf

Kenyan Citizenship Act, stateless children's right to acquire the Kenyan nationality will remain futile.

This provides one with the basis of what legislative and constitutional instruments govern the nationality laws in Kenya. While the well-known Nubian children case[189]was successful and brought about change for children of ethnic minorities in Kenya, such change is merely words in law and contradicted in practice. Thus, the new Constitution and Citizenship and Immigration Act, if implemented according to the African Committee's recommendations, may end political manipulation of perceptions of exclusion and marginalization that has profoundly contributed to interethnic strife in Kenya.[190]

After establishing the crucial changes in Kenya's nationality laws, its compliance with its international obligations is to be analysed. While it may be generally objected, [191]the nationality laws in Kenya will be discussed through a dual lens of the old and the new nationality laws especially that of the Kenyan Constitution in order to conduct this analysis.

3.2.3. Kenya's nationality laws vs. international human rights obligations towards statelessness

Kenya is party to several international and regional treaties containing legal standards on the right to nationality, including the ICCPR,[192]CRC,[193]CERD,[194]CEDAW,[195] ACHPR[196]and ACRWC.[197] Although procedural guidelines are required in Kenya in implementing its nationality laws,

[189] African Committee of Experts on the Rights and Welfare of the Child, Nubian Minors v. Kenya: See note 92.
[190] Akech M (2010: 7): See note 210.
[191] Odongo G (2012: 166): See note 196.
[192] Acceded to the International Covenant on Civil and Political Rights on March 23, 1976.
[193] Acceded to the Convention on the Rights of the Child on September 2, 1990.
[194] Acceded to the Convention on the Elimination of All Forms of Racial Discrimination on October 13, 2001.
[195] Ratified the Convention on the Elimination of All Forms of Discrimination Against Women on April 8, 1984.
[196] Acceded to the African Charter on Human and Peoples' Rights on January 23, 1992.
[197] Acceded to the African Charter on the Rights and Welfare of the Child on July 27, 2000.

these international instruments have indeed made an impact on Kenya's nationality laws.

The 2010 Constitution of Kenya sought to address the problem of statelessness especially for children who find themselves trapped with no identity. Subsequent to the enactment of the 2010 Constitution of Kenya,[198] the Citizenship and Immigration Act of 2011 was passed by parliament as the new law governing the issues of statelessness. In terms of the Citizenship and Immigration Act, all stateless persons must be registered as Kenyan citizens within 5 years of the enactment of the said Act or it could be extended by 3 years in the discretion of the cabinet secretary.[199] However, key gaps that can be exploited through arbitrary administrative actions that undermine nationality rights in Kenya are still present.[200]

These changes can be summarised into four points namely: every citizen is now entitled to rights and privileges of citizenship subject to the limitation the law can impose; a person is a citizen by birth if on the day of the person's birth whether or not in Kenya, either parent is a citizen[201]; citizenship may now be acquired either by way of birth or registration which cannot be lost by way of marriage or dissolution of marriage and finally, child foundlings who are less than eight years of age in Kenya whose parentage and nationality is unknown is deemed to be a citizen by birth.[202]Thus, the new Kenyan Constitution perceives citizenship in two interrelated ways, citizenship by birth or by registration.[203]

Kenya has further passed a new regulation that allows authorities to waive fees and documentation requirements for stateless persons, migrants and their descendants who are applying for citizenship and further meet other criteria.

[198] Kenya Human Rights Commission, "The Arduous Journey of the Makonde to Kenyan Citizenship, file:///D:/new%20information%20chapter%203/The-Arduous-journey-of-the-Makonde-to-Kenyan-Citizenship.pdf page 1.
[199] Kenya Human Rights Commission, "The Arduous Journey of the Makonde to Kenyan Citizenship", page 4: See note 217.
[200] Kanyinga K (2014: 34-35): See note 78.
[201] The Constitution of Kenya [Kenya], 27 August 2010, Article 14: See note 190.
[202] The Constitution of Kenya [Kenya], 27 August 2010, Article 14(4): See note 190.
[203] Kanyinga K (2014: 34): See note 78.

The implementation of the regulation has immediate effect and is currently on-going in Kenya. This change was aimed at providing the right to citizenship to residents of Kenya who would otherwise be eligible for citizenship was it not for the lack of documentation to prove otherwise or the ability to pay the required government fees when making application.[204]

However, the minimal period of time given provides a profound difficulty for persons to make application in this regard. Appleman and Leiden argue that *"there was no right to citizenship, only eligibility, the matter resting in the discretion of the cabinet secretary. However, it is my submission that there is little or no proof that the government did anything to inform stateless communities to these provisions."*[205] This is only one submission by two authors who have close relations in Kenya, let alone the submissions of those that are stateless who have never received communication as to the new laws.

It is therefore my submission that people are not informed about the changes in law and their rights coupled thereto which ultimately declares the said laws redundant to those unaware thereof. However, the international community has been working on the ground in Kenya with the aim of providing awareness, especially to those who have no knowledge of the law due to the inability to read or write which is arguably a result of their inability to access basic education due to their status.

The discrimination in Kenya is evidenced by the distinction between so called 'outsiders' (those who are not indigenous to an area) and that of 'insiders' which continue to be central to conflicts in various parts of Kenya.[206]In April 2016, a pilot project was conducted by the United Nations Human Rights Commission ('UNHCR") in co-operation with Kenya Bureau of Statistics, Norway and Haki

[204] Berry Appleman and Leiden LLP, Kenyan News, 10 Feb 2017 file:///D:/new%20information%20chapter%203/Kenya%20moves%20to%20ease%20citizenship%20requirements%20for%20stateless%20persons,%20migrants%20_%20B%20A%20L%20_%20Berry%20Appleman%20&%20Leiden%20LLP.html#/
[205] Berry Appleman and Leiden LLP, Kenyan News, 10 Feb 2017: See note 223.
[206] Kanyinga K (2014: 34): See note 78.

Centre.[207]Throughout 2016, the operation built on the achievements made in 2015 by supporting the local and central governments towards actions to reduce and prevent statelessness. The aim of the UNHCR in this regard is to raise awareness in Kenya on the longstanding issue of statelessness in the country.[208]

Though years have passed since the decision made in the Nubian case, the continued struggle of children facing statelessness or at risk of becoming stateless was brought to the attention of the CRC Committee. As such, in January 2016 the CRC Committee issued recommendations in terms of which its conclusions related to the ongoing concerns with respect to children's access to birth registration and nationality in Kenya.[209] In this regard, it highlighted the fact that despite the measures introduced in the Citizenship and Immigration Act, many children of Nubian descent have not obtained nationality.[210] As such, the CRC Committee has urged Kenya to expedite the adoption of a law that provides for and regulates universal and free birth registration at all stages of the registration process. Most importantly, the CRC Committee urgently recommended that Kenya strengthen administrative measures in respect of birth registration especially setting out guidelines to those executing the process.[211]

International support creates a source of guidance for those children or those who are now adults already, to establish a sense of belonging and the benefits of life which they were previously deprived of. The international communities takes cognisance of the urgent need for change in Kenya by bringing their concerns closer to the ground and engaging in work within the state. Its 2017

[207] The UN Refugee Agency, "Stateless Persons: A Stateless person is an individual who is not considered to be a national by any State under the operation of law", 2016 http://www.unhcr.org/ke/469-stateless-persons.html
[208] The UN Refugee Agency, "Stateless Persons: A Stateless person is an individual who is not considered to be a national by any State under the operation of law": See note 232.
[209] See UN Committee on the Rights of the Child, Concluding observations on the combined third and fifth periodic reports of Kenya, UN Doc CRC/C/KEN/CO/3-5, 21 March 2016, at para. 29
[210] See UN Committee on the Rights of the Child, Concluding observations on the combined third and fifth periodic reports of Kenya, at para. 29: See note 234.
[211] See Annex 7: Commission on Administrative Justice, Office of the Ombudsman, An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya, August 2015.

strategy is expected to contribute to Kenya's strategic implementation of prioritized actions of the national plan which are based on a global plan to end statelessness. Notwithstanding these international treaties that Kenya is party to, Kenya is not party to either of the international conventions on statelessness, namely, the 1954 Convention and the 1961 Convention. These instruments are key to establishing certain minimum protections for stateless people and establish certain rules designed to prevent situations that put people at risk of becoming stateless.[212]

3.2.3.1. Gender discrimination and Kenya's nationality laws

The main issue that contributes to the violation of children's human rights is discriminatory practices relating to the acquisition of nationality. Gender discrimination in access and passing of citizenship to children has been an important issue before the adoption of the new Kenyan Constitution. In terms of Article 90 of the 1963 Kenyan Constitution, only Kenyan fathers could pass citizenship to a child born outside of Kenya. This violated Kenya's international law obligations in the form of gender discrimination as it violated the provisions provided in the *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW") which was ratified by Kenya in 1984 the contents of which was discussed in Chapter 2.[213] Equal rights for men and woman to confer their nationality to their children only existed if the child was born in Kenya.[214]Thus, women who had children from non-Kenyan men were not able to confer their Kenyan nationality to their children.[215]

However, the new Kenyan Constitution addressed this issue by replacing Article 90 of the 1963 Kenyan Constitution by Article 14(1) of the new Kenyan

[212] The UN Refugee Agency (2014: 4): See note 57.
[213] See Chapter 2, page 31 - 32.
[214] UN High Commissioner for Refugees (UNHCR), UNHCR and the Kenya Human Rights Commission: Kenya Dialogue on Gender Equality, Nationality and Statelessness, 23 March 2015 available at available at: http://www.refworld.org/docid/54f838564.html [accessed 2 November 2016]
[215] UN High Commissioner for Refugees (UNHCR), UNHCR and the Kenya Human Rights Commission: Kenya Dialogue on Gender Equality, Nationality and Statelessness, 23 March 2015: See note 239.

Constitution. Article 14(1) provides that *"A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or the father of the person is a citizen."*[216] Therefore, both mother and father may confer their nationality to their children born abroad bringing this section 14(1) in line with the provisions of CEDAW. This provision is applied with retrospective effect in which regard all children born to Kenyan mothers abroad before the enactment of this provision are also considered Kenyan nationals.[217]However, a limitation is placed upon the provision by the Kenya Citizenship Act which only permits such conferring of nationality to a child born abroad if the mother or father is a Kenyan citizen by birth.[218]

As a result of the aforesaid limitation, not all Kenyan citizens are citizens by birth which places a bar on those parents who were and are citizens by registration to confer their nationality to their children born abroad[219]. Consequently, children in these circumstances are still deprived of obtaining the Kenyan citizenship, notwithstanding their parent/s being a Kenyan national. As mentioned above, a profound number of mothers in Kenya were unaware of these changes[220] and as such, were only able to attend to conferring their nationality to their children at a later stage creating a further delay in their children attempting to acquire Kenyan nationality. It is important to understand that laws mean nothing when those who are entitled thereto have no knowledge thereof and/or such entitlement boils down to mere theory rather than actual enforcement.

3.2.3.2. Children who would otherwise be stateless and foundlings

Prior to the enactment of the new Kenyan Constitution and citizenship laws, the right of a child to a name and nationality was only provided for in the Children's Act of 2001 which was overridden by the 1963 Kenyan Constitution. Not only

[216] The Constitution of Kenya [Kenya], 27 August 2010, Article 14(1): See note 190.
[217] Akech M (2010: 7): See note 210.
[218] Kenya: The Kenya Citizenship and Immigration Act, 2011 [Kenya], Act No. 11 of 2011,, Article 7.
[219] Kanyinga K (2014: 78): See note 78.
[220] Institute on Statelessness and Inclusion (2017) *"The World's Stateless Children"*, Wolf Legal Publishers (WLP), *Netherlands*, 500.

did the 1963 Constitution omit to protect or prevent children from becoming stateless, it violated its international obligations with regards to specific provisions in the ACRWC. Article 6(4) of the ACRWC[221] gives effect to the principle that a child shall acquire the nationality of the state in which he or she is born, if at the time of birth the child is stateless.[222]This has been partially addressed as a child's right to name and nationality is now provided for by the 2010 Kenyan Constitution bringing it in line with Article 6(4) of the ACRWC. As such, it is my submission that this is another example of the changes in law reflecting the recommendations laid down in the Nubian case judgment but falls short of the enactment of procedural guidelines to implement same.

The 2010 Kenyan Constitution further fails to provide for citizenship by birth for children born in Kenya to stateless parents or who would otherwise be stateless if citizenship is not granted. Instead it provides that *"A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth".*[223] While this provision protecting foundlings[224]is a welcomed change it is insufficient in guaranteeing against childhood statelessness due to their parents status. Thus, children found in Kenya with unknown parents are protected by Kenyan laws and children who are born to stateless parents in Kenya are not. It has been argued and I concur, that the circumstances where a child's parents are stateless or do not have the right in practice to pass their nationality to their children is much greater than when a child's parents are unknown.[225] Although this is a great concern, the right to nationality for children of unknown parents

[221] Article 6(4) of the ACRWC states: '4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.' The CRC contains a similar obligation under Article 7.

[222] See further the first substantial decision of the African Committee of Experts on the Rights and Welfare of the Child as per the issue of children of Nubian descent in respect of the absence of this provision- *Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent v. the Republic of Kenya*, Decision No. 002/COM/002/09 available at https://www.opensocietyfoundations.org/litigation/nubian-minors-v-kenya [accessed 20 July 2015].

[223] The Constitution of Kenya [Kenya], 27 August 2010, Article 14(4): See note 190.

[224] Children found on the Kenyan territory whose parents are unknown are considered foundlings.

[225]United Nations High Commissioner for Refugees, UNHCR and the Kenya Human Rights Commission Kenya Dialogue on Gender Equality, Nationality and Statelessness http://www.refworld.org/pdfid/54f838564.pdf [accessed 28 September 2016]

is incorporated into national law by more countries than the requirement to grant nationality to children who would otherwise be stateless.[226] Thus, it is submitted that Kenya take cognisance of this issue by amending Article 14(4) of the Kenyan Constitution to include protection of stateless children regardless of their parent's status bringing it in line with Article 6(4) of the ACRWC and the Nubian case judgment.

Despite the changes in its national laws, Kenya's continued systematic practice in discriminating against ethnic minorities in access to citizenship renders thousands of such persons stateless or at risk of becoming stateless.[227] However, hope lies in the projects formed on the ground by the UNHCR which one can only wait to see whether success is imminent.

3.2.3.3. Ethnic minorities and Kenyan nationality laws

In law and practice there is a high percentage of ethnic groups that are deprived of the rights that are core to the ability to participate fully in economic, political and social life of the country. As mentioned in chapter two, these groups are either legally stateless (de jure) or others face difficulties such as obtaining documentation to prove their citizenship which results in their citizenship for practical purposes to be ineffective (they are de facto stateless).

As previously mentioned, the first substantive decision of the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC") was in the *Nubian Minors v Kenya*[228] case in which the ACERWC found that Kenya was in violation of its obligations under the ACRWC on the grounds of discrimination in respect of the right to nationality. The "strong and direct link" between children's right to nationality and birth registration was stressed by the ACERWC as both rights are importantly contained in Article 6 of the ACRWC.[229]

[226] Manby B (2016: 49: See note 211.
[227] Kanyinga K (2014: 16): See note 78.
[228] *African Committee of Experts on the Rights and Welfare of the Child, Nubian Minors v. Kenya*: See note 92.
[229] *African Committee of Experts on the Rights and Welfare of the Child, Nubian Minors v. Kenya,* para 42: See note 92.

Therefore, the ACERWC clarified that under Article 6, children should have a nationality when they are born. However, due to discriminatory vetting and inadequate birth registration of Nubians in Kenya, a child's best interest and protection under Article 6 is disregarded by simply being stateless. [230] As more accurately stated by Liefaard and Doek,[231] *"being stateless as a child is an anti-thesis to the best interest of the child".*

Though Kenya has removed the discriminatory nationality laws that haunted ethnic minorities for decades, in practice Nubian children as well as children from various stateless communities in Kenya still suffer under discrimination. This has been made known by the ACERWC in its 2014 briefing paper that at the time 3 years have passed and Nubian children still face overwhelmingly discriminatory hurdles in obtaining birth certificates.[232]

These aforesaid hurdles include the disproportionate requirement of Nubians to provide additional documentation to support their applications compared to that of Kenyan citizens. In order to acquire these additional documents Nubian must execute strenuous trips to various government facilities and incur additional costs which inevitably lead to dealing with an intimidating prolonged process.[233] This is compounded by the fact that the stateless population overlaps with a larger undocumented population whose nationality status is unclear until put to the test through efforts to acquire documentation.[234]

Despite the on-going struggle for laws to be converted into practice and the Nubian case's effect on Kenyan nationality laws, another welcoming example

[230] *Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent v. the Republic of Kenya*, Decision No. 002/COM/002/09, para 42.- See further; Namati, Nubian Rights Forum, Open Society Initiative for East Africa, Open Society Justice Initiative (2014) "Briefing Paper: Implementation of Nubian mInors v Kenya, ACERWC, 2 - for more detail on ineffective application of the law in practice see further in this article, available at https://namati.org/resources/briefing-paper-implementation-of-nubian-minors-v-kenya/ [accessed on 28 September 2016]

[231] Liefaard T and Doek J E, (2016) Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisdictions, 261.

[232] Namati, Nubian Rights Forum, Open Society Initiative for East Africa, Open Society Justice Initiative (2014: 1): See note 229.

[233] Namati, Nubian Rights Forum, Open Society Initiative for East Africa, Open Society Justice Initiative (2014: 1): See note 229.

[234] Institute on Statelessness and Inclusion (2017: 32): See note 245.

is the struggle faced by the Makonde people. In July 2014 the Kwale County assembly petitioned the President to recognize the Makonde as citizens and issue them with birth certificate in respect of children and identity cards for adults.[235] In response to the petition, the President of Kenya established an interdependent taskforce on statelessness to gather information and look to the plight of the Makonde people as well as other stateless persons residing at the coast of Kenya.[236] However, the taskforce has yet to be released. Civil Society organisations led by the Kenya Human Rights Commission has supported the Makonde people and set out questions through members of parliament in the National Assembly and in the senate but regrettably the questions went unanswered.[237]

As a result, in order to make a statement, the Makonde trekked to Nairobi to see the President of Kenya. The Makonde people were surprisingly welcomed by the President of Kenya and his response to their plight has provided hope for the Makonde people. The President of Kenya apologised on behalf of the government and that of previous governments for the conditions the Makonde had to suffer under for many years. As a result, he subsequently ordered that they receive title deeds for the land they occupy which was previously denied due to lack of identity documents.[238] As Yash Pal Gai states, *"let us hope that the government officials will be in the position to grant citizenship to our newly discovered "brothers and sisters. After all, the President was careful in his promise to refer to only those who were qualified to be citizens.*[239] It has been estimated that as a result of the Makonde trek, approximately 1176 Makonde children and adults were issued birth certificates and identity cards in February 2017 when the Makonde were officially declared the 43rd tribe by the President of Kenya.[240]

[235] Kenya Human Rights Commission, "The Arduous Journey of the Makonde to Kenyan Citizenship, page 1: See note 217.
[236] Kenya Human Rights Commission, "The Arduous Journey of the Makonde to Kenyan Citizenship, page 1: See note 217.
[237] Kenya Human Rights Commission, "The Arduous Journey of the Makonde to Kenyan Citizenship, page 7: As above.
[238] Yash Pal Gai, "Predicament of citizenship and stateless" 22 October 2016: See note 160.
[239] Yash Pal Gai, "Predicament of citizenship and stateless" 22 October 2016: See note 160.
[240] The UN Refugee Agency, Modesta Ndubi, (2016) "The Makonde: From Statelessness to Citizenship in Kenya"

It is evident that changes have been slowly forthcoming in the plight to reduce statelessness in Kenya on both a national and international level. However, one cannot ignore the fundamental rights that stateless children are deprived of due to the inability of the state to provide protection for all children who are stateless. In February, April and May 2015, the Justice Initiative conducted qualitative and quantitative research in Kibera focusing on the link between access to documentation and core development outcomes.[241] The research proved that documentation in Kenya is undeniably linked to lifetime educational attainment, equal participation in economic life and political engagement. It is therefore my submission that there is no doubt that without furnishing the required documentation in Kenya, ethnic minorities will be denied the opportunity to live a dignified life and most importantly children will grow up without the opportunity to be educated and make a success of their lives. As such, delay in documentation equals potential "missed opportunities in life".

3.2.3.3. Stateless children and fundamental children's rights

These "missed opportunities" are presented in the form of fundamental rights which include, basic education, secondary and tertiary education as well as the opportunities to obtain scholarships or bursaries, educational or employment opportunities.[242] The right to education is one of these fundamental rights important to the life of any human being and a good education enhances the chances of a child to secure employment in the future. The ACRWC underlines that the education of a child should be geared towards promoting and developing his or her 'personality, talents and mental and physical abilities' to the 'fullest potential'.[243] International law stresses that a child's education should be directed at preparing the individual: *'For responsible life in a free*

http://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html

[241] Annex 3: Open Society Justice Initiative, Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya (2015). The report is based on a population survey (1,179 adults; 624 Nubian and 555 non-Nubian) that looked at development outcomes for individuals with varying levels of documentation as well as key informant interviews, 5.

[242] Kanyinga K (2014: 10): See note 78.

[243] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 11: See note 138.

society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples, ethnic, tribal and religious groups'.[244]

The laws governing the right to education in Kenya are found in the Education Act of 1968[245] and Children Act of 2001. The Children Act in particular reiterates the provisions of the CRC and the ACRWC in which it provides that every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents and that every child shall be entitled to free basic education which shall be compulsory.[246] The practice in Kenya of allowing children at risk of statelessness to access primary and secondary education is a step in the right direction and one that is consistent with the provisions of Kenya's international obligations.[247]

Kenya has however argued that the reason for the extensive vetting processes before children can acquire nationality to actually attend school is based on security of the country. However, the intense measures taken in the name of safeguarding security or countering extremism not only has a disproportionately negative impact on the lives of children of ethnic minorities but evidence further indicates that they may be counterproductive in achieving their specific aims.[248] In a nutshell, the more documented children are, the possibility of attaining more years of education is higher.

Despite the violation of the fundamental right to basic education, the right to dignity and life is in my view violated as a direct consequence of a child being stateless. I stress this argument as children cannot live a life of substance without being provided the opportunity to attain the ability to do so. This is compounded by the severe poverty most ethnic communities in Kenya live in

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[244] The *Convention on the Rights of the Child,* Article 29: See note 34.
[245]Education Act of 1968 available at http://www.legislation.gov.uk/ukpga/1968/17/pdfs/ukpga_19680017_en.pdf
[246]Children Act of 2001 available at https://www.icrc.org/applic/ihl/ihl-nat.nsf/a24d1cf3344e99934125673e00508142/95bcf642e7784b63c1257b4a004f95e8/$FILE/Children's%20Act.pdf [accessed on 29/09/15], Article 7.
[247] Abuya E(2010: 28): See note 14.
[248] Oppenheim B and Powell B.M (2015), *"Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*, Open Society Justice Initiative, Policy Paper, 5.

as their standard of living decreases daily due to the inability to secure employment due to lack of education.

It is my submission that while Kenya may have certain nationality laws in place, the adverse effect of the violation of fundamental rights which include education and access to health care[249] of many children increase the risk of their lives being depreciating day by day. The denial of human rights due to the inability to acquire nationality may include the failure to benefit from protections and constitutional rights granted by the state. The difficulty to travel or access justice procedures when necessary which further remains absent and results in stateless persons finding themselves in a legal limbo vulnerable to expulsion from their home country.[250]

Though Kenya has acceded to and ratified various international treaties, the country has been selectively abiding by its obligations thereto. Kenya may be able to make a change once it ratifies the two statelessness conventions as it would provide its nationality laws with the key principles in preventing statelessness. However, one can argue that even if Kenya ratifies the two stateless conventions, who is to say Kenya will fulfil its mandate towards these instruments, especially since there are no enforcement mechanism in place in the international human rights sphere? While the UNHCR are in the process of trying to enforce these international obligations on the ground, the need for the Kenyan government to incorporate the laws into their domestic law is not sufficient. This further requires guiding principles and taskforces on the ground in order to sufficiently implement these new nationality laws, with children as their primary priority.

[249] The inability of stateless children to access healthcare services due to lack of documentation serves as another factor which can be argued to contribute to the violation of the right to life and in general a violation of Article 11 and 13 of ICESCR. See further Liefaard T and Doek J.E, (2016) Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence, page 258 [Chapter by Sloth-Nielsen]

[250] Liefaard T and Doek J.E, (2016: 261) See note 258.

3.3. The status, protection and prevention of stateless children in South Africa

There are a variety of forces that have resulted in statelessness across the African continent. Some are merely circumstantial, in the sense that it was not necessarily the result of ill will towards the stateless person but rather a series of unfortunate events that led to no state recognising him or her as a national.[251] South Africa through its statelessness project via its Lawyers for Human Rights project ("LHR") has identified different populations of concern that are either stateless or at risk of becoming stateless.[252]

Like Kenya, these populations include those who may qualify for South African nationality but due to various reasons are at risk of statelessness. These stateless populations include migrants and their children from neighbouring countries to South Africa such as Lesotho, Zimbabwe, Botwana, Swaziland, Mozambique and Malawi as well as those who flee persecution in countries. These persons include but not limited to Ethiopia, Rwanda and Burundi who find themselves unable to prove any connection to their own country of origin on arrival in South Africa.[253]

South Africa as a democracy is based on values of equality and non-discrimination with mechanisms in place to address the statelessness epidemic. However, orphaned and abandoned children born in South Africa of stateless parents or accompanying adult asylum-seekers into South Africa lack the documentation to access South African citizenship. This is evident in the case of *Ali v Minister of Home Affairs and Another*[254] and *Mubake v Minister of*

[251] Lawyers for Human Rights (2015) *"The Committee on the Rights of the Child, 73rd Pre-Sessional Working Group (1 – 5 February 2016) South Africa, Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC,* 13.
[252] Elphick R, George J (2014), *"Promoting citizenship and preventing statelessness in South Africa: A Practitioners Guide",* Lawyers for Human Rights: Pretoria University Press, 2.
[253] Elphick R, George J (2014: 2): See note 280.
[254] Ali and Others Minister of Home Affairs and Another (15566/2016) [2017] ZAWCHC 94; 2018 (1) SA 633 (WCC) (7 September 2017)

Home Affairs and others[255] which dealt with access to South African citizenship and will be discussed below.

Though the biggest challenge in South Africa is implementation of the laws relating to acquisition of its nationality, South Africa has taken various positive steps in its aim to reduce statelessness in its territory. In this regard, an analysis of the nationality legislation in South Africa will be discussed with the aim of determining its compliance with its international human rights obligations.

3.3.1. National Laws governing the right to nationality in South Africa

3.3.1.1. The Constitution of the Republic of South Africa

Only a few countries provide for explicit rights to nationality in their Constitutions or in domestic legislation and even these countries may not grant citizenship to all children born on their territory of which South Africa is one of them. In South Africa there are various pieces of legislation that provide for the protection of the right to nationality. The Bill of Rights of the 1996 Constitution of the Republic of South Africa is the primary piece of legislation which establishes the rights and privileges that constitutes fundamental human rights.[256] There are a number of provisions of the Bill of Rights that apply to both citizens and non-citizens equally, which protects all individuals' innate humanity regardless of their nationality or status in the country.[257]Thus, these provisions protect stateless persons present in South Africa.

The Constitution of the Republic of South Africa ("The Constitution") provides for the right to nationality in terms of section 28 which provides that every child has the right to a name and a nationality from birth.[258]One must note that these provisions apply equally for citizens and non-citizens and that the Constitution protects the right to a nationality from birth which even goes further than the

[255] Mubake and Others v Minister of Home Affairs and Others (72342/2012) [2015] ZAGPPHC 1037; 2016 (2) SA 220 (GP) (9 July 2015)
[256]Constitution of the Republic of South Africa, Chapter 2: See note 9.
[257] Elphick R, George J (2014: 20): See note 280.
[258] Constitution of the Republic of South Africa, section 28(1)(a): See note 9.

ACRWC.[259] The reason for this is that the ACRWC only protects the child's right to 'acquire ' a nationality unless the child is stateless at birth, in which case the ACRWC protects the child's right to acquire the nationality of the birth country.[260]The fact that South Africa has a respectable aim at protection of the right to a nationality, it is one step closer to ending statelessness for all stateless persons living in South Africa. However, it should be noted that South Africa protects the right of child to 'a' nationality which does not necessarily mean South African nationality.[261] Despite the latter, it is a provision that is encapsulated in the Bill of Rights and as such, justiciable in South Africa. This allows persons to adjudicate on the right to nationality should such person's right to nationality be violated which creates a remedy that allows stateless persons to access justice. [262]

The right to nationality may begin at birth but definitely does not end when a person reaches majority. When persons reach majority, the importance of nationality only increases. This is so because when a person reaches the age of majority an identity document becomes necessary to do just about anything to improve one's position in life, which includes, furthering one's education, opening a bank account, getting a job and so much more.[263]The Constitution's protection of the child's right to a nationality enables one to interpret the provisions for all person's right to nationality by reading section 28(a) with the right to human dignity in section 10 of the Bill of Rights which also applies to all persons regardless of their citizenship.[264]

The Constitution further explicitly prohibits the deprivation of nationality. This is provided for in section 20 in terms of which no person regardless of their status

[259] Elphick R, George J (2014: 20): See note 280.
[260] African Charter on the Rights and Welfare of the Child, Article 5 available at http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Wlefare_of_the_Child_AddisAbaba_July1990.pdf
[261] Elphick R, George J (2014: 21): See note 280.
[262] Unlike Kenya, South Africa has opened the doors to allow access to justice via court procedure in order for stateless persons to enforce and/or protect their right to nationality and all rights linked thereto. This creates a sense of certainty but not certainty in itself.
[263] Elphick R, George J (2014: 21): See note 280.
[264] Constitution of the Republic of South Africa, section 10 and section 28(a): See note 9.

may be deprived of citizenship.[265]However, there are sections in the Citizenship Act that violate this constitutional provision. Despite several amendments to the Citizenship Act (as amended in 2010) since its enactment, the sections on deprivation of citizenship still stand.[266]

There are also fundamental rights that flow from the right to acquire a nationality that is provided for by the Bill of Rights of The Constitution, such as the right to equality,[267] the right to freedom and security,[268] the right to freedom of movement[269], the right to human dignity[270] as well as the right of access to socio-economic rights including the right to education, social security and health care. However, these are the rights that are often denied to stateless persons as a result of their lack of nationality and immigration status.[271]

3.3.1.2. South African Citizenship Amendment Act 2010

In addition to the supreme law of the land, the acquisition and loss of South African citizenship is governed by the South African Citizenship Act 88 of 1995 ("Citizenship Act") which was amended by the South African Citizenship Amendment Act.[272] South African citizenship by birth can be divided into three categories namely: persons born on the territory to a citizen or to permanent

[265] Constitution of the Republic of South Africa, section 20: See note 9.
[266] Lawyers for Human Rights (2015: 21): See note 279.
[267] Section 9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
[268] Section 12 (1) Everyone has the right to freedom and security of the person, which includes the right- (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way.
[269] Section 21 (1) Everyone has the right to freedom of movement. (2) Everyone has the right to leave the Republic. (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic. (4) Every citizen has the right to a passport.
[270] Section 10 Everyone has inherent dignity and the right to have their dignity respected and protected.
[271] Elphick R, George J (2014: 21): See note 280.
[272] South African Citizenship Amendment Act): See note 10.

residents[273]; persons born from parents with permanent residence status[274]and people born on the territory without access to any other nationality.[275] The Citizenship Amendment Act elevated the status of those born abroad to citizens by birth rather than by descent.

There are certain rules that apply to a few of these provisions for those persons who fall within these provisions and want to obtain South African citizenship. In respect of permanent residents of South Africa, a child of a permanent resident must wait until the age of 18 to access South African citizenship provided he or she can show that he or she resided in South Africa from birth until majority and his/her birth has been registered in accordance with the Birth and Death Registration Act ("BDRA").[276] In order to access citizenship certain persons must first register their birth in accordance with the BDRA.[277]

These are persons who acquire nationality by naturalisation, which includes: those born on the territory who are stateless; those born on the territory to parents admitted for permanent residence, who live in the Republic until the age of 18; those adopted by a South African citizen and those born on the territory to parents not admitted to the Republic for permanent residence who live in the Republic until the age of 18.[278] Though these provisions provide protection for the stateless, loopholes remain evident as a result of the failure of government officials to put in place the mechanisms required to facilitate the implementation thereof.

[273] Section 2 (1)(a) Any person- who immediately prior to the date of commencement of this Act, was a South African citizen by birth; or (b) who is born in the Republic on or after the date of commencement of this Act.
[274] Section 2(3) Any person born from parents with permanent residence, has resided in South Africa since birth until being a major, and his/her birth is registered in South Africa in terms of the Birth and Deaths Registration Act.
[275] Section 2(2)Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (2), shall be a South African citizen by birth, if- he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality
[276] Lawyers for Human Rights (2015: 52): See note 279.
[277] Birth and Deaths Registration Act 51 of 1992 available at http://www.saflii.org/za/legis/consol_act/badra1992301/ [accessed on 01/10/2015]
[278]Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), Section 2(4)(b)(ii); Citizenship Amendment Act 88 of 1995, section 4(3).

This is evident in the case of *Ali v Minister of Home Affairs*, in terms of which the applicants made application to the court in terms of section 4(3) as all of them where born in South Africa to parents who have not been admitted into the Republic for permanent residence. The applicants met the requirements of section 4(3) namely: they were born in South Africa; lived in South Africa until the age of majority and had their births registered in accordance with the BDRA. However, the Minister of Home Affairs ("Minister") refused to accept their applications for citizenship on affidavit because the applicants were born before 1 January 2013 when the Citizenship Act was enacted. However, while the court took cognisance not to usurp the powers of the Minister, it held that should the provision not be applied retrospectively, it violates section 9 and 10 of the Constitution. It was therefore held that the provision applies retrospectively, that the Minister is directed to accept the applications for consideration and that an application form be created to make such applications.

The Ali case is an example of the lack of precision and procedural guidelines in place that would arguably contribute to statelessness in South Africa. The outcome of the Ali case has brought about change to those eligible to apply for citizenship in terms of section 4(3). However, Section 5 of the Citizenship Act regulates who the Minister of Home Affairs may grant a certificate of naturalization to and children are explicitly excluded as one of the requirements to acquire nationality through naturalisation, is to be a major.[279] Section 5(4) of the Citizenship Act attempts to remedy this defect by authorising the Minister of Home Affairs to consider granting South African nationality to a minor child who is permanently and lawfully resident in South Africa.[280] However, the requirements set out in Section 5 will continue to make it overwhelmingly difficult for minor children to apply for citizenship in terms of Section 5(4) as the majority of stateless minor children in South Africa are undocumented precisely because they are stateless.[281]

[279] Section 5(1) states that the Minister may upon receiving an application grant a certificate of naturalisation to any "foreigner" who satisfied various requirements in which the first requirement is that he/she is not a minor.
[280] Legal Resource Centre, (2015) "Submission on Arbitrary Deprivation of Nationality" to the Office of the United Nations High Commissioner for Human Rights, 10.
[281] Mandivavarira Mudarikwa, Legal Resource Centre, (2015) "Submission on Arbitrary Deprivation of Nationality" to the Office of the United Nations High Commissioner for Human Rights, 11.

The Legal Resource Centre in Cape Town makes it clear in their submissions when they provide that *"while section 5(4) is aimed at enabling minor children to apply for citizenship, it fails to consider the difficulty of lawful residents for them rendering South African citizenship a challenging and demanding, if not impossible, status to obtain for minor stateless children".*[282] It is to this extent that one can acknowledge that while laws may be accessible to stateless children, they are deprived from actual access due to lack of documentation or not having their births registered.

3.3.1.3. The Refugee Act 130 of 1998 ("Refugee Act") and stateless children

The Refugee Act provides a further protection for stateless children by providing them with the ability to apply for asylum-seeking status in South Africa as provided for in terms of section 22 of the Refugee Act. While the asylum-seeking status may be temporary, it provides stateless children with the ability to access basic fundamental rights in South Africa, such as education. However, while children who are accompanied by their biological parents are eligible to be granted a temporary permit, abandoned or separated children who accompany adult asylum-seekers cannot be granted same as they are not considered as a "dependant" in terms of the Refugee Act.

However, this exclusion of stateless children was challenged in the case of *Mubake v Minister of Home Affairs* section 1 of the Refugee Act was challenged to include abandoned or separated children within the definition as denying same would result in children being undocumented. The court held that section 1 include separated or abandoned children and that the Minister of Home Affairs grant temporary permits to such children. This case illustrates the daunting fact that due to the failure to document these children in terms of section 22 prior to this judgment, abandoned stateless children entering the country prior thereto arguably remain stateless. In this regard, it is my submission that South Africa requires procedural mechanisms in place to assist

[282]Mandivavarira Mudarikwa, Legal Resource Centre, (2015:11): See note 307.

stateless children and promote the spirit of its Constitution by protecting the best interest of children regardless of their status.

It is clear that while South African nationality laws provide for protection of stateless children there are certain gaps in the law that create profound concern in protecting stateless children or the lack thereof due to encumbered citizenship provisions or lack of procedural guidelines. By establishing these nationality laws the next step is to determine whether these laws are in line with South Africa's international human rights obligations provided for by the international instruments that it is party to.

3.3.2. South Africa's nationality laws vs. international human rights obligations towards statelessness

South Africa is party to many international and regional instruments, including but not limited to the CRC, ACRWC, CEDAW and ICCPR. Notwithstanding its applauded high rate of ratification of various international human rights instruments, South Africa has to date not ratified the 1954 or 1961 Statelessness Conventions and has no dedicated domestic legislation in place to deal with statelessness. Thus, no laws or guidelines exist to protect and regulate stateless children entering the country but rather stateless children should ascertain in terms of which law they may be eligible to be documented in South Africa.

As shown above, South Africa has many national laws that relate to statelessness but there are still legal gaps and challenges that must be addressed as a matter of urgency. However, by South Africa depriving undocumented minors currently residing in or attempting to enter South Africa with the ability to acquire nationality or asylum-seekers status, flies in the face of the best interest principle. Despite such deprivation, children who find themselves in these circumstances could have the right vindicated before the courts in South Africa and through international bodies as done by the Kenyan Nubians. This is evidenced in the cases of Ali and Mubake provided above and

a recent judgment held by the High Court of South Africa which will be elaborated upon further below.

When considering section 2 and 5 of the Citizenship Act in conjunction with the Constitution, citizenship by birth and naturalisation is provided for but does not provide a definition for what it means to live in South Africa until majority is attained. It is more often than not, stateless children lack the required documentation to acquire nationality or any other status in South Africa. However, recent judgments have provided some clarification in respect of naturalisation as well as refugee status. These changes are only specific at best and illustrates the need to implement mechanisms that aim at documenting and regulating stateless children and adults. In this regard, an identification and protection system would ultimately create a system that would provide stateless persons, particularly children, with the guidance and principles to acquire South African nationality.

3.3.2.1. The relevance of birth registration, stateless children and South Africa's nationality laws

An important and yet burdensome issue is birth registration which refers to the permanent and official recording of a child's existence by an administrative branch of the state and is a human right.[283] The starting point for the recognition of a person's legal existence is through birth registration and thus key to the realisation of nearly all other fundamental rights and practical needs.[284] These rights include the right to nationality, education, healthcare and protection from child labour and trafficking. It is important to note that with this, when a child is born on a state's territory, birth registration ought to occur without discrimination.[285] In addition, children born to migrant workers, asylum-seekers,

[283] Proudlock P(ed) (2014), '*South Africa's Progress in Realising Children's Rights: A Law Review'*: Cape Town: Children's Institute, University of Cape Town and Save the Children South Africa, 18; Lawyers for Human Rights (2011: 2): See note 29.
[284] Lawyers for Human Rights (2011: 2): See note 29.
[285] Elphick R, George J (2013: 47): See note 6.; Lawyers for Human Rights (2011: 2): See note 29.

refugees and undocumented foreigners hold this right equally to children of citizens.[286]

An increasing number of people migrate to South Africa from other African countries, including Somalia, Kenya, the DRC and Zimbabwe.[287]In the year 2011, there were approximately 220 000 asylum-seekers in South Africa and by the end of the year there were only 63 000 that had been recognised as refugees. [288] This brings me to the fact that as mentioned above South Africa lacks a parallel protection system for stateless persons as stateless children who are undocumented fall within the cracks as evidenced above in the Mubake and Ali cases.

The aforesaid issue is compounded by the notion that in order to register the birth of your child, the parents must have legally valid documentation which confirms their legal status. This creates a barrier for stateless children as put perfectly by the LRA: *"the combination of birth registration being required for children to benefit from the safeguard against statelessness and birth registration being impossible for parents without the requisite documentation or legal status means that both the registration of children and the safeguard against statelessness are contingent on the status of the parent".*[289] This restriction brings to light the cycle of lack of documentation, statelessness and undermines the right to an identity of all children. As such, it is trite that this restriction is contrary to section 28(1) (a) of the South African Constitution and consequently a violation of Article 7 of the CRC.

The aforesaid restriction includes the situation in which one parent is South African with an identity document because the other parent must also have an identity document according to the Department of Home Affairs in South Africa.

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[286] Lawyers for Human Rights (2011: 2): See note 29.
[287] Schreier T (2012) '*Critical challenges to protecting unaccompanied and separated foreign children in the Western Cape: Lessons learned at the University of Cape Town Refugee Rights Unit': Refuge*, 28(2).
[288] United Nations High Commissioner for Refugees (2012) *2014 UNHCR Country Operation Profile-South Africa* available at : http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e485aa6&submit=GO.
[289] Lawyers for Human Rights (2015: 4): See note 279.

An investigation into allegations of failure to register the birth of a child in 2011 by the Northern Cape Department of Home Affairs was held, [290]in which the public protector found that the Department of Home Affairs' failure to register the birth of a child with a South African father and non-South African mother was "procedurally and substantively flawed" and in violation of the Constitution.[291] This concern stems further into the administrative level of determining who can or cannot acquire South African citizenship as restrictive time limits are placed on those wishing to make application to acquire nationality.

In terms of the BDRA, all births in the country must be registered within 30 days of birth and while the possibility of late registration exists, it is subject to payment of administrative fees and compliance with prescribed requirements[292]. Without compliance, the child's birth is not registered, the child remains undocumented and the cycle of statelessness begins. Notwithstanding the above, these late applications do not apply to children of non-permanent residents further compounding the risk of statelessness. It is therefore submitted that the right to nationality in terms of Article 7 of the CRC and the right to name and birth registration in term of Article 6 of the ACRWC is being violated by South Africa in that certain stateless children are denied access to South African nationality.

In a similar case to that of the Northern Cape Department of Home Affairs, the High Court ordered that the details of the South African father be entered on the birth certificate for a child born out of wedlock to a non-South African mother and the child be declared a South African citizen.[293] These guidelines illustrate the importance of the need for a well-structured parallel system and procedural

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[290] *Report on an investigation into allegations of failure to register the birth of a child and the naturalisation of the mother by the Northern Cape Department of Home Affairs,* Report No.38 of 2011, Public Protector of South Africa; *Steven Sikhumbuzo Moyo and another v. Minister Home Affairs*, North Gauteng High Court case : 44424/09.

[291]Manby B (2011) *'Statelessness in Southern Africa'*, Briefing Paper for UNHCR Regional Conference on Statelessness in Southern Africa, 13.

[292] Lawyers for Human Rights (2015: 5): See note 279.

[293] *Steven Sikhumbuzo Moyo and another v. Minister Home Affairs*, North Gauteng High Court case number: 44424/09.

guidelines for the Minister of Home Affairs to implement in order to protect the rights of stateless children and those at risk of becoming stateless.

3.3.2.2. Deprivation of nationality and the rights of children

Children who are born in South Africa to non-national parents who do not possess South African nationality as yet, are haunted by their invisibility in the country and the inability to be recognised as someone entitled to a life that is hopeful. This was the experience of an 8 year old Cuban child ("Daniella") who was born in South Africa to parents who do not possess South African nationality and who was denied the right to acquire a nationality in terms of the Citizenship Act because of her parents status.[294] After more than 20 years have passed since the inclusion of section 2(2), the said provision was finally implemented.

In September 2016, the Supreme Court of Appeal ("SCA") opened the doors to nationality for stateless children born in South Africa and with non-national parents. This was done by the SCA confirming the order of the High Court of Pretoria in a landmark ruling which provided that the Department of Home Affairs make regulations for stateless children born in the country in order for them to apply for citizenship.[295] Daniella applied for citizenship in terms of section 2(2) as she would otherwise be status. However she was denied citizenship. While Daniella has been registered as a South African citizenship in the year 2017, the landmark case will potentially affect thousands of children in South Africa. This is a positive step forward in the prevention of statelessness in South Africa. We are yet to see the implementation thereof in other cases of the same nature.

[294] D.G.L.R and K.M.R.G v Minister of Home Affairs and others case number 38429/13 held on 3 July 2014.
http://citizenshiprightsafrica.org/wp-content/uploads/2016/09/High-Court-order-3-July-2014-DGLR-v-Min-DHA.pdf

[295] Minister of Home Affairs and Others v D.G.L.R and K.M.R.G
http://citizenshiprightsafrica.org/wp-content/uploads/2016/09/Min-of-DHA-v-DGLR-SCA-Order-Stateless-child-6-Sept-2016.pdf

At present, people who Department Officials suspect of being unlawfully present in the territory must be 'referred' to immigration services.[296] The BDRA provides that the Director-General may issue a birth certificate to non-South Africans provided that if the Director-General is in doubt about the identity and status of the persons concerned he or she shall refer the matter to the inspectorate to investigate and deal with it in terms of the provisions of the Immigrations Act.[297]The language in this section is peremptory and leaves no room for discretion and thus, parents who come to register their children are at risk of being sent to immigration and arrested which in effect serves as a deterrent to undocumented parents or parents unlawfully present on the territory from registering the birth of their child.[298]

The deprivation of nationality in various cases as provided above, creates the possibility of violation of other rights, most importantly, the fundamental rights as provided for by the Constitution and the Children's Act. Education is one of these fundamental rights which children fail to access due to their inability to furnish documentation that proves South African nationality or any other status. Education is an important part of a child's life and must be of paramount important as it affects the quality of the child's life. Stateless children are often unable to obtain any form of identity document without a birth certificate and result in mothers struggling to enrol their children in primary school.[299] This situation remains with the child when he or she reaches the age by which he or she needs an identity document, such as when a child has to write a matric exam. Their ability to improve their lives is now limited and they often are stuck in a cycle of poverty, reliant on others for charity and goodwill despite their higher aspirations.[300]

[296]Birth and Death Registration Act 51 of 1992 , Section 6(8) , available at : http://www.saflii.org/za/legis/consol_act/badra1992301.pdf [accessed on 01/10/2015]
[297] Immigration Act 13 of 2002 available at : http://www.saflii.org/za/legis/hist_act/ia13o2002157/ia13o2002a27a2004245.pdf [accessed on 01/10/2015]
[298] Elphick R, George J (2013: 32): See note 6.
[299] Elphick R, George J (2013: 49): See note 6.
[300] Proudlock P(ed) (2014:21): See note 309.

Even though the right to nationality is clearly articulated under South African law, foreign and undocumented children in South Africa who are abandoned, orphaned, unaccompanied minors and separated children are still declared vulnerable under the law. It is clear by the above analysis that while South Africa has various nationality laws in place to protect stateless persons, the implementation thereof is flawed. In this regard, these gaps in law are directly in conflict with South Africa's international human rights obligations in respect of the protection and prevention of statelessness among children.

3.4. Conclusion

In discussing and analysing the various national instruments, the application thereof and the issues surrounding them with regards to statelessness among children, it is to my concern that there are many issues in both Kenya and South Africa that give rise to violations not only of stateless children's right to nationality but also their fundamental rights as discussed above.

It is seen above that Kenya's national legislation is in violation of various international human rights instruments that Kenya is party to due to lack of procedural guidelines governing same. These violations include gender discrimination in access to citizenship, denial of access to fundamental human rights (in which ethnic minority groups suffer tremendously) and arbitrary denial of citizenship or recognition of citizenship profoundly due to maladministration. The ACRWC provides detailed obligations on States to put in place mechanisms for the protection of children to a nationality and the prevention of children ending up stateless due to having no recourse to prevent same. While Kenya has shown to slowly move towards protecting children who are stateless or at risk of becoming stateless with the support of the UNHCR, the road to ending statelessness in still far having been achieved.

South Africa can be seen to have a well-rounded set of national laws that sought to protect and prevent statelessness through various provisions in various pieces of legislation. However, it does not have set laws that aim to deal with the protection and prevention of statelessness and lack the guidelines in the

implementation of those laws currently in place. This was shown by the approach of the Department of Home affairs in High Court judgement and Appeal in the SCA in which the said department refused to grant Daniella South African citizenship, the Ali case as well as the Mubake Case. As such, one must wait in anticipation to see whether these cases will provide a stepping stone to change in practice and close the gaps in laws left without interpretation resulting in officials having unfettered discretion.

Children are already the most vulnerable groups of persons in the world, being subject to even more difficulty as far as being denied an identity or access to a nationality is unacceptable. Based on the findings of this chapter, the next chapter will provide a conclusion to this paper and provide recommendations in an attempt to contribute to or facilitate change in the legislation and improvement in the mechanisms relating to the protection and prevention of statelessness in South Africa and Kenya.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

In this paper the status of statelessness among children in Kenya and South Africa and the impact of the countries national laws on the issue of statelessness was analysed from an international human rights and legal perspective. It is established that the national laws or the absence thereof relating to the right to nationality in these countries, under certain circumstances, violate human rights of many children as protected under international human rights instruments the countries are party to. In addition, it established that these countries have an obligation under international and human rights instruments to protect and promote fundamental human rights which include the protection and prevention of statelessness in the said countries. In establishing these important aspects, this paper continued to the main purpose of determining whether or not the national laws of these countries violate the international and regional human rights instruments that it is party to.

Thus, it has been established that while certain laws have been enacted to enable children living in Kenya to acquire Kenyan nationality, lack of procedural guidelines and exclusion of certain stateless children directly violates Article 6 of the ACRWC and Article 7 of the CRC. These omissions include, the right of children who are born to stateless parents in Kenya to acquire the Kenyan nationality which resultantly forces these children to continue another generation of being stateless resulting in transgenerational statelessness. The aforesaid omissions further include the lack of guidelines or laws to govern the administrative component when implementing the right to acquire a nationality in Kenya. These omissions must be included in order to eradicate statelessness in Kenya as advocated by the international CRC Committee. It also establishes that while South Africa's national laws may provide for certain provisions that protect stateless persons, certain provisions as analysed in Chapter 3 are not

in line with South Africa's international human rights obligations as implementation of the said laws are not forthcoming and sometimes impossible. As such, it is clear that the both countries lack stringent guidelines in implementing the right to acquire a nationality which allows the opportunity for abuse thereof by officials.

The nationality laws in Kenya and South Africa further allow for discrimination due to a child's status from birth. Officials of various state departments lack the required guidelines in implementing the right to acquire a nationality and result in certain children requiring more documentation than others which documentation they already lack. Thus, it is submitted that both countries need to establish an identification system such as mapping in order to protect children who are stateless and to bring its nationality laws, such as article 14 (4) of the Constitution of Kenya and article 2(2) of the South African Citizenship Act, in line with Article 7 and 8 of the CRC as expressed in Chapter 3.

These states have a duty to take the best interest of a child into consideration when making decisions regarding children. As such, the African Committee in the Nubian case and the High Court of South Africa have strongly emphasised its position as to the best interest principle and its importance in application of the right to acquire a nationality. However, various amendments in the legislation relating to nationality require change in both countries in order to facilitate reducing the number of stateless children and bring those laws in line with international human rights law instruments each country are party to.

These conclusions lead to the violation of a number of fundamental rights and show the interrelated aspect of human rights in that the violation or lack of protection of one human right act as a domino effect in violating other human rights. As such, the selected jurisdictions do not afford enough protection to stateless children as per their international human rights obligations. Therefore, this paper has proven that measures need to be taken in respect of these countries national laws and implementation thereof when dealing with the important mandate of protection and prevention of statelessness among children and as a whole.

The initial failure to curb statelessness from the outset creates the daunting issue that statelessness becomes something that parents pass onto their children, compounding the number of children and persons who are stateless. It is commonplace that stateless children do not exist in any country on paper neither are they considered to be present in a particular country that they reside in which ultimately means that these children do not exist. While they can be argued to not exist, these children do have lives, rights and needs due to their vulnerability that must be satisfied. As such, international human rights law mechanisms are put in place to monitor states compliance to their international human rights obligations in order to bring to light violation of human rights through states' laws and procedure.

4.2. Recommendations

A number of recommendations are suggested based on the findings of this paper. These recommendations entail the amendment of domestic legislation and guiding principles incorporated in law for the implementation thereof when applying the said laws. In order to provide a logical flow of the said recommendations, it will be divided into the obligations of states in terms of section 4 of the CRC namely, to take all appropriate legislative, administrative and other measures in the implementation of rights in the CRC.

4.2.1. Legislative measures

The most important recommendations provided for by both the CRC Committee and the African Committee which will facilitate all other recommendation possible or capable of being achieved is that both Kenya and South Africa ratify the 1954 and 1961 Conventions relating to statelessness. These two conventions provide a wide range of protection and preventative mechanisms that would, if followed, provide Kenya and South Africa with the foundation to amend its laws accordingly in order to eradicate childhood statelessness in both countries.

While it is welcomed that the 2010 Kenyan Constitution now provides for both mother and father to confer nationality to their children as well as protection of foundlings, those provisions are not enough. The CRC Committee has recommended that Kenya amend its Constitution to include the provision that a child who is born in Kenya shall acquire the nationality of the State if at the time of birth the child is stateless or without such acquisition of nationality the child would otherwise be stateless. This would address the inconsistency of Kenya's national laws and would further bring it in line with Article 6 (4) of the ACRWC.

It is further recommended by the ACERWC that it is of paramount important that the decision of the ACERWC in the case of *Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (OSJI) on behalf of children of Nubian descent v. the Republic of Kenya* be fully implemented by Kenya.

The birth registration of children in Kenya is of great importance in the reduction and eradication of statelessness amongst children in Kenya. As such, it is submitted that Kenya expedite the adoption of a law that provides for universal and free birth registration at all stages of the registration process. This includes that Kenya outlaw all vetting on the basis of race, ethnicity, religion, national origin or other status as recommended by the ACERWC.

While South Africa may have legislation in place which protects children who are stateless or at risk of becoming stateless as discussed in Chapter 3, there are no regulations in place to guide or monitor the implementation of these laws which include section 2(2) of the South African Citizenship Act. It is therefore recommended that regulations be enacted to guide and monitor the implementation of section 2(2) and provide a definition for what "foundling" encapsulates as no such guidelines exist. It is further recommended that the High Court order as obtained by the LHR to make and implement a regulation to facilitate applications for nationality under section 2(2) of the South African Citizenship Act which to date South Africa has failed to implement.

The South African laws relating to loss, deprivation and renunciation of stateless as stipulated in section 7, 8 and 10 of the South African Citizenship Act do not provide any adequate safeguards against statelessness for naturalised citizens and as a result, such provisions can render the parents and their children stateless. It has therefore been recommended by the CRC Committee that these provisions be reviewed and amended in order to prevent children being at risk of becoming stateless due to their parents status or actions.

It is further recommended that section 4(3) of the Citizenship Act be amended as stateless children should not have to wait until the age of majority in order to escape the status of being stateless. In this regard, the Department of Home affairs should amend their restrictive policy in order for section 4(3) to apply to all children born in South Africa who would otherwise be stateless as provided for in the Ali case. Such change would further facilitate the Citizenship laws in this regard to be in line with the CRC Committee's recommendation that State Parties expeditiously grant nationality to all children born in their territory.

It is further recommended that in order for the nationality laws of South Africa to be in line with its obligations under international human rights law, regulations 3, 4, and 5 of the BDRA must be amended in order to facilitate the ability of parents to register their children at birth whether it's a single father where the mother is undocumented, unwilling or unavailable. This would bring the BDRA in line with the CRC Committee's recommendation that states should guarantee that all children born on the territory be registered at birth regardless of their parents' citizenship status and/or country of origin as portrayed in the High Court decision regarding stateless children born to non-national parents.

It is further recommended that section 12 of the BDRA should be amended to facilitate the acquisition of nationality for all minor children who are abandoned or orphaned and not registered before rather than the existing provision which only provides such approach to infants under the age of 8. This means that section 12 would apply to all children whose parentage is unknown. This would

be in line with South Africa's obligations not only in terms of its current provision under section 2(2) of the Citizenship Act but in line with the Committee's interpretation of Article 7 of the CRC as well as article 6(4) of the ACRWC.

4.2.2. Administrative measures

Discriminatory practices by administrative or government officials in facilitating birth registration and the acquisition of a nationality in Kenya and South Africa is evident due to the lack of guidelines provided to such officials. This results in officials having a wide scope of discretion in determining the success of applications for birth registration and the acquisition of a nationality in both countries.

When looking at the discrimination against various ethnic minorities and children who are part of these minorities in Kenya, for example Nubian and Makonde children, it is recommended that Kenya resolve the situations of statelessness in these minority groups in positively protecting them by assisting them in obtaining a nationality and creating taskforces on the ground to analyse the situation and seek remedies. Furthermore the CRC Committee recommendations is reiterated that Kenya strengthen various efforts to ensure the birth registration of all children, in particular in rural and remote areas, including setting up programmes to facilitate the mapping out and registering of those who have not been registered at birth.

In amending legislation by providing guidelines on the legislative sphere, it is recommended that Kenya facilitate programmes that provide for transparency and awareness of the right to acquire a nationality in Kenya and the steps that must be taken in order to ensure such right is protected. As such, legal aid in Kenya should be made available for vulnerable persons faced with the inability to acquire a nationality as well as their right of access to courts.

While South Africa's nationality laws may be considered as comprehensive, certain gaps in law are evident in the implementation thereof by local authorities

on the administrative level. Consequently, it has been recommended by the CRC Committee, the High Court decision as obtained by the LHR and reiterated herein that South Africa formulate an identification and protection system which includes setting up programmes to facilitate the mapping out and registering of those who have not been registered at birth. Thus, it is submitted that the Minister of Home affairs should formulate a regulation which will provide guidance and facilitate documentation that would make it possible for children who are stateless or those who are at risk of becoming stateless to apply and obtain citizenship. This would alleviate the delay in obtaining nationality and prevent discriminatory practices by government offices.

In addition to and in support of the above, the ACERWC has further recommended that Kenya and South Africa set transparent benchmarks, including in relevant national action plans and budget commitments, as part of a comprehensive implementation strategy to prevent child statelessness and protect those children at risk of becoming stateless.

4.2.3. Other measures

While certain important recommendations in respect of legislative and administrative change is crucial, certain other measures are in place and available in order to seek international assistance in implementing recommendations. As such, the CRC and ACRWC Committees have recommended that states seek technical assistance from the Office of the United Nations High Commissioner for Refugees, UNICEF and other international human rights organisations for the implementation of recommendations made by the UN Committees.

Therefore, as recommended to South Africa by the CRC Committee in their 2016 concluding observations, it is recommended that Kenya and South Africa seek technical assistance from international human rights organisations when implementing legislative, administrative and other recommendations in the efforts of eradicating statelessness amongst children.

Various efforts and change has been made by the LHR through the means of strategic litigation which played a pivotal role in developing solid precedents for non-discrimination and equality. It is recommended that Kenya and South Africa place the importance of strategic litigation at the top of its human rights agenda and place more emphasis on developing foundations with its key aim of preventing statelessness amongst children and adults. The LHR is one of the national human rights institutions that play a pivotal role in the prevention of statelessness in South Africa. While the NRF plays a fundamental role in assisting stateless children in obtaining the Kenyan nationality, the Kenyan government needs to invest a greater portion of its national agenda in creating and supporting more branches such as the NRF. These national institutions create a path in which children who are stateless or at risk of becoming stateless can be assisted and supported in acquiring the right to nationality in both South Africa and Kenya.

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