

STATELESSNESS AS A FAILURE OF INTERNATIONAL LAW: A CRITICAL  
ANALYSIS OF THE EFFECT OF STATELESSNESS ON GENDER RIGHTS

by

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A thesis submitted in partial fulfillment of the requirements for  
the LL.M degree in the Faculty of Law,  
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## Declaration

I declare that this work: **Statelessness as a failure of international law: a critical analysis of the effects of statelessness on gender rights** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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Signed: .....



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## Acknowledgements

Without the Almighty's strength and guidance, my endeavours to make the world a better world would have never become a reality.

To my parents and family, I have the most love and gratitude for all that you do. Without you, I would have never become the strong woman I am today.

To my supervisor, Dr K Chinnian, you were the one who helped me realise my purpose. One who become a friend and mentor in ensuring that my work mirrored my passion.

To Prof B Mezmur, I am eternally grateful for your support and help in achieving my goals. Your mentorship has been exponential.

Dr C Albertus, your friendship and support in the battle has been a great support.

To Chante Evelyn Heynes, Alvizo Romano Miggles, Kelly-Jade Tara Staines, Amanda Nakwanyana, Robyn Shepherd and Bilqees Fakier, friends who became family and helped me with the many long nights I spent on my thesis. I acknowledge the effort and love you put into hearing me speak about something so important to me. I am forever thankful.

To Moses Norman Mills, there are no words to describe the blessing you became. I am thankful for the love, support and patience. There are no words to describe how grateful I am for you.

## Dedication

*To all stateless women –*

*Someday I pray that you will no longer suffer in the shadows.*



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## KEYWORDS

Nationality

Citizenship

Statelessness

*De jure* statelessness

*De facto* statelessness

Sex and Gender

Discrimination

Gulf Cooperation Council States

International Human Rights law

Accountability

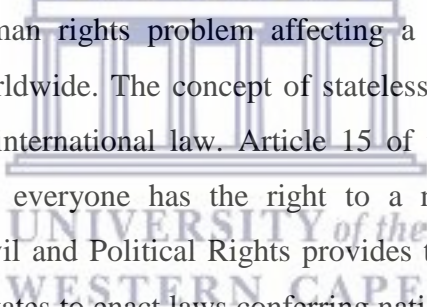


# ABSTRACT

## STATELESSNESS AS A FAILURE OF INTERNATIONAL LAW: A CRITICAL ANALYSIS OF THE EFFECTS OF STATELESSNESS ON GENDER RIGHTS

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Statelessness is a global human rights problem affecting a vast number of individuals, families and communities worldwide. The concept of statelessness comes to existence as a conflict that was created by international law. Article 15 of the Universal Declaration of Human Rights provides that everyone has the right to a nationality. Article 1 of the International Covenant on Civil and Political Rights provides the right to state sovereignty. The latter article thus allows states to enact laws conferring nationality as it deems fit, even if such laws offend the former article. In addition, this phenomenon affects men and women differently, something which international law fails to take proper cognisance of. This causes the failure of properly being able to regulate the issue of statelessness. Furthermore, the failure at law stumps the growth of women by be destabilising and disempowering it.

While Article 9 of Convention on the Elimination of All Forms of Discrimination Against Women provides that there should be no discrimination between men and women with regard to the acquisition or conferral of nationality. However, there are 27 countries who maintain gender-based discriminatory nationality laws. One of the main reasons for generational statelessness is gender –based discriminatory nationality laws. The problem of statelessness will continue to persist if nothing is done to reform the laws of those countries who maintain the gender-based discriminatory nationality laws.

This thesis will examine the legal gaps at international law in addressing the issue of statelessness. It will also look at States that continue to implement nationality laws and practices which are gender discriminatory. This thesis will argue that Article 9 is used as a basis of accountability for violator States who fail to protect women who have been subjected to human rights violations as a result of statelessness. It will also provide recommendations that will aid in acquiring effective change that could ultimately lead to the eradication of statelessness.



## ACRONYMS AND ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
ESOSOC	Economic and Social Council
GCC	Gulf Cooperation Council States
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MENA	Middle East and Northern African Regions
PICJ	Permanent Court of International Justice
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees





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# CHAPTER 1

## INTRODUCTION

### 1.1 INTRODUCTION AND BACKGROUND

Nationality outlines the legal relationship or link between the citizen and her State. This is based on the social facts of attachment, which then attributes rights and duties on both parties to that relationship.

Statelessness on the other hand, is a human rights problem affecting an estimated 12 million individuals, families and communities worldwide.<sup>1</sup> Statelessness refers to all those who lack the protection of a national government.<sup>2</sup> At this juncture it is important to note the differentiation between two categories of statelessness, namely, *de jure* stateless and *de facto* statelessness. The former refers to those who are not nationals of any State, while the latter refers to those who, after having left their country of which they are nationals, no longer enjoy the protection and assistance of their national authorities.<sup>3</sup> There is arguably a third category of statelessness that can be introduced and that is the lack of nationality at birth. Statelessness at birth is largely caused as a result of gender discriminatory nationality laws that prevent mothers from conferring their nationality to their children,<sup>4</sup> effectively ensuring that there is a generation of stateless persons.

It is peculiar that even though the right to a nationality is an entrenched notion under international law, it is only marginally protected with the reinforcement by the qualification

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<sup>1</sup> See Norwegian Refugee Council Report 2015 *Statelessness and Displacement: Scoping Paper* (2015) 7.

<sup>2</sup> Article 1 of the Stateless Persons Convention. Van Waas L 'The UN statelessness conventions' in Edwards A and Van Waas L *Nationality and Statelessness under international law* (2014) 66.

<sup>3</sup> Van Waas L (2014) 67.

<sup>4</sup> Article 1 of the Decree No15 on Lebanese Nationality, 1925. Edwards A and Govil R 'Women, nationality and statelessness; The problem of unequal rights' in Edwards A and Van Waas L *Nationality and Statelessness under international law* (2014) 169.

that States have a corresponding obligation to confer that right.<sup>5</sup> This is evident under the 1961 Convention on the Reduction of Statelessness (Reduction of Statelessness Convention) which provides for three main safeguards against the emergence of statelessness in the following ways; first, the prevention of statelessness at birth. Secondly, the prohibition of the withdrawal of citizenship if it would cause statelessness; and thirdly, avoiding statelessness in the context of the transfer of territory.<sup>6</sup> The Reduction of Statelessness Convention makes no mention of the prohibition of enacting laws that target gender as a basis for the refusal of conferring nationality. This omission is evident in Article 9 of the Reduction of Statelessness Convention, which provides for the prohibition on the deprivation of nationality on the grounds of race, ethnicity, religion or political grounds.<sup>7</sup> It is thus evident that the importance of gender was not a consideration of international lawmakers when drafting the Reduction of Statelessness Convention even though at the time of its drafting, there were clearly States who were depriving women of nationality solely based on their gender.<sup>8</sup>

It is important to understand that without nationality, women suffer from a violation of a vast range of civil, cultural, economic, political and social rights.<sup>9</sup> When you are stateless, you receive a minimum standard of these rights. It is as if the rights are there to prevent the image of inhumane treatment while in reality, this is not conducive to living a dignified life. Ethnic, racial and gender discrimination are at the source of many governmental actions to deprive individuals of their nationality.<sup>10</sup> Discrimination on the basis of sex and inequality between men and women is a worldwide phenomenon that impedes the enjoyment of rights and the full progression of women worldwide.<sup>11</sup> Women are disproportionately affected by

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<sup>5</sup> See Edwards A 'The meaning of nationality in international law in an era of human rights' in Edwards A and Van Waas L *Nationality and Statelessness under international law* (2014) 14.

<sup>6</sup> See the Introductory Note of the Reduction of Statelessness Convention at page 4.

<sup>7</sup> Article 9 of the Reduction of Statelessness Convention.

<sup>8</sup> Edwards A and Govil R (2014) 169.

<sup>9</sup> Edwards A and Van Waas L 'Introduction' in Edwards A and Van Waas L *Nationality and Statelessness under international law* (2014) 1.

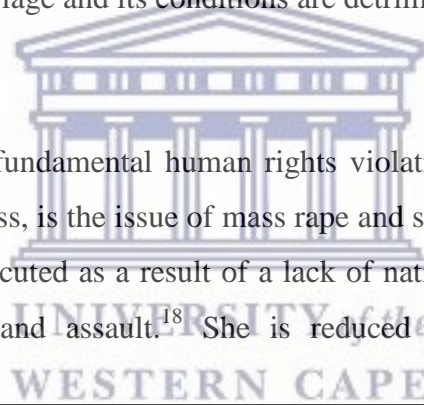
<sup>10</sup> Edwards A and Van Waas L (2014) 1.

<sup>11</sup> Background Paper prepared for the United Nations (UN) High Commissioner for Refugees and the UN Committee on the Elimination of Discrimination against Women Seminar 2009 – Edwards A *Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All forms of Discrimination against Women* (2009) 5.

statelessness in some of the following aspects. First, women continue to be discriminated against in the enjoyment of the equal right to a nationality, and in turn they may be unable to pass on their nationality to their children.<sup>12</sup> In some States such as those in the Middle East and Northern African (MENA) regions, nationality laws prevent women from conferring her nationality to her children.<sup>13</sup> The father has to complete the necessary procedures in order to confer his nationality to his children. If he dies before these procedures are complete, his children will not have a nationality.<sup>14</sup> This gender-based discrimination found in nationality laws qualifies and provides the origin of generational statelessness.<sup>15</sup>

Secondly, statutes that link nationality of married women to their husbands can leave women stateless if their spouses die or divorce them.<sup>16</sup> This can lead to specific human rights concerns, for instance it could force a woman into marriage for the sole reason of attaining citizenship even if such a marriage and its conditions are detrimental to her well-being.

Lastly, and one of the most fundamental human rights violations committed as a result of statelessness and being stateless, is the issue of mass rape and sexual assault. When a specific ethnic minority is being persecuted as a result of a lack of nationality,<sup>17</sup> women become the prime target of mass rape and assault.<sup>18</sup> She is reduced to nothing; the violation is



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<sup>12</sup> Edwards A and Van Waas L (2014) 4.

<sup>13</sup> In Jordan, a woman has no right to pass her Jordanian citizenship to her children, only the father has that right. See article 9 and 10 of the Law No. 6 of 1954 on Nationality (last amended 1987), 1 January 1954, available at <http://www.refworld.org/docid/3ae6b4ea13.html> (accessed 4 April 2017).

<sup>14</sup> Edwards A and Govil R (2014) 169.

<sup>15</sup> UN High Commissioner for Refugees (UNHCR) 'Background Note on Gender Equality, Nationality Laws and Statelessness 2014' 8 March 2016 available at <http://www.refworld.org/docid/56de83ca4.html> (accessed 12 March 2017).

<sup>16</sup> Fullerton M 'The Intersection of Statelessness and Refugee Protection in US Asylum Policy' (2014) 2 (3) *Journal on Migration and Human Security* 149.

<sup>17</sup> Equal Rights Trust 'Burning Homes, sinking Lives: A situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh' 2 July 2012 available at <http://www.refworld.org/docid/5034fadb2.html> (accessed on 12 March 2017).

<sup>18</sup> Equal Rights Trust 'Burning Homes, sinking Lives: A situation report on violence against stateless Rohingya in Myanmar and their refoulement from Bangladesh' 2 July 2012 available at <http://www.refworld.org/docid/5034fadb2.html> (accessed on 12 March 2017).

exacerbated by their statelessness which results in her having no right of recourse in that State. Furthermore, international law is delayed in responding to these atrocities out of fear of encroaching on the sovereignty of a State. She suffers at the hands of her oppressors while simultaneously being let down by international law. Her suffering, when it comes to being stateless, is both physical and psychological. It is thus evident that statelessness and its effect on gender are vastly different and manifestly discriminatory.

There is a persistent conflict between international and national law when it comes to the issue of nationality. It will be argued that this conflict has given rise to the pandemic of statelessness. This thesis will therefore investigate and critically analyse how statelessness relentlessly and discriminately affects the physical growth of women.

## **1.2 SIGNIFICANCE OF THE STUDY**

Neither the 1951 Convention Relating to the Status of Refugees (Refugees Convention), the 1954 Convention Relating to the Status of Stateless Persons (Stateless Persons Convention), nor the Reduction of Statelessness Convention, contain provisions which prohibit direct or indirect gender-based discriminatory laws that confer nationality. Gender discrimination in nationality laws do not only cause statelessness, but it also creates a cycle of statelessness between generations.<sup>19</sup>

The tension at international law that confirms the pandemic of statelessness is Article 15 of the Universal Declaration of Human Rights (UDHR). It provides that every person has the right to a nationality and that no one should be deprived of it arbitrarily.<sup>20</sup> Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup> on the other hand affords

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<sup>19</sup> Govil R and Edwards A (2014) 170.

<sup>20</sup> Article 15 of the UDHR.

<sup>21</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains the exact same provision under Article 1.



States the right of self-determination.<sup>22</sup> What this means is that even though international law prohibits one from being deprived from a nationality, the manner in which a person attains or deprived of nationality is a matter that falls within the powers of the lawmakers of individual States. It can therefore be argued that State sovereignty is the cause of a global human rights violation.

This research will critically analyse gender discriminatory nationality laws and how it gives rise to cases of statelessness. The Reduction of Statelessness Convention has the latent conception that even though States uphold the right to draft the content of their nationality laws, they must do so in alignment with international norms relating to nationality.<sup>23</sup> The Reduction of Statelessness Convention fails at an international level in realising that stateless women suffer in a unique way. This failure is perpetuated in the total disregard of the Reduction of Statelessness Convention in specifically providing that nationality laws should not enact domestic law that would see the emergence of stateless women.<sup>24</sup>

### 1.3 RESEARCH QUESTIONS

Article 15 of the UDHR provides that everyone has the right to a nationality. Article 1 of the Reduction of Statelessness Convention however defines a stateless person as someone who is not considered a national by any State under the operation of its law. There is clearly a conflict of interest, and this disproportionately affects women. The following questions will be the focus of this research:

- a) Is statelessness caused by self-determination in that States are allowed to enact its own nationality laws, and how does this affect women's attainment and enjoyment of fundamental human rights?
- b) What is the rationale for gender-specific nationality laws?

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<sup>22</sup> Article 1 of the ICCPR provides States with the right to self-determination.

<sup>23</sup> Reduction of Statelessness Convention, see the introductory note by the Office of the United Nations High Commissioner for Refugees.

<sup>24</sup> Article 9 of the Reduction of Statelessness Convention.

- c) How can the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provide a remedy to eradicate gender-specific nationality laws?

#### 1.4 LIMITATIONS AND FOCUS OF THE STUDY

This thesis will not focus on refugees, migrants and/or internally displaced persons. This does not preclude mention of the nexus between, for example, internally displaced persons and statelessness.<sup>25</sup> Although these concepts form a large portion of the conflict of law at hand, it will be impossible to address the issue within this thesis. Statelessness and migration are intimately intertwined, and statelessness is often a consequence and cause of migration.<sup>26</sup> People who are stateless often flee their country as a result of persecution frequently linked to them being a stateless minority.<sup>27</sup> Refugees are a special class of migrants who under international law deserve specific protection by their host state.<sup>28</sup> Although all refugees are stateless, many stateless persons are not refugees.<sup>29</sup>

Internally displaced persons (or IDP's) are persons who are internally displaced due to conflict within their territory. This too is a closely connected concept that pairs with statelessness, for example, the on-going civil conflict in Syria has led to an estimate of 9 million IDP's who are at risk of becoming stateless.<sup>30</sup> This thesis will only be making reference to the abovementioned terms to the extent that they relate to statelessness.

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<sup>25</sup> Norwegian Refugee Council Report 2015 *Statelessness and Displacement: Scoping Paper* (2015) 23.

<sup>26</sup> Nonnenmacher S and Cholewinski R 'The nexus between statelessness and migration' in Edwards A and Van Waas L *Nationality and Statelessness under international law* (2014) 247.

<sup>27</sup> "All You Can Do is Pray" Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State available at <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims#page> (accessed on 8 March 2017).

<sup>28</sup> Article 1 of the 1951 UN Convention, as modified by the 1967 Protocol.

<sup>29</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De Facto statelessness* (April 2010) i.

<sup>30</sup> Norwegian Refugee Council Report (2015) 5.

This thesis will be focusing on statelessness and how it comes about as a result of gender-based discriminatory domestic law which confers nationality. Furthermore, there will be instances where the mother and the child are referred to as a unit, but the focus of this thesis will not be on the child but rather solely on the woman and the effect of statelessness on her well-being. This thesis will also not limit itself to a single country where statelessness is evident, rather an investigation of various countries will be considered and analysed in accordance with the objectives of this thesis. There will be specific mention of certain States in the MENA regions where gender discriminatory nationality law is still avidly being practiced.

## **1.5 RESEARCH METHODOLOGY**

This thesis will be a strictly desktop study. An enquiry of the pertinent primary sources such as the provisions of; the UDHR, the Stateless Persons Convention and CEDAW, with further analysis on national legislation as well as case law will serve as a foundation in order to adequately ascertain the complexity of the problem at play. To deliver profundity to the thesis, the various opinions and assessments of international academic writers on this topic articulated in various textbooks and journal articles, will be referred to as secondary sources.



## **1.6 STRUCTURE OF THE THESIS**

This chapter has introduced a broad overview of what this thesis will be addressing and why exactly it is needed. Chapter 2 will focus on nationality in the context of international and national law. The chapter considers nationality as an individual international human right in conflict with State sovereignty. Ultimately it will be argued that the latter creates a platform for States to introduce nationality laws which violate the former right, thus causing statelessness.

Chapter 3 will continue to explain what it means to be stateless. This chapter will be a continuation of chapter 2 by considering what categories of statelessness are created by and through discriminatory nationality laws. The classifications of statelessness that will be

considered are the following; *de jure* statelessness, *de facto* statelessness and statelessness at birth. The argument will be that each category is created as a result of discriminatory nationality laws that have caused statelessness.

Once there has been an understanding of what it means to be stateless and the different classification of statelessness, chapter 4 will specifically focus on how statelessness has been especially detrimental to gender and fundamental human rights. This chapter will investigate six countries in the MENA region known as the Gulf Cooperation Council States (GCC or the Gulf States). The GCC States will be the primary focus in determining how statelessness has flourished due to gender discriminatory nationality laws. The chapter will further consider the specific human rights violations that are posed to women who are stateless. Thereafter, it will be analysed whether Article 9 of CEDAW could assist as a basis for accountability to hold violator States liable for their failure to protect women. The final chapter, chapter 5, will provide amicable recommendations based on the UNHCR's Global Action Plans to reduce statelessness by 2024 before concluding this thesis.

## **1.7 CONCLUDING REMARKS**

This chapter introduced the reason why this research is important and how it requires the need to understand why statelessness is a problem in the context of international human rights. The next chapter will ruminate how the law has been a forerunner in creating the problem of statelessness by creating the platform for discriminatory nationality laws.

## CHAPTER 2

### INTERNATIONAL LAW AND THE STATE: CONTEXTUALISING NATIONALITY

*Formerly [woman] had only a body and soul. Now [she] needs a passport as well, because without it [she] will not be treated as a human.*<sup>1</sup>

#### 2.1 INTRODUCTION

Although international and national law are interdependent, where the latter relies on the former for guidance on acceptable legal norms, the two are still autonomous. The dichotomy comes as a result of international law conferring national sovereignty on States. By doing this there is a clear conflict; origin States are afforded the ability to manipulate their domestic law in such a way that they can deprive persons in their State of a nationality.

The concept of nationality revolves around *inter alia*, the ability of an individual who relies on an origin State bestowing upon her external protection against other territorial communities.<sup>2</sup> Individuals are considered nationals of a particular State when such a State assents and the larger world community honours that the State claims to protect and control such individuals.<sup>3</sup> State sovereignty on the other hand further protects origin States that disregard the position that “no person shall be without a nationality”.<sup>4</sup> In this chapter, the interplay between international and national law along with the idea that nationality was birthed at international law, will be investigated and analysed.

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<sup>1</sup> Gibney MJ ‘Foreword’ in Bloom T, Tonkiss K and Cole P *Understanding Statelessness* 1<sup>st</sup> ed (2017) 1.

<sup>2</sup> McDougal MS, Laswell HD & Chen L ‘Nationality and Human Rights: The Protection of the Individual in External Arenas’ (1974) 83 *The Yale Law Journal* 901.

<sup>3</sup> McDougal MS, Laswell HD & Chen L (1974) 901.

<sup>4</sup> Article 15 of the Universal Declaration of Human Rights (UDHR), 1948.

## 2.2 NATIONALITY: AN OVERVIEW

Nationality is not a consideration of an individual belonging to a particular State for purposes of international administration; it is an individual's entitlement to the ascertainment and enforcement of human rights. When one has no nationality and therefore no State as a protector, her aspirations for human rights become meaningless.<sup>5</sup> She is effectively classified and considered as one who is in the world as an illegal human. Being an illegal human ironically has a legally accepted description, that is, to be stateless.<sup>6</sup> A stateless person, technically defined as one without a nationality from any State, is treated as an international outcast, an unprotected person.<sup>7</sup>

In a so-called public order of human dignity, there should be an international legal framework that regulates nationality in such a way that there is better protection of an individual. In addition to this, there should be minimum repercussions to the organised interests of the territorial communities.<sup>8</sup> The Permanent Court of International Justice observed that:

[T]he rule of international law on which the [origin State's] objection is based [on] is that in taking up the case of one of its nationals ... a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to ... the bond of nationality between the State and the individual which alone confers upon the State the right ... to take up a claim.<sup>9</sup>

Under this procedural observation, it is reiterated that a State's right to protect is independent of the individuals' interest; a State is under no formal duty to respect the existence of an

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<sup>5</sup> McDougal MS, Laswell HD & Chen L (1974) 902.

<sup>6</sup> See Article 1(1) of the Stateless Persons Convention

<sup>7</sup> McDougal MS, Laswell HD & Chen L (1974) 902.

<sup>8</sup> McDougal MS, Laswell HD & Chen L (1974) 905.

<sup>9</sup> Panevezys-Saldutiskis Railway (*Estonia v. Lithuania*) 1938 P.C.I.J (ser A/B) No. 76 (28 February 1939) Publications of the Permanent Court of International Justice Series A./B. No. 76; Collection of Judgments, Orders and Advisory Opinions A.W. Sijthoff's Publishing Company, Leyden, 1939. Hereafter the Panevezys-Saldutiskis Railway Case at 65.

individuals' interest.<sup>10</sup> Rather, discretion is afforded to an origin State on whether or not to initiate claims against external entities on behalf of its nationals.<sup>11</sup> A State's right to act or not act is a determination resultant of State sovereignty.

The concept of sovereignty was interpreted as justifying the use of absolute power or symbolising the possession of it.<sup>12</sup> The sovereignty of a State was not seen as a power to be used towards the common good of the international community, but as a subjective right to be exercised in the own interest of the State. Snyman-Ferreira suggests that:

[s]ince the beginning of the twentieth century, it has become increasingly apparent that the classical approach to sovereignty as absolute and unlimited authority, constitutes a threat to international peace and to the existence of independent nation States. In a contemporary setting, sovereignty has been described as having no real essence and to exist as a bundle of rights and powers accorded to the State by legal order.<sup>13</sup>

This legal order argued for is prescribed under the ICCPR.<sup>14</sup> As a result, sovereignty can also be divided and limited.<sup>15</sup> On the other hand, a position of a more modern approach to limited sovereignty is applicable as a basic principle where a population is suffering serious harm, as a result of internal war, insurgency, repression or State failure, and the State in question is unwilling or unable to halt or avert it.<sup>16</sup> In such an instance, the principle of non-intervention by external bodies will yield to the international responsibility to protect.<sup>17</sup> However, it is not

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<sup>10</sup> McDougal MS, Laswell HD & Chen L (1974) 907.

<sup>11</sup> McDougal MS, Laswell HD & Chen L (1974) 907.

<sup>12</sup> Snyman-Ferreira MP 'The Evolution of State Sovereignty: A Historical Overview' (2006) 12(2) *Fundamina* 12.

<sup>13</sup> Snyman-Ferreira MP (2006) 15.

<sup>14</sup> Article 2 of the ICCPR.

<sup>15</sup> Snyman-Ferreira MP (2006) 15.

<sup>16</sup> International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (December 2001) at XI.

<sup>17</sup> International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (December 2001) at XI.

clear whether this limited sovereignty applies to States determining their own nationality laws.

In order to fully understand the above conundrum, this idea of what the foundation of nationality constitutes in a sovereign State needs to be systematically unpacked. First, the definition of nationality will be analysed with an evaluation on how nationality is generally determined in a State. Secondly, the scope of nationality will be explained in relation to its procedural and substantive implications. Further, the limitations on the scope of nationality will be critiqued with specific reference to State sovereignty as well as the lack of guidelines provided to States on how to enact effective nationality laws. Lastly, the chapter will consider how the nationality laws of various States discriminate on the basis of gender,<sup>18</sup> which ultimately causes the complete loss of nationality thus resulting in statelessness.

### 2.3 WHAT IS NATIONALITY? AN INTERNATIONAL PERSPECTIVE

Nationality is essential in ensuring access to other basic human rights.<sup>19</sup> Nationality is an entitlement every human being has as a result of Article 15 of the UDHR. It is a right that is theoretically afforded to everyone, without limitation, from the moment they are born,<sup>20</sup> suggesting that no person should be without a nationality.

It is an accepted understanding that the UDHR is a declaration and not a treaty that can be enforced on individual States who do not comply with its provisions.<sup>21</sup> Although this is the technical reality, the UDHR has an insightful impact on the growth and expansion of

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<sup>18</sup> Nationality laws that discriminate on the basis of gender will only be touched on in this chapter. However, a more in depth analysis of the gendered discrimination will be considered under chapter 4 of the thesis.

<sup>19</sup> Batchelor C 'Preparation of a Nationality Law: Promoting the Legal Identity of Women in the Field of Nationality' (2004) 22 *Law Context: A Socio-Legal Journal* 35.

<sup>20</sup> Article 24(3) ICCPR. See further Article 7 of the Convention of the Rights of the Child.

<sup>21</sup> Australian Human Rights Commission 'Fact Sheet 5: The international bill of rights' available at [https://www.unicef.org/crc/index\\_30228.html](https://www.unicef.org/crc/index_30228.html) (accessed 30 August 2017).



international human rights law.<sup>22</sup> The UDHR has been a pioneer for the succession of conventions such as the ICCPR which recognises that there is a binding right to member States to provide that its people can acquire nationality. When this is read together, each human should *prima facie*, have a nationality and be afforded a right to a nationality in the State where they reside. This right would then be protected and enforced under international law.

The contemporary conception of nationality developed only after the advent of an international community of separate sovereign States following the Peace of Westphalia 1648.<sup>23</sup> However, the formulation of the right to nationality as a human right only presented itself in the mid-20<sup>th</sup> century.<sup>24</sup> Article 19 of the American Declaration of the Rights and Duties of Man stipulates that:

every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.<sup>25</sup>

Although the initiative to introduce a codified right to nationality was realised, its weakness is that the State in which the individual finds herself, has the right to confer nationality. This is the manifest fault of the American Declaration even though the document realises that the premise of its creation is based on the recognition that the essential rights of man are not deprived from the fact that he is a national of a certain State, but are based upon attributes of

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<sup>22</sup> Australian Human Rights Commission 'Fact Sheet 5: The international bill of rights' available at <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5-the-international-bill-rights> (accessed 30 August 2017). The constant reliance and perpetual use of the UDHR by States, has elevated it to the status of it being only a declaration to a more esteemed position as forming part of customary international law.

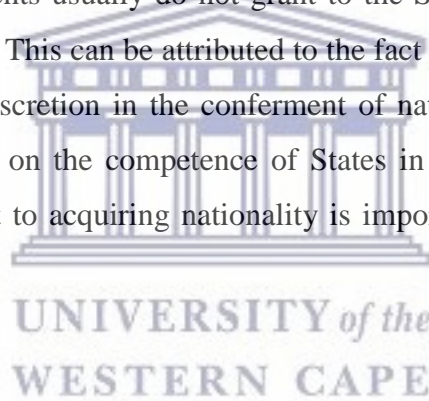
<sup>23</sup> Shearer I and Opeskin B 'Nationality and Statelessness' in Opeskin B, Perruchoud R and Redbath-Cross J *Foundations of International Migration Law* (2012) 2.

<sup>24</sup> Ganczer M 'The Right to Nationality as a Human Right?' in Chain PL, Varga R, Thomas M and Szabo M *Hungarian Yearbook of international Law and European Law* (2014) 16.

<sup>25</sup> Article 19 of the American Declaration of the Rights and Duties of Man, O.A.S. Res, III, Ninth International Conference of American States, Bogotá, 2 May 1948 available at <https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm> (accessed on 16 January 2018).

his human personality.<sup>26</sup> Nationality matters falling within the domestic jurisdiction of States are limited by international law to such extent only as the State concerned undertakes international obligations pertaining to the matter.<sup>27</sup>

Even though the procedural law of nationality is governed in detail under domestic law, regulation of the substantive right to nationality is a rare phenomenon.<sup>28</sup> The specific mention of the right to nationality appears in international documents, this reiterates the importance of it being an international human right. The contemporary universal protection of the right to a nationality commenced with the adoption of Article 15 of the UDHR. Article 15 provides for the protection of the right to a nationality to a wide group of persons without discrimination, while the prohibition of arbitrary deprivation offers both protection against statelessness and a possibility to change nationality.<sup>29</sup> The main shortcoming of the right to a nationality is that the international law instruments usually do not grant to the State the obligation to provide nationality to the individual.<sup>30</sup> This can be attributed to the fact that international law bestows on States a high degree of discretion in the conferment of nationality.<sup>31</sup> It remains unclear what limitations are imposed on the competence of States in endorsing nationality laws.<sup>32</sup> What is clear is that the right to acquiring nationality is important to the human rights and well-being of the individual.



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<sup>26</sup> The American Declaration of the Rights and Duties of Man, O.A.S. Res, III, Ninth International Conference of American States, Bogotá, 2 May 1948 available at <https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm> (accessed on 16 January 2018).

<sup>27</sup> Ganczer M (2014) 17.

<sup>28</sup> Ganczer M (2014) 17.

<sup>29</sup> Adjami M & Harrington J 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 *Refugee Survey Quarterly* 95.

<sup>30</sup> Van Waas L *Nationality Matters: Statelessness under International Law* (published PhD Thesis, Tilburg University, 2008) 59.

<sup>31</sup> McDougal MS, Laswell HD & Chen L (1974) 918.

<sup>32</sup> McDougal MS, Laswell HD & Chen L (1974) 918.

## 2.4 DEFINING THE SCOPE OF NATIONALITY

Before one can define the scope of nationality, it is important to consider the relationship between nationality and citizenship. Citizenship is the status of belonging to a particular country, as defined by its domestic law.<sup>33</sup> It is a narrower term that is sometimes used to denote the status of those nationals who have full political privileges.<sup>34</sup> Nationality on the other hand, is the status of belonging as seen on an international playing field.<sup>35</sup> Nationality is in fact commonly regarded as an inalienable human right of every human being.<sup>36</sup> For purposes of this thesis, when reference is made to nationality, it is as a result of her not having the domestic protection attached to holding citizenship. This section will therefore look at, first, the importance of having a nationality. Secondly, the procedural and substantive implications of having a nationality will be considered. Lastly, the limitations to acquiring nationality in an origin State as a result of their nationality laws will be unpacked.

### 2.4.1 The importance of nationality

The concept of nationality is important since it determines not only the benefits an individual is entitled to, but also any obligations a person may be responsible for.<sup>37</sup> Nationality is of cardinal importance because it is mainly through nationality that the individual comes within the scope of international law and has access to not only political and economic rights, but also to any privileges conferred by modern States on their nationals.<sup>38</sup>

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<sup>33</sup> Fawcett J 'Nationality and Citizenship' (1981) 71 *The Round Table: The Commonwealth Journal of International Affairs* 9.

<sup>34</sup> Encyclopaedia Britannica 'Nationality International Law' available at <https://www.britannica.com/topic/nationality-international-law> (accessed 23 February 2018).

<sup>35</sup> Fawcett J (1981) 9.

<sup>36</sup> Encyclopaedia Britannica 'Nationality International Law' available at <https://www.britannica.com/topic/nationality-international-law> (accessed 23 February 2018).

<sup>37</sup> 'The Concept of Nationality is Important' available at <https://www.lawteacher.net/free-law-essays/human-rights/concept-of-nationality-is-important.ph> (accessed 30 August 2017).

<sup>38</sup> Encyclopaedia Britannica 'Nationality International Law' available at <https://www.britannica.com/topic/nationality-international-law> (accessed 23 February 2018).

There is no single, coherent definition of the term nationality under international law, there are only contradicting descriptions under the various municipal laws of States. Additionally the rights and duties attendant upon nationality differ from State to State.<sup>39</sup> There are, however, regional instruments that attempt to cohesively define a national. The European Convention on Nationality defines nationality as the legal bond between a person and a State and does not indicate the person's ethnic origin.<sup>40</sup> This concept of nationality has been expounded upon in the *Nottebohm* case where the International Court of Justice (ICJ) suggested:

[T]hat nationality is not only a legal bond, but one which has as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.<sup>41</sup>

Edwards claims that nationality is defined through the determination of one's social ties to the country of one's nationality, and that when these ties are established, they give rise to rights and duties on the State and the national.<sup>42</sup> This definition suggests that there are two aspects attached to nationality. First, to be a national of an origin State requires that she is legally attached to the State. Secondly, she must have some sort of sentimental connection to the State such as a family heritage or business interests. However, it is unclear what happens where the one aspect is present and the other is not. Edwards' definition might result in more exclusion, particularly where the abovementioned criteria has not been met. Not having a cohesive definition of what constitutes a nationality can have a dire effect into enacting nationality laws. It may cause every State to determine nationality based off of their interpretation on the definition of nationality.

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<sup>39</sup> 'The Concept of Nationality is Important' available at <https://www.lawteacher.net/free-law-essays/human-rights/concept-of-nationality-is-important.ph> (accessed 30 August 2017).

<sup>40</sup> Article 2 of The European Convention on Nationality.

<sup>41</sup> *Nottebohm Case (Liechtenstein v Guatemala)*; Second Phase, International Court of Justice (ICJ), 6 April 1955, ICJ Reports 1955, p.4; General List, No 18 available at: <http://www.refworld.org/cases,ICJ,3ae6b7248.html> (accessed 30 August 2017).

<sup>42</sup> Edwards A (2014) 11.

## 2.4.2 Procedural and Substantive implications

Although human rights issues were removed from domestic jurisdiction, the right to a nationality as an international human right is pervaded by the procedural nationality matters, which form part of the reserved domain of the State.<sup>43</sup> What this means is that the right to acquire a nationality has been afforded at an international level. However, the right exists not only at an international level, but also at a regional and domestic level because the right itself belongs to the individual. It is the regulation and implementation of the right that differs from State to State. International law does not prescribe the manner in which a State should afford its subjects a nationality. Nationality law is a consideration accounted for under the domestic law of a State, but the right itself has been bestowed on every human at an international level. The State, through constitutional and statutory provisions, sets the criteria for determining who shall be its nationals.<sup>44</sup> This in turn gives rise to substantive and procedural implications regulating citizenship within the origin State.

The substantive implications can be explained in the following manner. Under domestic law, a national owes a duty of allegiance to the State who in return affords the national a reciprocal right of permanent residence and to participate in public life.<sup>45</sup> Acquisition of nationality in turn provides the individual with rights and protection.<sup>46</sup> This notion of protection is common under the present international law practice, where States may exercise a right of fortification of their nationals where they have suffered injury by another State such as *inter alia*, denials of justice by the courts, or police brutality.<sup>47</sup>

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<sup>43</sup> Ganczer M (2014) 15.

<sup>44</sup> Encyclopaedia Britannica 'Nationality International Law' available at <https://www.britannica.com/topic/nationality-international-law> (accessed 23 February 2018).

<sup>45</sup> Shearer I & Opeskin B (2012) 1.

<sup>46</sup> Shearer I & Opeskin B (2012) 3.

<sup>47</sup> This kind of security is referred to as diplomatic protection. The judgment of *Panevezys-Saldutiskis Railway* noted that the right of diplomatic protection is limited to intervention on behalf of its *own nationals*. See *Penevezys-Saldutiskis Railway (Estonia v. Lithuania)* 1938 P.C.I.J. (ser.A/B) No.76 (28 February 1938). (*My emphasis*).

Nationality and the conferment thereof become substantially important where the human rights of the individual are at stake. The issue is that at a domestic law level, the procedure in which the law of nationality is handled differs between States. Although there is a right to a nationality there is no corresponding obligation on a State to confer nationality.<sup>48</sup> The procedure in determining nationality thus endangers the proper functioning of substantive rights. The safeguards in place at international law exist only as a guideline on what States should avoid; there is no regulation on what a State should consider when enacting nationality laws.<sup>49</sup> What remains an accepted notion is that even though States maintain the right to elaborate the content of their nationality laws, they must do so in compliance with international norms relating to nationality, including the principle that statelessness should be avoided.<sup>50</sup> The meaning and import of nationality has progressed with the changing character of States, but the common and most consistent attribute remains to be the membership in the society of a State.<sup>51</sup>

Once domestic law has granted one with nationality, she becomes a citizen of that State. The terms 'nationality' and 'citizenship' emphasise two different aspects variants of the same notion – State membership.<sup>52</sup> Nationality gives rise on the part of the State to personal jurisdiction standing over the individual in relation to other States.<sup>53</sup> In contrast, citizenship is the highest of political rights and duties in municipal law.<sup>54</sup> The substantive content of citizenship is, to a large extent, dependent on one's country and its procedural regulations with regard to citizenship.<sup>55</sup>

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<sup>48</sup> See Edwards A (2014) 14.

<sup>49</sup> An example of what principles are put in place can be found in Article 4 of the European Convention on Nationality.

<sup>50</sup> See the Introductory Note to the 1961 Convention on the Reduction of Statelessness.

<sup>51</sup> See Edwards A (2014) 14.

<sup>52</sup> Wies P *Nationality and Statelessness in International Law* (1979) 4 -5.

<sup>53</sup> Boll A 'Nationality and Obligations of Loyalty in International and Municipal Law' (2003) 24 (3) *Australian Yearbook of International Law* 37.

<sup>54</sup> Boll A (2003) 37.

<sup>55</sup> See Edwards A (2014) 14.

International law limits State's regulation of the right to nationality in the following ways. First, each individual should have the right to acquire, change and retain a nationality.<sup>56</sup> Secondly, once nationality has been conferred by a State, her nationality cannot be arbitrarily removed.<sup>57</sup> The right to nationality under international law therefore undertakes the primary classification of a procedural right, which covers the rights and regulations relating to nationality acquisition and deprivation.<sup>58</sup> Nationality or citizenship creates access to civil rights, political participation, social welfare, identity and recognition, the common good and social belonging.<sup>59</sup>

There are three main methods in which nationality is acquired or conferred by States, namely, *jus sanguinis* and *jus soli*. In terms of *jus sanguinis* (right of blood), nationality is acquired by birth.<sup>60</sup> *Jus sanguinis* provides that a person's nationality is determined on the basis of the nationality of her parents – or one particular parent, at the time of her birth.<sup>61</sup> The second mode is the concept of *jus soli* (right of soil).<sup>62</sup> The principle is considered where a person's nationality is determined by her country of birth.<sup>63</sup>

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<sup>56</sup> Report of the Secretary – General to the General Assembly *Human rights and arbitrary deprivation of nationality* A/HRC/13/34 (14 December 2009).

<sup>57</sup> Report of the Secretary – General to the General Assembly *Human rights and arbitrary deprivation of nationality* A/HRC/13/34 (14 December 2009).

<sup>58</sup> See Edwards A (2014) 16.

<sup>59</sup> Institute for European Integration Research Austrian Academic of Sciences, *Vienna Acquisition and Loss of Nationality, Policies and trends in 15 European States: Summary and Recommendations* Bauböck R, Ersboll E, Groenendijk K and Waldrauch H (eds) (January 2006) 1.

<sup>60</sup> 'Modes of acquisition of nationality' available at <http://internationallawu.blogspot.co.za/2012/11/modes-of-acquisition-of-nationality.html> (accessed 31 August 2017).

<sup>61</sup> Waldrauch H 'Acquisition of Nationality' in Institute for European Integration Research Austrian Academic of Sciences, *Vienna Acquisition and Loss of Nationality, Policies and trends in 15 European States: Summary and Recommendations* Bauböck R, Ersboll E, Groenendijk K and Waldrauch H (eds) (2006) 3.

<sup>62</sup> 'Modes of acquisition of nationality' available at <http://internationallawu.blogspot.co.za/2012/11/modes-of-acquisition-of-nationality.html> (accessed 31 August 2017).

<sup>63</sup> Waldrauch H(2006) 9.

Nationality may also be acquired also through *jus domicilii* or the legal process of naturalization or long residence.<sup>64</sup> Naturalization can take place in one of four ways; marriage, legitimation or adoption of children, acquisition of domicile, or through appointment as a government official.<sup>65</sup> The conditions for naturalization may differ in different municipal laws; the common thread is that there should be a certain period where the person has assumed permanent residence in the State from which she seeks to acquire nationality.<sup>66</sup>

In each case, the idea is that nationality reflects a link with the State, either by establishing a connection with the territory or through lineage such as blood association with a family member who is already a national.<sup>67</sup> Compared to the modes of *jus sanguinis* or *jus soli* in conferring nationality, the granting of nationality by naturalization remain more stoutly within the discretion of States, and has largely remained unscathed by international law.<sup>68</sup> When one considers the implications of all the modes of acquiring nationality, it is safe to suggest that the best mode is *jus soli*. The mode allows any person born within the territory acquires a nationality. This limits the number of stateless cases and regulates matters of uncertainty on any conflicting laws.

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<sup>64</sup> Edwards A (2014) 16.

<sup>65</sup> Van Waas L *Nationality Matters: Statelessness under International Law* (published PhD Thesis, Tilburg University, 2008) 34.

<sup>66</sup> ‘Modes of acquisition of nationality’ available at <http://internationallawu.blogspot.co.za/2012/11/modes-of-acquisition-of-nationality.html> (accessed 31 August 2017).

<sup>67</sup> Edwards A (2014) 16.

<sup>68</sup> Edwards A (2014) 18.



### 2.4.3 Limitations to the Scope of Nationality

There are instances where the conferment of nationality is limited as a result of legal processes. In relation to nationality and within the framework of this thesis, the impediments to nationality can be considered as the following. First, the freedom provided by State sovereignty to the lawmakers of a State in deciding what nationality laws to enact can be considered as an obstacle to attaining a nationality. Secondly, the lack of guidelines provided to States on what should and should not be considered when enacting nationality laws creates a foundation for certain groups of persons to risk being stateless.

#### 2.4.3.1 State Sovereignty

International law has granted all States the right to self-determination.<sup>69</sup> Self-determination is defined as the right of a people living within a non-self-governing territory to choose for themselves the political and legal status of that territory.<sup>70</sup> They may choose *inter alia*, independence and the formation of a separate State, with autonomy in internal affairs.<sup>71</sup> Once a State has been formed, it enjoys sovereignty and independence.<sup>72</sup>

Legal scholars have expressed that sovereignty should be considered as a social phenomenon, which is closely allied with the State, its role in international relations and the regularities of its development.<sup>73</sup> There are many definitions explaining the concept of sovereignty. One of the more ordinary and core definitions of State sovereignty is that it is the intrinsic supremacy of the State in its territory, and its independence regarding international relations including the importance of international human rights.<sup>74</sup> Krilov further interprets that sovereignty is

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<sup>69</sup> Article 1 of the ICCPR.

<sup>70</sup> Unrepresented Nations and Peoples Organization 'Self-Determination' available at <http://www.unpo.org/article/4957> (accessed 20 August 2018).

<sup>71</sup> Law J and Martin EA (2009) *A Dictionary of Law* (7<sup>th</sup> ed) 500.

<sup>72</sup> Law J and Martin EA (2009) 524.

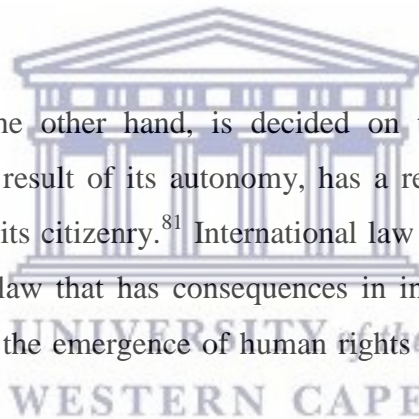
<sup>73</sup> Manelis BL *Problems of Sovereignty* (Resume of Ph.D Dissertation, Moscow) 9.

<sup>74</sup> Gevorgyan K 'Concept of State Sovereignty: Modern Attitudes' at 445 available at

the State's ability to independently, without external interference, determine its internal and external policies.<sup>75</sup> He further suggests that this is only possible, provided that there is respect for the civil and human rights, the protection of minority rights and most importantly, respect for international law.<sup>76</sup>

The essential characteristics of a sovereign State consist of, *inter alia*, a fixed territory and a permanent population.<sup>77</sup> As a result of its internal independence and territorial supremacy, the State may adopt any constitution that will be pleasing to it for organising its management necessary to pass laws which are not only desirable for the State, but that also fits the requirement of respecting the demands that exist at international law.<sup>78</sup> The territorial sovereignty of the State is therefore reflected in the fact that law-making activities such as the publication, modification and cancellation of the law, is centralised by State authorities.<sup>79</sup>

A permanent populace on the other hand, is decided on through the establishment of citizenship.<sup>80</sup> The State, as a result of its autonomy, has a relatively unobstructed right to normalise the composition of its citizenry.<sup>81</sup> International law acknowledges that nationality is an institution of domestic law that has consequences in international law as a result of sovereignty.<sup>82</sup> However, with the emergence of human rights law, States acquired extended



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[ysu.am/files/Karen\\_Gevorgyan.pdf](http://ysu.am/files/Karen_Gevorgyan.pdf) (accessed 5 March 2018).

<sup>75</sup> Manelis BL *Problems of Sovereignty* (Resume of Ph.D Dissertation, Moscow) 4.

<sup>76</sup> Manelis B *Problems of Sovereignty* (Resume of Ph.D Dissertation, Moscow) 4.

<sup>77</sup> Caoindealbháin B.Ó 'Citizenship and Boarders: Irish Nationality Law and Northern Ireland' (2006) available at [https://www.ucd.ie/ibis/filestore/wp2006/68/68\\_boc.pdf](https://www.ucd.ie/ibis/filestore/wp2006/68/68_boc.pdf) (accessed 30 August 2017).

<sup>78</sup> Jennings R and Watts A (2008) Oppenheim's International Law(9ed) vol 1 Oxford University Press: Harlow at 384.

<sup>79</sup> Gevorgyan K 'Concept of State Sovereignty: Modern Attitudes' at 442 available at [ysu.am/files/Karen\\_Gevorgyan.pdf](http://ysu.am/files/Karen_Gevorgyan.pdf) (accessed 5 March 2018).

<sup>80</sup> Citizenship and nationality are used interchangeably but refer to the same notion, see Barnhurt CL, Barnhurt RK and Zeleny RO (1991) *The World Book Dictionary* (Vol 2) at 1383.

<sup>81</sup> Caoindealbháin BÓ 'Citizenship and Boarders: Irish Nationality Law and Northern Ireland' (2006) available at [https://www.ucd.ie/ibis/filestore/wp2006/68/68\\_boc.pdf](https://www.ucd.ie/ibis/filestore/wp2006/68/68_boc.pdf) (accessed 30 August 2017).

<sup>82</sup> Article 1 of the League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930. (The Hague Convention).

recognition in that its regulation of nationality would be recognised by other States in so far as it is consistent with international conventions, international custom, and the law as it is generally recognised.<sup>83</sup> An important principle that international conventions prescribe is that the primary objective of creating the right to nationality is to eliminate statelessness.<sup>84</sup> A stateless person is one who is not considered as a national by any State under the operation of its law.<sup>85</sup> There are various genres of statelessness that are caused as a result of either discriminatory nationality laws, or due to the fact that a State has gaps in their nationality laws. However, this will be explained in more depth in chapter 3.

It is therefore a process of the domestic law of a State which determines the scope of who a national is according to their legal standards as a result of State sovereignty. However, the downfall of this is that international law does not offer effective guidelines to States who still have discriminatory and/or gaps in their nationality laws.

#### 2.4.3.2 Lack of Guidelines: Gender discrimination, *jus sanguinis* and *jus soli*

The lack of guidelines from the Statelessness Convention is essentially in relation to States who either have gender discriminatory laws, or where there is confusion between the principles of *jus sanguinis* and *jus soli*. The impediments created by the lack of effective guidelines in determining nationality is a danger to human rights.

In the past, the nationality laws of majority of States did not provide equal rights to women in nationality matters.<sup>86</sup> This has significantly changed since the adoption of CEDAW.<sup>87</sup>

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<sup>83</sup> Article 1 of the Hague Convention.

<sup>84</sup> Ganczer M (2014) 15.

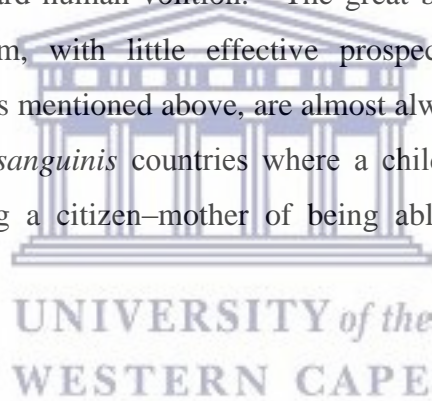
<sup>85</sup> Article 1 of the 1954 Convention relating to the Status of Stateless Persons.

<sup>86</sup> UN High Commissioner for Refugees (UNHCR), *Revised Background Note on Gender Equality, Nationality, Laws and Statelessness*, 8 March 2013, available at: <http://www.refworld.org/docid/4f59bdd92.html> (accessed 8 March 2018).

<sup>87</sup> UN High Commissioner for Refugees (UNHCR), *Revised Background Note on Gender Equality*,

Article 9 of CEDAW provides that all State parties should enact nationality laws that are gender neutral.<sup>88</sup> However, this provision does not mean that gender discrimination in nationality laws has entirely been eradicated. The UNHCR's survey of nationality legislation reveals that equality between men and women relating to conferral of nationality upon children has not been attained in 29 countries.<sup>89</sup> While some States have nationality laws which are not discriminatory, there are States where ethnic, racial and gender discrimination are at the source of nationality laws which essentially contributes to the deprivation or loss of nationality.<sup>90</sup> This is the reality despite international conventions prohibiting the deprivation of nationality on racial, ethnic, religious, political<sup>91</sup> or on the grounds of gender.<sup>92</sup>

The important consideration from the perspective of human rights is that the principles of *jus sanguinis* and *jus soli* disregard human volition.<sup>93</sup> The great bulk of humankind have their nationality forced upon them, with little effective prospect of change.<sup>94</sup> The gender discriminatory nationality laws mentioned above, are almost always directed towards women. This is evident in some *jus sanguinis* countries where a child's lineage is traced through paternal lines only, depriving a citizen-mother of being able to independently pass her



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*Nationality, Laws and Statelessness*, 8 March 2013, available at: <http://www.refworld.org/docid/4f59bdd92.html> (accessed 8 March 2018).

<sup>88</sup> Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

<sup>89</sup> UN High Commissioner for Refugees (UNHCR), *Revised Background Note on Gender Equality, Nationality Laws and Statelessness*, 8 March 2013, available at: <http://www.refworld.org/docid/4f59bdd92.html> (accessed 8 March 2018).

<sup>90</sup> Edwards A and Van Waas L (2014) 4.

<sup>91</sup> Article 9 of the Reduction of Statelessness Convention.

<sup>92</sup> Article 9 of CEDAW.

<sup>93</sup> McDougal MS, Laswell HD and Chen L (1974) 919.

<sup>94</sup> McDougal MS, Laswell HD and Chen L (1974) 919.

nationality to her children.<sup>95</sup> Under such domestic law restrictions, these categories of children will be rendered stateless.<sup>96</sup>

Gender discrimination further perpetuate to instances of marriage. When it comes to the effect of marriage on nationality, domestic laws regulating such conferment differ widely.<sup>97</sup> A number of States deprive woman of her nationality automatically upon marriage.<sup>98</sup> There are two contradictory principles governing the law on nationality regarding married women. First, the traditional principle that there should be unity of family through the nationality of everyone being the same in order to avoid split loyalty.<sup>99</sup> Secondly, the contemporary principle that honour the freedom of a married woman to choose her own nationality.<sup>100</sup>

The preliminary observation is that the latter principle has the least amount of consideration when States contemplate nationality laws. From the perspective of human rights, nationality laws of certain States endorse the violation of autonomy and enables gender discriminatory laws.<sup>101</sup> A prime example of this gender discrimination can be found in Egypt where the law provides that a foreign woman who gets married to an Egyptian shall not acquire the nationality.<sup>102</sup> Women in this position are unable to pass their nationality to their children in the event that the father leaves, or dies during the process of finalising nationality documentation. In such instances, the child effectively becomes stateless. Egyptian

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<sup>95</sup> Edwards A (2014) 18.

<sup>96</sup> Article 1 of Stateless Persons Convention.

<sup>97</sup> McDougal MS, Laswell HD and Chen L (1974) 919.

<sup>98</sup> See Edwards A (2014) 18.

<sup>99</sup> McDougal MS, Laswell HD and Chen L (1974) 922.

<sup>100</sup> United Nations Division for the Advancement of Women Department of Economic and Social Affairs *Women, Nationality and Citizenship* (2003) 5.

<sup>101</sup> McDougal MS, Laswell HD and Chen L (1974) 923.

<sup>102</sup> Article 7 of the Law No 26 For The Year 1975 Concerning Egyptian Nationality As Amended By Law No 154/2004 -<http://www.refworld.org/docid/3ae6b4e218.html> (accessed 9 March 2018).

authorities explain the reason for precluding Egyptian women who marry non-Egyptians (and vice versa) from passing on their nationality to their children<sup>103</sup> by claiming that:

[t]his is [necessary] in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien [and vice versa], that her children shall be of the father's nationality.<sup>104</sup>

These gender discriminatory nationality laws on women has the devastating impact in fuelling their inability and difficulty in exercising other rights including, but not limited to, equality before the law, freedom of movement and access to education.<sup>105</sup> Upon the consideration of these laws alone, women are disproportionately affected though nationality laws.<sup>106</sup> These laws are a visceral violation of the international prohibition of discrimination on the basis of sex,<sup>107</sup> this leads to the arbitrary deprivation of nationality as it is the States which enact nationality laws.



## 2.5 CONCLUDING REMARKS

In this chapter, the idea of nationality has been unpacked in relation to its position under international law. It has been discovered that even though international considers that having nationality is a right, domestic law determines who receives a nationality. The clumsiness of the emergence of statelessness was caused as a result of international affording States discretion in determining the regulation of nationality law. This discretion was implemented

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<sup>103</sup> United Nations Division for the Advancement of Women, Department of Economic and Social Affairs Women, nationality and citizenship (June 2003) 9.

<sup>104</sup> Egyptian reservation, 18 September 1981; see <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (accessed 9 March 2018).

<sup>105</sup> Edwards A 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women' *UNHCR Legal and Protection Policy Research Series* POLAS/2009/02 Geneva, August 2009 available at <http://www.unhcr.org/4a8d0f1b9.html> (accessed 31 August 2017).

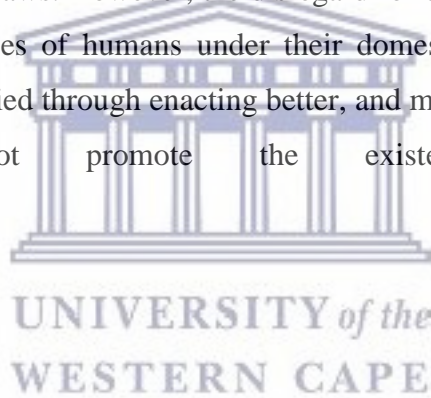
<sup>106</sup> Edwards A (2014) 14.

<sup>107</sup> UN High Commissioner for Refugees (UNHCR), *Background Note on Gender Equality, Nationality Laws and Statelessness 2015*, 6 March 2015, available at: <http://www.refworld.org/docid/54f8369b4.html> (accessed 31 August 2017).

from the very first time the right to nationality was codified in law. The problem is evident in the results it yielded.

This chapter further addressed the importance of having a nationality within in an international setting. To consider nationality is to look at both the substantive and procedural elements making up the right to a nationality. Upon determining its scope, the understanding was that nationality laws in the various States, based on the three modes of conferring nationality, violated the basic human rights of individuals, mostly the violation based on gender.

In conclusion, it is accepted that the flaw under international creates an abyss of discretion to States in deciding nationality laws. However, the disregard for basic respect for human rights by excluding certain categories of humans under their domestic nationality laws with no viable excuse has to be remedied through enacting better, and more gender neutral nationality laws which do not promote the existence of statelessness.



## CHAPTER 3

### INTERNATIONAL LAW AND THE INDIVIDUAL: STATELESSNESS

*Whoever and wherever one may be, one is both entitled and bound to regard oneself as belonging to ... [a state]: statelessness is anomaly, a disability, and presumptively an injustice.*<sup>1</sup>

#### 3.1 INTRODUCTION AND BACKGROUND

Statelessness is not a new concept. In 1951, Hannah Arendt described the stateless as the most symptomatic group in contemporary politics that symbolised the triumph of exclusivity of the nation above the civic inclusion and of the State.<sup>2</sup> This position has been endorsed by the United Nations where it has been concluded that statelessness is a phenomenon as antiquated as the concept of nationality.<sup>3</sup> The absence of the general attribution of nationality and the discrepancies between the various national legislations constitute the permanent source of statelessness.<sup>4</sup>

There is one substantive similarity between citizenship and stateless individuals – both conditions are as a result of the decision making of States.<sup>5</sup> Gaps in nationality laws are a major cause of statelessness. Every country has laws which establish under what circumstances someone acquires nationality or can have it withdrawn.<sup>6</sup> If these laws are not

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<sup>1</sup> Finnis J 'Nationality, Alienage and Constitutional Principle' Oxford Legal Studies Research Paper No. 08/2008 (2008) at 30.

<sup>2</sup> Gibney MJ 'Statelessness and citizenship in ethical and political perspective' in Edwards A and Van Waas L (eds) *Nationality and Statelessness under international law* (2014) 45.

<sup>3</sup> UN Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness' United Nations (August 1949) Lake Success: New York (1 August 1949), E/1112; E/1112/Add.1, available at <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018).

<sup>4</sup> UN Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness' United Nations (August 1949) Lake Success: New York (1 August 1949), E/1112; E/1112/Add.1, available at <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018).

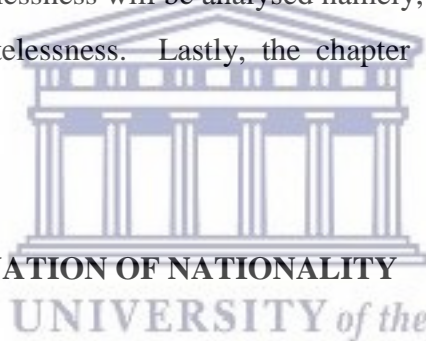
<sup>5</sup> Belton K "The Great Divide: Citizenship and Statelessness" (2005). *Electronic Theses and Dissertations*. 531 available at <http://stars.library.ucf.edu/etd/531> (accessed 7 February 2018) 1.

<sup>6</sup> Belton K "The Great Divide: Citizenship and Statelessness" (2005). *Electronic Theses and Dissertations* 531 available at <http://stars.library.ucf.edu/etd/531> (accessed 7 February 2018) 1.



carefully written and correctly applied, some people can be excluded and left stateless. Rules setting out who can and who cannot pass on their nationality are sometimes discriminatory on the basis of gender, race and ethnicity.<sup>7</sup>

Stateless persons, not being nationals of any country, are deprived of protection in all its forms.<sup>8</sup> The inferiority of the stateless woman's legal position is reflected in her social standing; it creates a prejudice against her and makes people regard her with distrust and suspicion.<sup>9</sup> This chapter will unpack the understanding of what constitutes statelessness in the following manner. First, the concept of the loss of nationality as opposed to the deprivation of nationality in correlation to voluntary versus involuntary statelessness will be explained. Secondly, this chapter will critically analyse how the leading international law conventions define the problem of statelessness and propose to work towards remedying the problem. Thirdly, the variations of statelessness will be analysed namely, statelessness at birth, de facto statelessness and de jure statelessness. Lastly, the chapter will provide the reader with concluding remarks.



### 3.2 LOSS VERSUS DEPRIVATION OF NATIONALITY

The right to a nationality requires not only that a person can acquire a nationality at birth, but also that arbitrary deprivation of nationality is prohibited.<sup>10</sup> The Reduction of Statelessness Convention distinguishes between the two ways in which one can be stripped of her nationality; through loss or deprivation, and deprivation can in turn be voluntary or

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<sup>7</sup> United Nations High Commissioner for Refugees 'Ending Statelessness' available at <http://www.unhcr.org/stateless-people.html> (accessed 7 February 2018).

<sup>8</sup> UN Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness' United Nations (August 1949) Lake Success: New York (1 August 1949), E/1112; E/1112/Add.1, available at <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018).

<sup>9</sup> UN Ad Hoc Committee on Refugees and Stateless Persons 'A Study of Statelessness' United Nations (August 1949) Lake Success: New York (1 August 1949), E/1112; E/1112/Add.1, available at <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018).

<sup>10</sup> Molnár T 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and the EU Law: New Perspectives' (2014) *Hungarian Yearbook of International Law and European Law* 71

involuntary.<sup>11</sup> In other words, nationality may be lost by an act of the national or through a commission by the State.<sup>12</sup>

### 3.2.1 Loss of Nationality: Voluntary Statelessness

Ideally, a loss of nationality refers to the automatic surrendering of a specific nationality through the operation of law.<sup>13</sup> An example of this would be where a person surrenders her current nationality in favour of acquiring a new nationality.<sup>14</sup> The Reduction of Statelessness Convention provides that a Contracting State is allowed to enact such legislation that would cause the individual to lose her nationality on condition that she acquires another one.<sup>15</sup> However, there are instances where one may voluntarily request the loss of her nationality without having acquired another one.<sup>16</sup> Voluntary renunciation of nationality occurs in cases where citizens disagree with certain political policies of the State.<sup>17</sup>

An example of voluntary renouncement occurred when seven hundred Israeli Jews gave up their nationality as an act of defiance against the Israeli government and its policies towards whom they believed to be innocent Palestinians.<sup>18</sup> While possessing a nationality may

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<sup>11</sup> Citizenship Rights in Africa Initiative 'Loss and Deprivation of Nationality' available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>12</sup> Weis P *Nationality and Statelessness in International Law* second edition (1979) 115.

<sup>13</sup> Citizenship Rights in Africa Initiative 'Loss and Deprivation of Nationality' available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>14</sup> Citizenship Rights in Africa Initiative 'Loss and Deprivation of Nationality' available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>15</sup> Article 5(1) of the Reduction of Statelessness Convention.

<sup>16</sup> Global Post 'Stateless in Slovakia: What if you renounce US citizenship' (6 December 2011) available at <https://www.pri.org/stories/2011-12-06/stateless-slovakia-what-if-you-renounce-us-citizenship> (accessed 9 February 2018).

<sup>17</sup> Global Post 'Stateless in Slovakia: What if you renounce US citizenship' (6 December 2011) available at <https://www.pri.org/stories/2011-12-06/stateless-slovakia-what-if-you-renounce-us-citizenship> (accessed 9 February 2018). The single most successful case of voluntary declaring oneself as stateless (the one that has been formally documented) is that of Mike Gogulski. In December 2008, he voluntarily renounced his US citizenship in the US embassy in Bratislava, Slovakia. He then later burned his passport in defiance. Gogulski said in response to critics that voluntarily rejecting citizenship was the only way to truly repudiate a system he hates.

<sup>18</sup> 'Messianic Jew Renounces Israeli Citizenship' available at

provide an individual with rights and entitlements in a contemporary world, it also enchains people to a particular territory, reinforcing egregious patterns of global inequality enforced by a mocking consent based government.<sup>19</sup> Having a nationality in a modern era is beneficial but it also creates a moral dilemma for an individual whose State advances discriminatory practices. Being stateless is not something that most people prefer. Majority of the current victims of statelessness did not willingly choose to have that title.<sup>20</sup> They were deprived, sometimes arbitrarily, of the right to acquire and retain a nationality.

### 3.2.2 Deprivation of Nationality: Involuntary Statelessness

As opposed to the automatic loss of nationality, the deprivation of nationality involves the decision by the executive of the State.<sup>21</sup> A decision by the administrative authorities to deprive one of her nationality can either be legitimate or arbitrary.<sup>22</sup> A legitimate deprivation of nationality could be in the instances where the national has committed a serious crime against her State. What constitutes a serious crime is not defined but has been explained as including involvement in terrorism, espionage, serious or organised crime, war crimes or unacceptable behaviours.<sup>23</sup> In such situations, the State is justified in depriving the citizen of her nationality. The complication of deprivation arrives when the authorities arbitrarily deprive an individual of the right to acquire a nationality. The Reduction of Statelessness Convention prohibits the arbitrary deprivation of nationality especially in the instances where it causes statelessness.<sup>24</sup> Arendt argues that the stateless persons are victims of three loses;

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[https://www.henrymakow.com/messianic\\_jew\\_renounces\\_israel.html](https://www.henrymakow.com/messianic_jew_renounces_israel.html) (accessed 9 February 2018).

<sup>19</sup> Gibney MJ 'Statelessness and citizenship in ethical and political perspective' in Edwards A and van Waas L (eds) *Nationality and Statelessness under international law* (2014) 45.

<sup>20</sup> Berliner Gazette '(un)belonging – who benefits from statelessness' available at <http://berlinergazette.de/statelessness/> (accessed 9 February 2018).

<sup>21</sup> Citizenship Rights in Africa Initiative 'Loss and Deprivation of Nationality' available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>22</sup> Citizenship Rights in Africa Initiative 'Loss and Deprivation of Nationality' available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>23</sup> Mantu S 'Terrorist' citizens and the human right to nationality' (2018) 26 *Journal of Contemporary European Studies* 33.

<sup>24</sup> Article 8(1) read with Article 8(4) of the Reduction of Statelessness Convention.

loss of home, the loss of government protection, and the loss of a place in the world which makes opinions significant and actions effective.<sup>25</sup>

Involuntary statelessness can be caused by deprivation either through the legitimate reasoning of States or by the arbitrary deprivation of States. Gibney states that:

Statelessness is often generated by the unintentional actions of States. Conflict of citizenship laws, State dissolution, gendered nationality laws and bureaucratic incompetence can lead to people without membership.<sup>26</sup>

This viewpoint is problematic because it provides that States are unaware of the growing number of stateless persons internationally. It is further impossible to suggest that States are unmindful of how domestic nationality laws are the biggest cause of statelessness. For example, there are a number of States where there are still gender discriminatory nationality laws even though CEDAW provides that no distinction should be made between genders in the enactment of nationality laws.<sup>27</sup>

Nationality laws in at least 25 countries prevent mothers from passing their nationality to their children and another 50 countries deny females equal rights with males in their ability to acquire, change, retain and confer nationality.<sup>28</sup> When a State disavows equal nationality rights to women and men, it creates a category of second class citizens.<sup>29</sup> Gender discrimination in nationality laws is one of the primary causes of statelessness. Statelessness can occur when children are unable to acquire their parents' nationality, or when a woman

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<sup>25</sup> Gibney MJ (2014) 50 – 51.

<sup>26</sup> Gibney MJ (2014) 53.

<sup>27</sup> Article 9 of CEDAW.

<sup>28</sup> Global Campaign for Equal Nationality Rights 'The Problem' available at <http://equalnationalityrights.org/the-issue/the-problem> (accessed 27 March 2018).

<sup>29</sup> Global Campaign for Equal Nationality Rights 'The Problem' available at <http://equalnationalityrights.org/the-issue/the-problem> (accessed 27 March 2018).

loses her nationality due to her gender and marital status.<sup>30</sup> Ending gender discrimination in nationality laws is critical to eradicating statelessness.<sup>31</sup>

### 3.3 OVERVIEW OF STATELESSNESS CONVENTIONS

In an international State system, statelessness is detrimental because it risks intensifying international strains and disorder.<sup>32</sup> Statelessness also creates problems for individual States, potentially challenging their ability to control and order their subject population.<sup>33</sup> The pitfall of statelessness is that it not only tracks patterns of social and political exclusion, it creates circumstances of vulnerability and precariousness to the individual burdened with that plight.<sup>34</sup>

When the United Nations Charter (UN Charter) was signed on the 26 June 1945, one of the intended purposes of the United Nations (UN) was to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.<sup>35</sup>

Subsequent to the horrendous event that was World War 2 (WW2), the international community was left to deal with an insurmountable number of violations to human rights. Large-scale displacement and denationalisation left hundreds and thousands of people without the protection of any government.<sup>36</sup> It was proposed that those who had no protection

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<sup>30</sup> Global Campaign for Equal Nationality Rights 'The Problem' available at <http://equalnationalityrights.org/the-issue/the-problem> (accessed 27 March 2018).

<sup>31</sup> Action 3 of the United Nations High Commissioner for Refugees *Global Action Plan to End Statelessness 2014-2024* (2014) 2.

<sup>32</sup> Gibney MJ (2014) 49.

<sup>33</sup> Institute on Statelessness and Inclusion *The World's Stateless* (2014) 31.

<sup>34</sup> Gibney MJ (2014) 50.

<sup>35</sup> Buergental T *International Human Rights (West Nutshell Series)* 2<sup>nd</sup> edition (1995) 23.

<sup>36</sup> Van Waas L 'The UN statelessness conventions' in Edwards A and van Waas L (eds) *Nationality and*

of any government could be protected under the auspices of the UN, but this was grimaced upon and received very little support from the rest of the international community.<sup>37</sup>

Although the international community only created an institution to oversee fundamental human rights in 1945, the issue of stateless persons already came about after World War 1 (WW1) in 1918.<sup>38</sup> Statelessness was not deemed to be an issue of importance until the end of WW2. After WW2, that the Commission on Human Rights requested that early consideration be given by the UN to the legal status of persons who do not enjoy the protection of any government, in particular those who are pending the acquisition of a nationality.<sup>39</sup> Then in March 1948 the Economic and Social Council (ESOSOC) requested the Secretary-General of the UN to undertake a study of the existing situation in regard to the protection of stateless persons.<sup>40</sup> Months later, the Universal Declaration of Human Rights (UDHR) proclaimed that everyone has the right to a nationality free from arbitrary deprivation of such a nationality obtained.<sup>41</sup> The expression on affording everyone the right to a nationality by the international community could be seen the start of an analogous interest in preventing new cases of statelessness from arising.<sup>42</sup>

Upon the request made by ESOSOC, the UN determined that it would address the situation based on the following objectives; first, there was a need to protect people who were already stateless and required the immediate attention and assistance.<sup>43</sup> Secondly, the enactment on

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*Statelessness under international law* (2014) 65.

<sup>37</sup> Van Waas L (2014) 66.

<sup>38</sup> Batchelor CA 'Stateless Persons: Some Gaps in International Protection' (1995) 7(1) *International Journal of Refugee Law* 239; at the end of WW1, refugees and stateless persons co-existed until their paths diverged into a hierarchy of refugees identified according to the reasons for their flight, while their statelessness, if it existed, was seen as a symptom of them being refugees.

<sup>39</sup> Batchelor CA (1995) 241.

<sup>40</sup> Van Waas L (2014) 64.

<sup>41</sup> Buergental T *International Human Rights (West Nutshell Series)* 2<sup>nd</sup> edition (1995) 29-30.

<sup>42</sup> Van Waas L (2014) 64.

<sup>43</sup> Van Waas L (2014) 64.

the regulation of statelessness ought to be developed in such a way that there is a clear avoidance of the creation of new cases of statelessness.<sup>44</sup> Based on these objectives, a 1949 Study of Statelessness (the Study) was publicised which concluded that the improvement of the position of stateless persons requires their integration in the framework of international law.<sup>45</sup> The Study further concluded that guaranteeing protection for stateless people necessitates the adoption of a general convention as a lasting international structure, as well as the creation of an independent organ which would to some extent make up for the absence of national protection and render stateless persons certain services which the authorities of a country of origin would render to their national residents abroad.<sup>46</sup>

Based on the objectives decided upon by the UN along with the findings published by the Study on Statelessness, the international community drafted two separate instruments that would help regulate statelessness.<sup>47</sup> First, the Stateless Persons Convention was introduced. This Convention is based on the core principle that stateless persons should not be treated worse than any other foreigner who may possess a nationality.<sup>48</sup> It also aims to ensure the widest possible enjoyment of their rights.<sup>49</sup> Secondly, the Reduction of Statelessness Convention was later introduced. This Convention offers carefully detailed safeguards against statelessness by setting out rules and regulations regulating conferral and withdrawal of nationality.<sup>50</sup>

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<sup>44</sup> Van Waas L (2014) 64.

<sup>45</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations*, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018) at para 43.

<sup>46</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations*, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018) at para 51 and 56.

<sup>47</sup> Van Waas L (2014) 64.

<sup>48</sup> UNHCR *Report on Statelessness in South Eastern Europe* (2011) 10.

<sup>49</sup> UNHCR *Report on Statelessness in South Eastern Europe* (2011) 10.

<sup>50</sup> UNHCR *Report on Statelessness in South Eastern Europe* (2011) 15. .

### 3.3.1 The Stateless Persons Convention<sup>51</sup>

The Stateless Persons Convention sets out the definition of a stateless person and specifies the treatment accorded to stateless persons by Contracting States.<sup>52</sup> The Convention further aims to guarantee the enjoyment by stateless people of a minimum set of rights.<sup>53</sup> One stated aim of the delegates at the 1954 Conference was to obtain the greatest possible number of signatures.<sup>54</sup> When the definition was being deliberated, the choice was made that the *de jure* stateless would be considered but not the *de facto* stateless.

The contention was that a definition which did not overlap with the Refugees Convention was more likely to obtain more signatures.<sup>55</sup> The likelihood was based off the assumption that *de facto* stateless persons were refugees and a State might not wish to accept obligations to both *de jure* and *de facto* stateless persons.<sup>56</sup> This assumption was justified by the findings made by the Study of Statelessness. The Study identified two causes of *de facto* statelessness, both of which were refugee related.<sup>57</sup> The first category of stateless persons was those who took refuge abroad as a result of racial, religious or political persecution; while the second class of stateless persons were those who undertook mass emigration as a result of their country's political or social system.<sup>58</sup> Most *de facto* stateless people would therefore be considered refugees.<sup>59</sup> Refugees could meanwhile also be stateless *de jure* if they have been deprived of

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<sup>51</sup> Convention relating to the Status of Stateless Persons, 1954 (1954) 189 UNTS 150.

<sup>52</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) 15.

<sup>53</sup> Van Waas L (2014) 71.

<sup>54</sup> Batchelor CA (1995) 247-248.

<sup>55</sup> Batchelor CA (1995) 247-248.

<sup>56</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 53.

<sup>57</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) 6.

<sup>58</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <http://www.refworld.org/docid/3ae6b3840.html> (accessed 27 March 2018) at para 8.

<sup>59</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) 15.



their nationality by their origin State.<sup>60</sup> However, the definition of a stateless person in the Stateless Persons Convention refers to one who is unprotected by virtue of her not having a nationality, it is irrelevant how she came to be stateless, once she has no nationality she is entitled to the protection of the Stateless Persons Convention.<sup>61</sup> The Stateless Persons Convention does not require State Parties to grant the stateless person nationality, but calls on States to facilitate naturalisation of stateless persons as soon as is reasonably possible.<sup>62</sup>

### 3.3.2 The Reduction of Statelessness Convention<sup>63</sup>

The Reduction of Statelessness Convention establishes a set of rules according to which a person is entitled to either acquire the nationality of, or not to be deprived of the nationality of a Contracting State, if she would otherwise be stateless.<sup>64</sup> The Reduction of Statelessness Convention was drafted with the objective of filling gaps created by conflicts of law.<sup>65</sup> The Convention however, does not define what a stateless person is. However, Resolution No. 1 of the Final Act of the Conference that drew up the 1961 Convention recommends that persons who are *de facto* stateless, should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.<sup>66</sup>

Apart from this, the Reduction of Statelessness Convention is relatively straightforward. It sets out safeguards for the avoidance of statelessness in three broad contexts.<sup>67</sup> The focus on reduction is evident in the Convention which aims at avoiding statelessness at birth, but do

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<sup>60</sup> Van Waas L (2014) 67.

<sup>61</sup> Van Waas L (2014) 72.

<sup>62</sup> Article 32 of the Stateless Person Convention.

<sup>63</sup> Convention of the Reduction of Statelessness, 1961 (1961) 989 UNTS 175.

<sup>64</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) 23.

<sup>65</sup> Batchelor CA (1995) 257.

<sup>66</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) 23.

<sup>67</sup> Van Waas L (2014) 74.

not prohibit the possibility of revocation of nationality under certain circumstances.<sup>68</sup> It regulates the following; first, acquisition of an original nationality at birth, including foundlings.<sup>69</sup> Secondly, the loss, deprivation or renunciation of nationality in later life.<sup>70</sup> Lastly, it regulates the procedure regulating matters of nationality in instances of succession of States and related matters.<sup>71</sup> The Reduction of Statelessness Convention therefore offers a decisive set of guarantees for the avoidance of statelessness in each of these potential areas of conflict of laws, that can readily transposed into domestic law.<sup>72</sup> It is worthwhile noting that despite the Reduction of Statelessness Convention's cautious and flexible approach, it was slow to attract support following its adoption.<sup>73</sup> Some of the challenges of the Convention could have been the factor hindering the support. Those challenges could be described as *inter alia*, are certain limitations that may allow a person to become or remain stateless even when the safeguards are fully implemented.<sup>74</sup> This

### 3.4 CATEGORIES OF STATELESSNESS

A person who does not have a nationality under the law of any State is referred to as a stateless person.<sup>75</sup> Article 1 of the Stateless Persons Convention defines a stateless person as the one who is not considered as a national by any State under the operation of its law.<sup>76</sup> This definition is attentively succinct and to the point, while simultaneously being very limited and legalistic to the degree that it only refers to a specific group of people known as the *de jure*

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<sup>68</sup> Batchelor CA (1995) 257.

<sup>69</sup> Article 1 to 4 of the Reduction of Statelessness Convention.

<sup>70</sup> Article 5 – 9 of the Reduction of Statelessness Convention.

<sup>71</sup> Article 10 of the Reduction of Statelessness Convention.

<sup>72</sup> Introductory Note to the Reduction of Statelessness Convention.

<sup>73</sup> Van Waas L (2014) 82.

<sup>74</sup> Van Waas L (2014) 84.

<sup>75</sup> Weis P *Nationality and Statelessness in International Law* second edition (1979) 161.

<sup>76</sup> UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <http://www.refworld.org/docid/3ae6b3840.html> (accessed 27 March 2018).

stateless.<sup>77</sup> The definition provided in the Stateless Persons Convention did not encompass the *de facto* stateless until the UN expanded this definition in 1949 to include *de facto* stateless persons as a category of statelessness.<sup>78</sup> Statelessness has been an issue for as long there has been a right to a nationality.<sup>79</sup> As a result of their invisibility, stateless people tend to fall outside a States protection system, leading in some cases to subjection to harmful practices such as exploitation, violence or abuse.<sup>80</sup> There are many reasons for the existence of statelessness. First, a person may become stateless at birth. Secondly, statelessness can occur subsequent to birth when an individual loses her nationality and does not acquire a new one. Lastly, individuals may find themselves stateless as a result of faulty administrative practices. Whatever the cause of becoming stateless may be, the common denominator is that there are detrimental effects to the individual who suffers from statelessness.

### 3.4.1 Statelessness at Birth

Stateless children are born into a world in which they will face a lifetime of discrimination; their status profoundly affects their ability to learn and grow.<sup>81</sup> The effects of being born stateless are severe.<sup>82</sup> In more than 30 countries, children need nationality documentation to receive medical care.<sup>83</sup> In at least 20 countries, stateless children cannot be vaccinated.<sup>84</sup> The effects of stateless children are therefore potentially already fatal from the onset.

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<sup>77</sup> 'What is the Concept of Statelessness International Law Essay' available at <https://www.lawteacher.net/free-law-essays/international-law/what-is-the-concept-of-statelessness-international-law-essay.php#ftn4> (accessed 27 March 2018).

<sup>78</sup> 'What is the Concept of Statelessness International Law Essay' available at <https://www.lawteacher.net/free-law-essays/international-law/what-is-the-concept-of-statelessness-international-law-essay.php#ftn4> (accessed 27 March 2018).

<sup>79</sup> Stein J 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential' (2016) 24 *International Journal of Children's Rights* 600.

<sup>80</sup> Stein J (2016) 600.

<sup>81</sup> United Nations High Commissioner for Refugees '*I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*' 3 November 2015 at i, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018).

<sup>82</sup> United Nations High Commissioner for Refugees '*I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*' 3 November 2015 at i, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018).

<sup>83</sup> United Nations High Commissioner for Refugees '*I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*' 3 November 2015 at i, available at:

The right of every child to a nationality is protected under the International Covenant on Civil and Political Rights (ICCPR)<sup>85</sup> as well as the Convention on the Rights of the Child (CRC).<sup>86</sup> The pitfall of both these Conventions is that it merely provides the child with the right to acquire a nationality. The right to a nationality has stronger implications than the right to acquire a nationality.<sup>87</sup> The right to acquire a nationality does not entail a right to a certain nationality nor does it prescribe which nationality is to be acquired.<sup>88</sup>

In the case of *The Yean Bean and Bosico Children v The Dominican Republic*,<sup>89</sup> it was stated that the authority of States is limited by the obligation to provide individuals with equal and effective protection of the law as well as by the obligation to prevent, avoid and reduce statelessness.<sup>90</sup> It was further provided in the *Nubian Children case*<sup>91</sup> that even though the African Charter does not expressly provide for the right to a nationality, Article 6(3) should be interpreted as strongly suggesting that children should, as much as possible, have a nationality beginning from the moment of birth.<sup>92</sup>

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<http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018).

<sup>84</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015 at 1, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018).

<sup>85</sup> Article 24(3) of ICCPR.

<sup>86</sup> Article 7 of the Convention on the Rights of the Child, 1989 (1989) 660 UNTS 195.

<sup>87</sup> Stein J (2016) 604.

<sup>88</sup> Stein J (2016) 604.

<sup>89</sup> *The Yean Bean and Bosico Children v The Dominican Republic* [8 September 2005] Inter-American Court of Human Rights (ser C) No130.

<sup>90</sup> Stein J (2016) 604.

<sup>91</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011, available at <http://www.refworld.org/cases,ACERWC,4f5f04492.html> (accessed 3 April 2018). (Hereafter the *Nubian Children Case*).

<sup>92</sup> *The Nubian Children case* at para 42.

Statelessness is an impediment to the ability of children to learn, grow, play and lead productive and fulfilling lives.<sup>93</sup> The prevalence of childhood statelessness cannot be attributed to one factor alone, several causes are identifiable, and they often overlap.<sup>94</sup> This section of the chapter will focus on three common instances where stateless children are disadvantaged through the enactment and implementation of domestic nationality laws.

#### 3.4.1.1 Discriminatory laws and practices

The most common cause within the domestic system which contributes to the growth of childhood statelessness is the enactment and implementation of discriminatory laws and practices.<sup>95</sup> In some countries, the laws are not discriminatory, but the practices are. One such example is the Dominican Republic. Despite a clear entitlement to nationality under the law,<sup>96</sup> individuals of Haitian descent have frequently been denied Dominican nationality by the civil registry.<sup>97</sup>

The discrimination in nationality laws are further perpetuated in the 27 countries worldwide which do not allow women to pass their nationality to their children on the same basis as men.<sup>98</sup> Children of stateless men may become stateless in such situations even where the

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<sup>93</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at 4.

<sup>94</sup> Stein J (2016) 601.

<sup>95</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 6.

<sup>96</sup> Article 18 (3) of the Dominican Republic's Constitution of 2015 available at <http://faolex.fao.org/docs/pdf/dom127543E.pdf> (accessed 3 April 2018).

<sup>97</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 6.

<sup>98</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 6.

mother may have a nationality.<sup>99</sup> One of the harmful effects of discriminatory nationality laws is that it could perpetuate discrimination on the basis of one's physical and mental ability. Italian nationality law provides a clear example of this. It provides that a personally prepared application or an individual's declaration of willingness is required to acquire nationality through naturalization.<sup>100</sup> Where a child has been born stateless and inevitably reaches the age of majority, but is differently abled on both a physical and intellectual level, she is unable to not only comprehend the notion of nationality, but she cannot consent to attaining an Italian nationality or prepare a personal application.<sup>101</sup> She has through no fault of her own, an inability to acquire a right that would provide her with access to her human rights.

#### 3.4.1.2 Conflicting nationality laws

A person may further be rendered stateless at birth due to conflicting nationality laws.<sup>102</sup> Safeguards in nationality laws against statelessness at birth prevent statelessness from being passed down from one generation to the next.<sup>103</sup> They also help to deter statelessness where parents have a nationality but are unable to confer it on their child, or where a child has been abandoned and her parents are unknown.<sup>104</sup> More than half the States in the world either lack or have inadequate safeguards in their nationality laws to grant nationality to children born stateless in their territory.<sup>105</sup> Orphaned, adopted and extramarital children are particularly

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<sup>99</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 57.

<sup>100</sup> Article 9(1) of *Act No. 91 of 5 February 1992, Citizenship*, 15 August 1992, available at: <http://www.refworld.org/docid/3ae6b4edc.html> (accessed 3 April 2018).

<sup>101</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 6.

<sup>102</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 57.

<sup>103</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 8.

<sup>104</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 8.

<sup>105</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End

vulnerable to restrictive policies and laws, which may contribute to their statelessness.<sup>106</sup> Another category of children who are inadequately protected are foundlings.<sup>107</sup> Nearly one third of all States lack provisions in their nationality laws which regulate the conferment of nationality to foundlings.<sup>108</sup>

#### 3.4.1.3 Birth registration

The growth of stateless children may perpetuate due to the issues surrounding the lack of birth registration. Although this does not guarantee a nationality, birth registration is often a prerequisite for obtaining a nationality and establishing a link to a country.<sup>109</sup> Lack of birth registration creates a particularly high risk of statelessness for specific groups such as migrants, as well as nomadic and border populations.<sup>110</sup>

The consequence of acquiring childhood statelessness by way of the above-mentioned factors creates a multitude of violations to. Given the foundation that she has been given, her upbringing will be riddled with obstacles. Stateless children live under the radar which means that they are susceptible to the risk of being exposed to illegal practices such as trafficking, sexual exploitation or early marriage.<sup>111</sup> In certain countries where the absence of identification documentation constitutes an offence, a child without it will be arrested and

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Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 8.

<sup>106</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 57. This idea will be unpacked in Chapter 4 where there is a combination of sacred and secular law.

<sup>107</sup> A foundling is defined as a baby or little child who has been found deserted. See Barnhart CL, Barnhart RK and Zeleny RO *The World Book Dictionary Volume one A-K* (1991) at 843.

<sup>108</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 8.

<sup>109</sup> Stein J (2016) 606.

<sup>110</sup> United Nations High Commissioner for Refugees 'I Am Here, I Belong: The Urgent Need to End Childhood Statelessness' 3 November 2015, available at: <http://www.refworld.org/docid/563368b34.html> (accessed 27 March 2018) at page 8.

<sup>111</sup> Stein J (2016) 602.

detained.<sup>112</sup> If she is in conflict with the law, she might be treated as an adult if her legal immaturity cannot be established.<sup>113</sup> Being a stateless child could result in a difficult start to life which stunts the personal and social development of any child.

### 3.4.2 The *de jure* and *de facto* Stateless

The definition of statelessness has been classified as *de jure* because it is a purely legal description.<sup>114</sup> The problem with the *de jure* definition of statelessness is that it excludes those individuals who might technically have a nationality yet are not able to obtain or enjoy the concomitant benefits and protection.<sup>115</sup> Batchelor has argued that:

the definition (clearly stated in the 1954 Convention and presumed in the 1961 Convention on the Reduction of Statelessness) itself precludes full realisation of an effective nationality because it is a technical, legal definition which can address only technical, legal problems.<sup>116</sup>

When one takes into consideration this point of view, the definition of statelessness should be broadened to include *de facto* statelessness.<sup>117</sup> Persons who are *de facto* stateless often have a nationality according to the law, but this nationality is not effective, or the individual cannot prove or verify her nationality.<sup>118</sup> Some of the problems that a stateless individual has to face is the fact that she will always have a lack of residence rights as well as access to travel documentation, but the harshest difficulty she faces is not having access to essential social services.<sup>119</sup> In order to understand the classifications of statelessness, one must familiarise one's self with the manner in which it is possible to acquire the status of statelessness.

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<sup>112</sup> Stein J (2016) 603.

<sup>113</sup> Stein J (2016) 603.

<sup>114</sup> Weissbrodt D and Collins C 'The Human Rights of Stateless Persons' (2006) 28 *Human Rights Quarterly* 251.

<sup>115</sup> Weissbrodt D and Collins C (2006) 251.

<sup>116</sup> Batchelor CA (1995) 232.

<sup>117</sup> Weissbrodt D and Collins C (2006) 251.

<sup>118</sup> Weissbrodt D and Collins C 252.

<sup>119</sup> Executive Committee of the High Commissioner's Programme (43<sup>rd</sup> session) Sub-committee of the Whole



### 3.4.2.1 The scope of *de jure* statelessness

A *de jure* stateless person has no legal nationality.<sup>120</sup> In 1949 *de jure* stateless was defined as being persons who are not nationals of any State, either occurring at birth, or not being afforded any nationality subsequent to birth, or because during their lifetime they lost their own nationality and did not acquire a new one.<sup>121</sup> In some instances, individuals and communities are deprived of their nationality by governmental decree and are subsequently expelled from the country which they consider to be their home.<sup>122</sup>

The identification of *de jure* statelessness presents itself in countries where a person is denied citizenship status in her desired country due to the ineffective co-operation of competent authorities in clarifying matters pertaining to her citizenship.<sup>123</sup> The exact point at which *de jure* statelessness arises will be specific to the context and must be evaluated on the basis of the totality of the circumstance.<sup>124</sup> A situation of *de jure* statelessness involving a large number of people can occur for various reasons. One such reason could be governments' amendments of nationality laws with the intention of denationalising whole sections of society<sup>125</sup> in order to either, marginalise them or to facilitate the exclusion from the State's

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on International Protection (18<sup>th</sup> meeting) 'Stateless Persons: A Discussion Note' (1 April 1992) EC/1992/SCP/CRP.4 at paragraph 1 on page 1.

<sup>120</sup> Van Waas L (2014) 67.

<sup>121</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, A Study of Statelessness, United Nations, August 1949, Lake Success - New York, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018) at 8.

<sup>122</sup> United Nations High Commissioner for Refugees 'Statelessness and Citizenship' in The State of the World's Refugees 1997: A Humanitarian Agenda (1 January 1997) available at <http://www.unhcr.org/publications/sowr/4a4c72719/state-worlds-refugees-1997-humanitarian-agenda.html> (accessed 14 February 2018).

<sup>123</sup> Open Society Foundations *De jure Statelessness in the Real World: Applying the Prato Summary Conclusions* (2011) 6.

<sup>124</sup> Open Society Foundations *De jure Statelessness in the Real World: Applying the Prato Summary Conclusions* (2011) 6.

<sup>125</sup> Chowdury S "'Burmese Bin Laden' creating division in Myanmar' *MIC* 22 April 2013 available at <https://mic.com/articles/37001/burmese-bin-laden-creating-division-in-myanmar#.E5By4Gsiy> (accessed 11 June 2018).

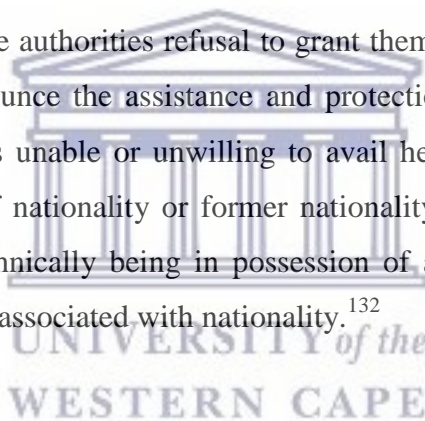
See further Baroud R 'Rohingya Population Control: The Onslaught in Burma Continues' *The Palestinian Chronicle* 6 June 2018 available at <http://www.palestinechronicle.com/rohingya-population-control-the-onslaught-in-burma-continues/> (accessed 11 June 2018).

territory.<sup>126</sup> The distinctive pattern is the intention of a State to expressly exclude a specific group from its nationality pool.

### 3.4.2.2 The scope of *de facto* statelessness

The concept of *de facto* statelessness has not yet been defined in a robust and comprehensive manner.<sup>127</sup> The borderline between what is commonly called *de jure* statelessness and what is called *de facto* statelessness is sometimes difficult to draw, but *de facto* is in common use and has acquired a meaning.<sup>128</sup> One such accepted definition is that the *de facto* stateless are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their origin State.<sup>129</sup>

This could be as a result of the authorities refusal to grant them assistance and protection, or because they themselves renounce the assistance and protection of their origin State.<sup>130</sup> In essence, it is a person who is unable or unwilling to avail herself to the protection of the government of her country of nationality or former nationality.<sup>131</sup> The UNHCR defines *de facto* stateless persons as technically being in possession of a nationality but who do not receive any benefits generally associated with nationality.<sup>132</sup>



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<sup>126</sup> United Nations High Commissioner for Refugees ‘Statelessness and Citizenship’ in *The State of the World’s Refugees 1997: A Humanitarian Agenda* (1 January 1997) available at <http://www.unhcr.org/publications/sowr/4a4c72719/state-worlds-refugees-1997-humanitarian-agenda.html> (accessed 14 February 2018).

<sup>127</sup> The Equal Rights Trust ‘Chapter 2 Critiquing the Categorisation of the Stateless’ (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 53.

<sup>128</sup> Batchelor CA (1995) 252.

<sup>129</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018) at 8.

<sup>130</sup> Batchelor CA (1995) 250.

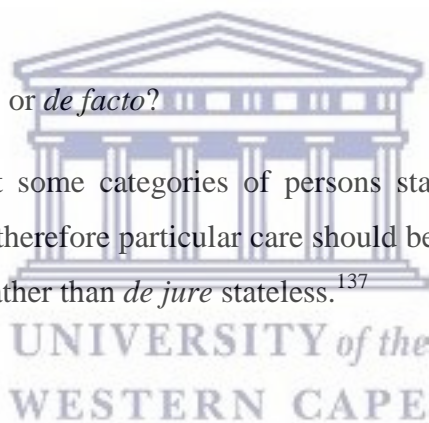
<sup>131</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018) at 8.

<sup>132</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1, available at: <http://www.refworld.org/docid/3ae68c2d0.html> (accessed 13 February 2018) at 8.

A considerable percentage of the world's stateless people are also victims of forced displacement.<sup>133</sup> These categories of people who are stateless are obliged to flee because of the persecution and discrimination which they experience.<sup>134</sup> After having left the country out of fear for their lives, and staying outside their origin State for a long period of time, stateless people often find it impossible to return.<sup>135</sup> Large scale statelessness under this category of statelessness may also arise in the context of mass expulsion and refugee movements, especially when the population concerned has lived in exile for many years without acquiring the citizenship of their asylum country.<sup>136</sup> The common thread of *de facto* statelessness is the governments' inability to protect its people, who are already nationals, from harm causing them to seek assistance outside of their origin State. However, *de jure* and *de facto* can either exist independently or simultaneously.

#### 3.4.2.3 Differentiation: *de jure* or *de facto*?

The UNHCR has agreed that some categories of persons stated as *de facto* stateless are actually *de jure* stateless, and therefore particular care should be taken before concluding that a person is *de facto* stateless rather than *de jure* stateless.<sup>137</sup>



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<sup>133</sup> United Nations High Commissioner for Refugees 'Statelessness and Citizenship' in The State of the World's Refugees 1997: A Humanitarian Agenda (1 January 1997) available at <http://www.unhcr.org/publications/sowr/4a4c72719/state-worlds-refugees-1997-humanitarian-agenda.html> (accessed 14 February 2018).

<sup>134</sup> International Law Commission *Nationality Including Statelessness – Third Report on the Elimination or Reduction of Statelessness* by Mr Roberto Cordova, Special Rapporteur (1954) at 30.

<sup>135</sup> United Nations High Commissioner for Refugees 'Statelessness and Citizenship' in The State of the World's Refugees 1997: A Humanitarian Agenda (1 January 1997) available at <http://www.unhcr.org/publications/sowr/4a4c72719/state-worlds-refugees-1997-humanitarian-agenda.html> (accessed 14 February 2018).

<sup>136</sup> United Nations High Commissioner for Refugees 'Statelessness and Citizenship' in The State of the World's Refugees 1997: A Humanitarian Agenda (1 January 1997) available at <http://www.unhcr.org/publications/sowr/4a4c72719/state-worlds-refugees-1997-humanitarian-agenda.html> (accessed 14 February 2018).

<sup>137</sup> United Nations High Commissioner for Refugees *The Concept of Stateless Persons under International Law: Summary Conclusions* (2010) 5.

It has also been argued that the categorisation of *de jure* and *de facto* stateless is insufficient and unjust on two accounts.<sup>138</sup> First, it establishes a protection hierarchy – some *de jure* stateless persons benefit from the protection of the 1954 Stateless Persons Convention while other *de jure* stateless persons (those who are not legally staying in a country) only partially benefit from the Convention’s protection, and *de facto* stateless persons do not benefit from any protection at all unless they are refugees.<sup>139</sup> The fact that there are gaps in the existing international protection regime that affect *de facto* stateless persons in particular does not go unnoticed,<sup>140</sup> however there has been little progression in enacting specific laws protecting the plight of *de facto* stateless persons.

Secondly, there are persons and communities who are difficult to categorise as either *de jure* or *de facto* stateless due to their particular circumstances or the lack of personal documents.<sup>141</sup> These persons fall into a grey area, and their protection may depend on whether a generous approach is taken, and they are considered *de jure* stateless or not.<sup>142</sup> The UNHCR has reiterated the importance that when the interpretation of stateless is considered under Article 1(1) of the Stateless Persons Convention, it is essential to bear in mind that the Reduction of Statelessness Conventions object and purpose is to secure for stateless people the widest possible enjoyment of their human rights and regulating their status.<sup>143</sup> The position that a variation around the categories of statelessness should be done away with, where a person has no nationality, whether it is by the operation of law or as a result of an origin State being unwilling or unable to help such an individual, the variation is unsubstantiated.

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<sup>138</sup> The Equal Rights Trust ‘Chapter 2 Critiquing the Categorisation of the Stateless’ (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 53.

<sup>139</sup> The Equal Rights Trust ‘Chapter 2 Critiquing the Categorisation of the Stateless’ (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 53.

<sup>140</sup> United Nations High Commissioner for Refugees *The Concept of Stateless Persons under International Law: Summary Conclusions* (2010) 5.

<sup>141</sup> The Equal Rights Trust ‘Chapter 2 Critiquing the Categorisation of the Stateless’ (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 53

<sup>142</sup> The Equal Rights Trust ‘Chapter 2 Critiquing the Categorisation of the Stateless’ (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 53.

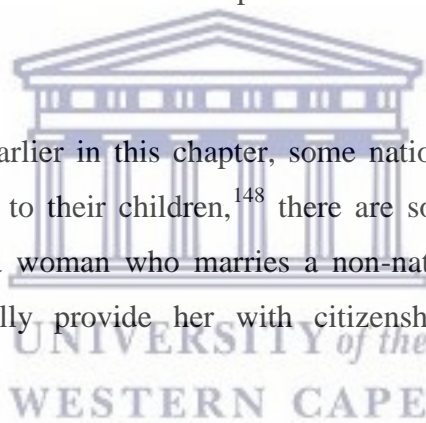
<sup>143</sup> United Nations High Commissioner for Refugees *The Concept of Stateless Persons under International Law: Summary Conclusions* (2010) 5.

#### 3.4.2.4 *De Jure* and *de facto* causes of Statelessness

*De facto* as well as *de jure* statelessness can be the intended result of the policy of discrimination.<sup>144</sup> The ethnic origin or religious persuasion of groups of persons has been the reason for actual, though not specific legislative denial of assistance and protection by States to a certain group of its nationals.<sup>145</sup>

Statelessness is perpetrated nowadays partly as a result of national legal provisions and administrative practice concerning the acquisition, change or loss of nationality which do not respect and ensure the right to a nationality.<sup>146</sup> For example, it is possible that a law of an origin State would require that when an individual intends to change nationalities that she renounces her nationality before acquiring another one.<sup>147</sup> The other frequently cited factors why people are still becoming stateless can be explained as follows.

First, as already mentioned earlier in this chapter, some nationality laws deny women the right to pass their nationality to their children,<sup>148</sup> there are some States that automatically withdraw the nationality of a woman who marries a non-national,<sup>149</sup> if the nation of her spouse does not automatically provide her with citizenship, she would be rendered stateless.<sup>150</sup>



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<sup>144</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) at footnote 11 on page 35.

<sup>145</sup> Division of International Protection *Legal and Protection Policy Research Series: UNHCR and De facto Statelessness* by Hugh Massey (April 2010) at footnote 11 on page 35.

<sup>146</sup> United Nations High Commissioner for Refugees *Regional Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 2.

<sup>147</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 57.

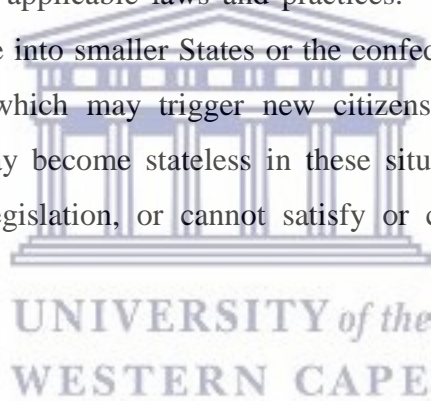
<sup>148</sup> United Nations High Commissioner for Refugees *Regional Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 2.

<sup>149</sup> Article 7 of the Bahraini Citizenship Act, 1963.

<sup>150</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 58. The manner in which this result in statelessness will be unpacked in Chapter 4. For now, it is enough to provide that a form of statelessness can result from unequal nationality laws.

Secondly, lack of safeguards against statelessness at birth<sup>151</sup> and administrative decisions on nationality and citizenship, including punitive withdrawal of nationality is often a silent yet often occurring cause of statelessness.<sup>152</sup> Bureaucracy can result in persons failing to acquire a nationality which they are qualified to obtain.<sup>153</sup> There are lengthy administrative and procedural issues related to the acquisition, restoration and loss of nationality.<sup>154</sup> Even if an individual is eligible for citizenship, excessive administrative fees, deadlines that cannot be met, or an inability to produce required documents on account of being in possession of the origin States nationality, can all prevent the individual from acquiring nationality.<sup>155</sup>

Lastly, changes in the territory or the sovereignty of a State can often result in groups of persons falling in-between the cracks of old and new nationality laws.<sup>156</sup> Such groups of persons will become stateless in the event that they are denied nationality because of a reinterpretation of previously applicable laws and practices.<sup>157</sup> Independence after colonial rule, the dissolution of a State into smaller States or the confederation of several States into one can create a situation which may trigger new citizenship laws and administrative procedures.<sup>158</sup> Individuals may become stateless in these situations if they fail to acquire nationality under the new legislation, or cannot satisfy or complete new administrative procedures.<sup>159</sup>



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<sup>152</sup> United Nations High Commissioner for Refugees *Regional Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 2.

<sup>153</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 58.

<sup>154</sup> Inter-Parliamentary Union *Nationality and Statelessness: A Handbook for Parliamentarians* (2005) 32.

<sup>155</sup> Inter-Parliamentary Union *Nationality and Statelessness: A Handbook for Parliamentarians* (2005) 32.

<sup>156</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 58.

<sup>157</sup> Inter-Parliamentary Union *Nationality and Statelessness: A Handbook for Parliamentarians* (2005) 34.

<sup>158</sup> The Equal Rights Trust 'Chapter 2 Critiquing the Categorisation of the Stateless' (July 2010) available at <http://www.equalrightstrust.org/ertdocumentbank/chapter%202.pdf> (accessed 3 April 2018) at 58.

<sup>159</sup> Inter-Parliamentary Union *Nationality and Statelessness: A Handbook for Parliamentarians* (2005) 34.

Whether statelessness is as a result of *de jure* or *de facto*, not having a nationality or not enjoying the protection of a State places one in a position of inferiority that is irreconcilable with the respect of human rights.<sup>160</sup> As it will be discussed in the next part of this chapter, international attempts to offer protection to the stateless. However, one should bear in mind that the political conditions which are presently the main causes of statelessness, will not disappear until more stable conditions are restored throughout the world.<sup>161</sup>

### 3.5 CONCLUDING REMARKS

This chapter has analysed the relationship between international law and the individual who is stateless. It was considered in the following discourse. First, the definition of a stateless person was considered, as well as what the implications are once you are a stateless individual. Secondly, the concepts of loss versus deprivation were considered. It was concluded that a loss of nationality amounts to voluntarily electing to be stateless. Deprivation of nationality on the other hand, can be divided into legitimate or arbitrary deprivation, which, depending on the form, can amount to involuntary statelessness. Thirdly, the categories of statelessness was analysed and was essentially grouped into the following; statelessness at birth, *de jure* stateless and *de facto* stateless. The causes resulting in statelessness under each group was critically unpacked.

Lastly, a brief overview of the Convention regulating statelessness and the development of the Conventions was considered. The conclusion of the last section offers insight on the relevance of statelessness. The Stateless Persons Convention and the Reduction of Statelessness Convention are the only modern-day global treaties designed specifically to address aspects of the problem of statelessness.<sup>162</sup> However, the Conventions fail to address the issue of gender and equality in nationality rights. That is the actual cause of statelessness which will be considered.

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<sup>160</sup> Citizenship Rights in Africa Initiative ‘Loss and Deprivation of Nationality’ available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>161</sup> Citizenship Rights in Africa Initiative ‘Loss and Deprivation of Nationality’ available at <http://citizenshiprightsafrika.org/theme/loss-and-deprivation-of-nationality/#> (accessed 26 March 2018).

<sup>162</sup> Manly M ‘UNHCR’s mandate and activities to address statelessness’ in in Edwards A and Van Waas L *Nationality and Statelessness under international law* (2014) 93.

## CHAPTER 4

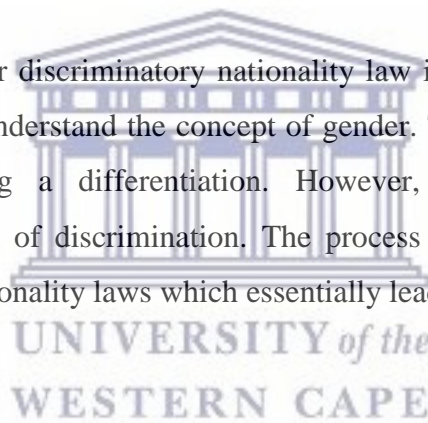
### INTERNATIONAL LAW AND WOMEN: HUMAN RIGHTS VIOLATIONS ASSOCIATED WITH STATELESSNESS

*It is painful to see [her] growing full of dreams and developing every day into a [cleverer] person, knowing deep down inside she has an uncertain future.<sup>1</sup>*

#### 4.1 INTRODUCTION

Gender discriminatory nationality laws are of the dominant causes of statelessness.<sup>2</sup> This chapter will introduce the intricacies of gender and how its conceptual foresight is often skewed. The chapter will critically analyse the following issues.

One of the issues with gender discriminatory nationality law is that those who are drafting and implementing it, fail to understand the concept of gender. The term gender can often be misconstrued as only being a differentiation. However, sometimes a *prima facie* differentiation can be a form of discrimination. The process leading up to discrimination presumably creates unfair nationality laws which essentially lead to statelessness.



Based on this presumption, a group of States in the Middle East Northern African Regions (the MENA States) will be investigated. In the MENA region, there are six States known as the Gulf Cooperation Council (GCC or the Gulf). These six States and the manner in which they enact and enforce gender discriminatory nationality laws and practices will be the focus of this chapter. There are several contributing factors to statelessness in the Gulf. First, the way in which gender is understood in the Gulf is dominated by patriarchy. Secondly, nationality is granted through the patrilineal descent, meaning that only the father, in most instances, can confer nationality to the child. Thirdly, gender discrimination is further evident

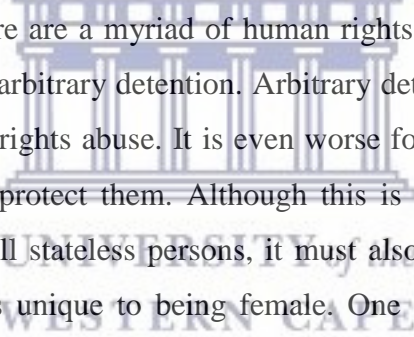
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<sup>1</sup> Lawyers for Human Rights *Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide* (2014) 5; [t]his quote was taken from a mother who cannot pass on her nationality to her daughter as a result of stringent Cuban nationality law.

<sup>2</sup> Global Campaign for Equal Nationality Rights 'Gender Discrimination in Nationality Laws and the Convention on the Elimination of All Forms of Discrimination Against Women' available at <http://equalnationalityrights.org/images/zdocs/Gender-Discrimination-in-Nationality-Laws-and-CEDAW-Guide--2.pdf> (accessed 28 June 2018).



in the registration of the child's nationality. Even though the child is not only attached to the mother, it is a common occurrence that the mother is the first identifiable parent. However, sometimes this is not enough to register or confer nationality to the child in the Gulf. Fourthly, there are restrictions to marriages for a female. She often has to reconcile herself with the idea that she will lose her nationality if she marries a foreigner. This restriction does not apply to men and there are harsher penalties against women who marry foreign nationals, one of the worst is that the State strips her of her nationality. Lastly, another cause of statelessness in the Gulf is the criminalisation of adultery. Mothers of children born out of wedlock are the first 'perpetrators' identified for the crime of adultery. Children born of independent mothers under these circumstances are often born while the mother is incarcerated. What this means is the child cannot be registered timeously with a nationality for one of two reasons; the mother is sometimes prohibited by law or the time limits does not permit her to register the child's nationality.



Once a person is stateless, there are a myriad of human rights abuses that they are exposed to. One of these violations is arbitrary detention. Arbitrary detention in all its forms against all people is a harmful human rights abuse. It is even worse for stateless people who has no claim to any State willing to protect them. Although this is an example of a violation to nationality status that affects all stateless persons, it must also be understood that there are exclusive human rights abuses unique to being female. One such example is that when a female reaches the status of legal non-existence, her vulnerability to extensive human rights violations is exacerbated. Her exposure to sexual exploitation is intensified and she becomes the ideal candidate for harmful violations such as human trafficking and forced marriages.

Ultimately, the excessive amount of violations that occur as a result of gender discriminatory nationality laws which causes generational statelessness has gone unnoticed. This culture of impunity is possible because States cannot or does not want to protect stateless females within their territory. This chapter recommends and concludes providing that as a viable sanction in response to the elite violations suffered by females, Article 9 of CEDAW is utilised as a source of accountability.

## 4.2 GENDER: DIFFERENTIATION OR DISCRIMINATION

The law has typically operated under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous categories of persons.<sup>3</sup> To categorise sex as certainly being male or female creates problems on a wider scale, it creates a presupposition that gender is not fluid. Rather than assuming sex to be a natural and pre-discursive substrate, Butler questions the understanding of a ‘natural’ sexual binary and suggests that sex and gender are not so easily differentiated, as they are both subject to cultural interpretations.<sup>4</sup> MacKinnon explains sex from the perspective of the difference approach providing that “sex is a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness”.<sup>5</sup> The expression provided is that regardless of the sex, all humans are the same. However, global cultural models are constructed and propagated through cultural and associated processes.<sup>6</sup> It is therefore relevant to recognise that gender is interpreted through cultural norms and practices.

Inevitably, the manner in which legal institutions define the terms ‘sex’, ‘male’, and ‘female’ will inevitably have a significant impact on a variety of areas within the legal fraternity.<sup>7</sup> The legal understanding of sex and gender is determined differently in different societies. As a regulatory factor in a patriarchal nation, gender is predominantly relevant in organising members of society.<sup>8</sup> The distinctions between the different terms are evident in a diverse number of federal and State statutes and regulations.<sup>9</sup> While sex is a more biological term, gender is generally used to refer to the cultural or social qualities that are regarded as

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<sup>3</sup> Greenberg JA ‘Defining Male and Female: Intersexuality and the Collision between law and biology’ (1999) 41 *Arizona Law Review* 267.

<sup>4</sup> Carrera MV, DePalma R and Lameiras M ‘Sex/gender identity: Moving beyond fixed and ‘natural’ categories’ (2012) 15(8) *Sexualities* 998.

<sup>5</sup> MacKinnon CA ‘Difference and Dominance: On Sex Discrimination [1984]’ in Bartlett K (1<sup>st</sup> Ed) *Feminist Legal Theory Readings in Law and Gender* (1991) 33.

<sup>6</sup> Meyer JM, Boli J, Thomas G.M and Ramirez FO ‘World Society and the Nation-State’ (1997) 103 (1) *American Journal of Sociology* 144-145.

<sup>7</sup> Greenberg JA (1999) 269.

<sup>8</sup> Carrera MV, DePalma R and Lameiras M (2012) 999.

<sup>9</sup> Greenberg JA (1999) 270.

characteristics of a particular sex.<sup>10</sup> It is therefore important for States to enact effective legislation that recognises that it must understand sex and gender in a holistic manner.<sup>11</sup> This requires that States acknowledge that sex is biological while gender is socially constructed.<sup>12</sup> Chinnian argues that:

[s]ex is conceived of as a fixed and natural determination. This understanding means that the attributes assigned to sex and sex roles, are immutable and the meanings of maleness and femaleness are accepted as pre-determined. Gender is interpreted to be based on sex, and this enables a hierarchy of not only sex, but gender roles and the power afforded to each. This narrow assumption of sex ignores the range of sexes between sexed male and sexed female. Then, the socially constructed concept of gender is superimposed on sex, and creates identities to give meaning to sex.<sup>13</sup>

Chinnian's argument supports the idea that gender is a predetermined notion that has been endorsed by societal norms and patriarchal ideals. The incorrect understanding of gender is a major contributing factor to the discrimination that is evident in a range of laws and State practices, including nationality laws.

The plurality of norms and values that exist in different cultures and societies are also reflected within the human rights system itself.<sup>14</sup> Gender, as used in this sense, is therefore socially constructed.<sup>15</sup> Gender can be viewed as a mechanism that considers women as being socially differentiated and significantly subordinate to men.<sup>16</sup> It is therefore important to analyse, identify problems and argue for change that departs

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<sup>10</sup> Greenberg JA (1999) 274.

<sup>11</sup> Carrera MV, DePalma R and Lameiras M (2012) 1003.

<sup>12</sup> Chinnian KA Gender Persecution as a Ground for Asylum in South Africa and Canada: Reconceptualising a Theoretical Framework for assessing refugee claims by women (unpublished LLD these, University of the Western Cape, 2014) 54.

<sup>13</sup> Chinnian KA Gender Persecution as a Ground for Asylum in South Africa and Canada: Reconceptualising a Theoretical Framework for assessing refugee claims by women (unpublished LLD these, University of the Western Cape, 2014) 54.

<sup>14</sup> Hellum A and Stewart J.E *Women's Human Rights and Legal Pluralism in Africa* 2<sup>nd</sup> Ed (1999) 31.

<sup>15</sup> Greenberg JA (1999) 274.

<sup>16</sup> Van der Poll L 'Pornography as sex discrimination? A critical reflection on the Constitutional Court's interpretation of gender politics, differentiation and (unfair) discrimination (2010) 21(3) *Stellenbosch Law Review* 390.

from the social construction of gender that imbeds itself in laws and policies.

To differentiate regarding gender is not necessarily to discriminate.<sup>17</sup> Not all forms of differentiation are constitutionally problematic, as subtle forms of differentiation between people or groups of people imbue human relations in a modern society which does not amount to discrimination.<sup>18</sup> It is necessary to distinguish between permitted differentiation and impermissible differentiation which could amount to discrimination.<sup>19</sup> Discrimination is defined widely as:

any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing.<sup>20</sup>

Discrimination may thus be described as a distinction based on grounds relating to personal characteristics.<sup>21</sup> While an example of mere differentiation may, for example, be distinguishing between prisoners or classifying different classes of taxpayers.<sup>22</sup> The unfair distinction based on personal characteristics has the effect of imposing burdens, obligations, or disadvantages on a specific group of people that is not necessarily imposed on the other members of that population.<sup>23</sup> The division may further withhold or limit access to opportunities, benefits, and advantages that might be available to members outside that specific group.<sup>24</sup> When a specific group is excluded from the general populace, it creates a category of 'the others'. The others are then discriminated on through the disproportionate impact of laws, actions, policies or other measures that, even though their wording is or

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<sup>17</sup> Huscroft G 'Discrimination, Dignity, and the Limits of Equality' (2000) 9 *Otago Law Review* 700.

<sup>18</sup> De Vos P and Freedman W *South African Constitutional Law in Context* (2014) 425.

<sup>19</sup> Huscroft G (2000) 700.

<sup>20</sup> Fisher BL 'Gender Discrimination and Statelessness in the Gulf Cooperation Council States' (2016) 23 *Michigan Journal of Gender and Law* 274.

<sup>21</sup> Huscroft G (2000) 703.

<sup>22</sup> De Vos P and Freedman W (2014) 431.

<sup>23</sup> Huscroft G (2000) 703.

<sup>24</sup> Huscroft G (2000) 703.

appears to be neutral, or has a general and homogeneous scope, have negative effects on a certain vulnerable groups.<sup>25</sup> States are therefore urged to abstain from establishing discriminatory laws and regulations that may impose a sense of otherness towards a specific category of persons.<sup>26</sup> Moreover, discrimination in an unequal society must be abolished, as MacKinnon correctly argues that:

[t]he more unequal a society gets, the fewer such [disadvantaged minorities] are permitted to exist. Therefore, the more unequal society gets, the less likely the difference doctrine (for example, anti-discrimination legislation) is likely able to do anything about it.<sup>27</sup>

The principle of non-discrimination is enshrined throughout all human rights instruments and recognised as the most fundamental principle of human rights law.<sup>28</sup> In the case of *Expelled Dominicans and Haitians v Dominican Republic*,<sup>29</sup> the court noted, that both direct and indirect practices of discrimination are condemned under international human rights law.<sup>30</sup> This principle of non-discrimination applies to each vital right contained within international treaties, including the right to nationality.<sup>31</sup> However, discrimination against women in nationality law persists in almost all regions of the world, and remains a significant cause of statelessness among men, women and children.<sup>32</sup> International law states that women should

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<sup>25</sup> *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Preliminary objections, merits, reparations and costs) [2014] Inter-American Court of Human Rights 86 263.

<sup>26</sup> *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Preliminary objections, merits, reparations and costs) [2014] Inter-American Court of Human Rights 86-87 264.

<sup>27</sup> Van der Poll L 'Conceptualising the sexually explicit as free expression: The distinct legal and political challenges presented to a liberal feminist critique in a South African constitutional context' (2012) 37(1) *Journal for Juridical Science* 38.

<sup>28</sup> Askin KD 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Barkeley Journal of International Law* 293. See further Article 18(3) of the African Charter.

<sup>29</sup> *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Preliminary objections, merits, reparations and costs) [2014] Inter-American Court of Human Rights.

<sup>30</sup> Baluarte DC 'The Risk of Statelessness: Reasserting a Rule for the Protection of the Right to Nationality' (2017) 19 *Yale Human Rights and Development Law Journal* 74.

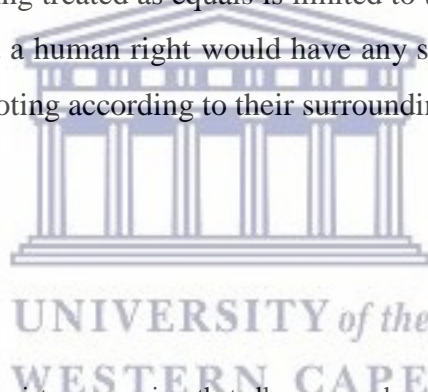
<sup>31</sup> Fisher BL (2016) 274.

<sup>32</sup> UN Human Rights Council, *The right to a nationality: women's equal nationality rights in law and in practice* : resolution / adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/7, available at: <http://www.refworld.org/docid/57e910044.html> (accessed 22 May 2018).

receive equal treatment to men, suggesting that States should follow the model of formal equality.<sup>33</sup> Yet, it is important to understand that sometimes it is necessary to apply substantive equality<sup>34</sup> in favour of a disadvantaged group in order to attain a true reflection of equality to level the plain field. Mahoney suggests that:

[i]n order for women to engage the law's transformative potential, there must be a legal framework with enough flexibility to permit the development of a theory of equality that will advance women's interests, identify and recognise violations of their rights, and lead to effective remedies.<sup>35</sup>

Echoing this sentiment, the UDHR provides the right to nationality to all regardless of inter alia, their sex, religion or social origin.<sup>36</sup> Article 15 of UDHR has been interpreted to include all people, male and female, and is applied as a basic human right.<sup>37</sup> The problem with this conception is that when women are paralleled to men, even in the conferral of the protection of a right, their prospect of being treated as equals is limited to the extent of their likeliness to men.<sup>38</sup> It is inconceivable that a human right would have any significance if it is not applied to all humans<sup>39</sup> on an equal footing according to their surrounding circumstances.



<sup>33</sup> Formal equality or equality as consistency requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as religion, race or gender. See Smith A 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611-612.

<sup>34</sup> Substantive equality ensures that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating peoples' differences. Substantive equality is concerned with eliminating barriers which exclude certain groups from participation ... the substantive equality approach incorporates indirect discrimination in its analysis. See Smith A 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 612-613.

<sup>35</sup> Mahoney KE 'Canadian Approaches to Equality Rights and Gender Equity in the Court' in Cook R.J *Human Rights of Women National and international Perspectives* (1994) 441.

<sup>36</sup> Fisher BL (2016) 273.

<sup>37</sup> Batchelor CA 'Preparation of a Nationality Law: Promoting the Legal Identity of Women in the Field of Nationality' (2004) 22 *Law Context: A Socio-Legal Journal* 16.

<sup>38</sup> Van der Poll L (2012) 39.

<sup>39</sup> Batchelor CA (2004) 16.

### 4.3 STATELESSNESS: UNFAIR DISCRIMINATION ON THE BASIS OF GENDER

Statelessness has serious consequences for people in almost every country in all regions of the world.<sup>40</sup> Stateless persons are often denied enjoyment of a range of rights such as identity documents, employment, education and health services.<sup>41</sup> Events in recent years have revealed large numbers of people who have no nationality anywhere in the world and who suffer myriad violations of their human rights as a result of this acute vulnerability.<sup>42</sup>

Statelessness may occur for a variety of reasons, including inter alia, discrimination against a particular ethnic or religious group, or on the basis of gender, or as a result of the conflict of nationality of laws.<sup>43</sup> Statelessness co-exists with “discrimination, violence and rejection”.<sup>44</sup> While there is no reliable data concerning the exact figure of stateless persons globally, the UNHCR estimates that there are currently millions of people without any nationality.<sup>45</sup> Essentially, the contribution to the growth of statelessness is evident in the gender discriminatory laws and practices administered by States. Most regions in the world have laws or practices which contribute to the growth of statelessness.

While it is not disputed that males may face gender bias laws, women suffer perpetual gender discriminatory nationality laws in most areas of the world.<sup>46</sup> While there has been a progression of international standards on women’s nationality that reflects changes in family relations norms that had previously prevented women from enjoying equal rights to

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<sup>40</sup> United Nations High Commissioner for Refugees *Global Action Plan to End Statelessness* (2010) 6.

<sup>41</sup> United Nations High Commissioner for Refugees *Global Action Plan to End Statelessness* (2010) 6.

<sup>42</sup> Baluarte DC (2017) 48.

<sup>43</sup> United Nation High Commissioner For Refugees “*This is our Home*” *Stateless Minorities and their Search for Citizenship* (2017) 6.

<sup>44</sup> Gibney M.J ‘Foreword’ in Bloom T, Tonkiss K and Cole P (eds) *Understanding Statelessness* 1<sup>st</sup> ed (2017) at xx.

<sup>45</sup> United Nation High Commissioner For Refugees “*This is our Home*” *Stateless Minorities and their Search for Citizenship* (2017) 6.

<sup>46</sup> UN Human Rights Council, *The right to a nationality: women's equal nationality rights in law and in practice: resolution / adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/7*, available at: <http://www.refworld.org/docid/57e910044.html> (accessed 22 May 2018).

citizenship, it has only been until recently that some focus has been placed on the issue of the links between unequal nationality laws and statelessness.<sup>47</sup>

Notwithstanding the many international and regional human rights protections against discrimination, including in respect of nationality laws, up to as many as sixty countries still maintain gender-discriminatory provisions in their nationality laws.<sup>48</sup> However, even where a law appears to be gender-neutral on paper, it is often in practice where the authorities are bias against females who are trying to acquire a nationality.<sup>49</sup> It is this very sentiment that propelled the Human Rights Council to call upon all States to:

identify and remove physical, administrative, procedural and any other barriers, especially those targeting women, that impede access to registration of vital life events including birth, marriage and death registration, ... , paying due attention to, among other *barriers relating to poverty, age, disability, gender, nationality, displacement, illiteracy and detention contexts, and to persons in vulnerable groups* and to remove barriers to birth registration based on discrimination against unwed mothers.<sup>50</sup>

Despite these attempts at drawing attention to the problems that are causing statelessness, the number of stateless persons continues to grow. There can be no reliable estimate,<sup>51</sup> which causes an unreliable picture of the actual statistics on stateless persons. What has been gathered provides the following information. European States accommodate large numbers of stateless persons.<sup>52</sup> If the estimates are dependable, they suggest that Asia and the Middle East have the highest number of stateless persons, while the America's have the least

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<sup>47</sup> Govil R and Edwards A 'Women, nationality and statelessness: The problem of unequal rights' in Edwards A and van Waas L *Nationality and Statelessness under international law* (2014) 171.

<sup>48</sup> Govil R and Edwards A (2014) 171.

<sup>49</sup> Fisher BL 'The Operation of Law in Statelessness Determinations under the 1954 Statelessness Convention' (2015) 33 *Wisconsin International Law Journal* at 284-285.

<sup>50</sup> UN Human Rights Council, *The right to a nationality: women's equal nationality rights in law and in practice: resolution / adopted by the Human Rights Council*, 18 July 2016, A/HRC/RES/32/7, available at: <http://www.refworld.org/docid/57e910044.html> (accessed 22 May 2018).

<sup>51</sup> United Nation High Commissioner for Refugees "This is our Home" *Stateless Minorities and their Search for Citizenship* (2017) 6.

<sup>52</sup> Lee TL 'Denationalization and Statelessness in the Modern World' (2006) 19 *ISIL Year Book of International Humanitarian and Refugee Law Articles* 19.



amount.<sup>53</sup> However, it is fundamentally impossible to acquire a complete demography on the number of stateless persons around the world, but it is only possible to identify regions where there are nationality laws contributing to the growth of statelessness. The focus is therefore on regions where there are gender based discriminatory laws affecting the physical, and to an extent, the psychological growth of women, and where such laws continue to contribute to the growth of statelessness.

#### 4.3.1 Middle East and North African Regions (MENA region)<sup>54</sup>

All the States in the MENA region have ratified the CRC and the majority has also ratified the ICCPR.<sup>55</sup> Most countries in the MENA region convey nationality by default through the father.<sup>56</sup> This idea of patrilineal passing of nationality has its roots imbedded in anachronistic ideals that a woman is a derivative from her father, her husband or another key male figure with whom she bears a relationship.<sup>57</sup> Based on these ideals, there are varied ways in which a woman can become stateless.<sup>58</sup>

In order to fully understand this reference will be made to the Gulf States in matters concerning statelessness and the effect of gender discriminatory nationality laws. The

<sup>53</sup> Lee TL (2006) 19. See Fullerton M 'Comparative Perspectives on Statelessness and Persecution' (2015) 63 *Kansas Law Review* at 869-870; Palestinians are the largest stateless population in the world. Recent surveys count more than 11 million Palestinians, with 2.7 million in the West Bank and East Jerusalem, 1.7 million in Gaza, 1.4 million inside [the occupied settlements of] Israel, 2 million in Jordan, 525,000 in Syria, 450,000 in Lebanon, almost 200, 000 in Saudi Arabia, and smaller groups in other countries all over the world. Not all Palestinians are stateless, but many – perhaps half – are. Of those Palestinians who are stateless, the 1954 Statelessness Convention excludes from its protections those who receive assistance and protection from the United Nations Relief Works Administration.

<sup>54</sup> See Palo S 'Still Citizens after Marriage: Exploring violations of women's nationality rights' (2009) 30 *Women's Rights Law Reporter* 684; statistics indicate that women in the MENA suffer from discriminatory nationality laws more than any other group-particularly in countries that have parallel legal systems based on the teachings of Islam, called Sharia law.

<sup>55</sup> Fisher BL 'Why non-marital children in the MENA region face a risk of statelessness' (2015) *Harvard Human Rights Journal Online* 2.

<sup>56</sup> Fisher BL (2015) 4.

<sup>57</sup> Batchelor CA (2004) 12.

<sup>58</sup> Stratton LS 'The Right to Have Rights: Gender Discrimination in Nationality Laws' (1992) 77 *Minnesota Law Review* 204; A woman may face further discriminatory deprivation of her nationality either upon marriage to a foreigner, or if there is a change in her husband's nationality.

reasoning behind this is that these countries have combined secular and sacred law<sup>59</sup> in such a way that perpetuates gender discrimination. The Gulf is saturated by a patriarchal tenor along with orthodox religious, social and cultural norms that underline the rights and privileges of men vis-à-vis women, ultimately restraining women's rights.<sup>60</sup>

The GCC are six States<sup>61</sup> which fall within the MENA region. The GCC is no stranger to hosting populations of stateless persons, although the data on the exact numbers are a bit elusive.<sup>62</sup> While some of the stateless persons are in the GCC as a result of descendants who might have also been stateless,<sup>63</sup> there are many new generational stateless persons who acquired the title of statelessness as a result of gender discriminatory nationality laws and practices.<sup>64</sup> The latter has been caused by the State in its commission of the following; first, laws which provide that a child can only acquire nationality through the father. Secondly, gender discrimination in civil registration laws.<sup>65</sup> Thirdly, some States have burdensome restrictions on marriages that largely affect women. And lastly, the GCC States are the only States in the world where there are laws which criminalise the act of adultery. The

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<sup>59</sup> For example, Kuwait justifies its policy of rejecting racism and racial discrimination as being in conformity with verse 13 of the Holy Qur'an entitled Al-Hujarat [The Apartments] ("O mankind! We created you from a single pair of a male and a female and made you into nations and tribes so that you may know each other. Verily, the most righteous among you shall be the most honoured in the sight of God, who is Omniscient and All-Cognizant"), especially as the Islamic Sharia is the primary source of the principles and provisions of the Kuwaiti Constitution, as stipulated in article 2 thereof. See Committee on the Elimination of Racial Discrimination *Consideration of reports submitted by States parties under article 9 of the Convention Kuwait CERD C/KWT/21-24* (2016) 2.

<sup>60</sup> Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs Women's Rights and Gender Equality *The Situation of Women in the Gulf States* (2014) 17.

<sup>61</sup> The six States are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates.

<sup>62</sup> Fisher BL (2016) 275. The UNHCR estimates that Kuwait hosts 93,000 stateless persons, Saudi Arabia 70,000, Qatar 1,200, but it does not provide estimates on the number of stateless persons in Bahrain, Oman, or in the United Arab Emirates.

<sup>63</sup> Dickinson E 'Kuwait's bidoon may still be in limbo' *The National* 1 April 2013 available at <https://www.thenational.ae/world/mena/kuwait-s-bidoon-may-still-be-in-limbo-1.293327> (accessed 19 June 2018).

<sup>64</sup> Palo S (2009) 684.

<sup>65</sup> Institute on Statelessness and Inclusion *Fisher LB Statelessness in the GCC: Gender Discrimination beyond Nationality Law* (Statelessness Working Paper Series No. 2015/01) 2 available at [https://www.institutesi.org/WP2015\\_01.pdf](https://www.institutesi.org/WP2015_01.pdf) (accessed 30 May 2018).

aforementioned will be analysed effectively in order to determine how it is the primary reasons for the existence of statelessness.

#### 4.3.1.1 Nationality through patrilineal descent

Each GCC State's nationality law has a *jus sanguinis* system<sup>66</sup> that transmits nationality to children at birth by default through the child's father.<sup>67</sup> Gender-discriminatory nationality laws which do not allow women an equal right to transfer nationality to their children is a major gap in nationality laws which cause statelessness.<sup>68</sup> On the face of it, the nationality laws of some of the GCC States do not distinguish between boy-children and girl-children, but the plain text of its law discriminates between fathers and mothers.<sup>69</sup> Bahrain is one such State, and justifies its actions by claiming that the conferral of nationality through the father is upheld because it maintains a feeling of national belonging, and a spiritual bond linking a person to the nation to which her forefathers belonged.<sup>70</sup> The justification on the descent of nationality disregards the respect for her autonomy.

In Kuwait, the authorities claim that they comply with international standards in affording every child a nationality.<sup>71</sup> Their justification is that their nationality law provides that every child of a Kuwaiti father will be a Kuwaiti citizen regardless of whether they are born in Kuwait or abroad.<sup>72</sup> This law discriminates against Kuwaiti mothers, and without any

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<sup>66</sup> Fullerton M 'Comparative Perspectives on Statelessness and Persecution' (2015) 63 *Kansas Law Review* 874.

<sup>67</sup> Fisher BL (2016) 277.

<sup>68</sup> Institute on Statelessness and Inclusion *Fisher L.B Statelessness in the GCC: Gender Discrimination beyond Nationality Law* (Statelessness Working Paper Series No. 2015/01) 2 available at [https://www.institutesi.org/WP2015\\_01.pdf](https://www.institutesi.org/WP2015_01.pdf) (accessed 30 May 2018).

<sup>69</sup> Fisher BL (2016) 277.

<sup>70</sup> Committee on the Elimination of Discrimination against Women *Consideration of the reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women Bahrain* CEDAW/C/BHR/3 (2011) 36.

<sup>71</sup> Fisher BL (2016) 279-280.

<sup>72</sup> Article 2 of Kuwait's nationality law provides that [a]ny person born in, or outside, Kuwait whose father is a Kuwaiti national shall be a Kuwaiti national himself. See Nationality Law, 1959, available at: <http://www.refworld.org/docid/3ae6b4ef1c.html> (accessed 30 May 2018).

safeguards, leaves a significant risk for children of Kuwaiti mothers to be stateless.<sup>73</sup> The abovementioned law is interpreted incorrectly. It ignores the ability of women to pass on her nationality to her child, the interpretation focuses on the gender of the child on whom the nationality is being conferred on, and not on the gender of who is conferring the nationality. The authorities should therefore reconcile the reality that implementation of an incorrectly interpreted law has dire consequences for all the parties involved.<sup>74</sup>

Oman on the other hand, reaches the conclusion that their nationality law has no discrimination between men and women because every person, whether they are male or female, born in Oman or outside the country to an Omani father is Omani.<sup>75</sup> Oman is therefore under the impression that, despite its obvious discrimination against mothers, if the nationality law provides nationality to any child regardless of gender, its nationality laws are gender neutral. Another instance where the law of a GCC State attempts justifying its seemingly gender neutral and compliant nationality laws is Qatar.

Qatar women have a limited ability to pass their nationality to their non-Qatari husbands and children.<sup>76</sup> Qatar's nationality laws does however provide for the naturalisation of children born from a Qatari woman and a non-Qatari man.<sup>77</sup> Naturalisation is available to only fifty applicants in one calendar year.<sup>78</sup> While this may appear to be an identical naturalization procedure available for both men and women, it could still be discriminatory towards women.<sup>79</sup> The reality is that non-citizen husbands of Qatari women and their children are

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<sup>73</sup> Fisher BL (2016) 279-280.

<sup>74</sup> Fisher BL (2015) 284.

<sup>75</sup> Fisher BL (2016) 280.

<sup>76</sup> 'Fact Sheet: Nationality Law' (2010) 129-130 *Al-Raida Journal: Citizenship and Gender in the Arab World* 70.

<sup>77</sup> Fisher BL (2016) 281.

<sup>78</sup> Article 17 of the Law No. 38 of 2005 on the acquisition of Qatari nationality available at <http://www.almeezan.qa/LawView.aspx?opt&LawID=2591&language=en> (accessed 20 June 2018).

<sup>79</sup> Knop K and Chinkin C 'Remembering Chrystal Macmillan: Women's Equality and Nationality in International Law' (2001) 22 *Michigan Journal of International Law* 549.

greatly disadvantaged in their ability to automatically obtain Qatari nationality, particularly when it is compared to non-citizen wives of Qatari men and their children.<sup>80</sup> The Qatar nationality is obviously disadvantageous in the sense that it does not take into consideration the practicality of the implementation of the law, and any possible lack of resources and means available to women in the area.<sup>81</sup>

It is clear from the above analysis that it is not only the nationality laws which create gaps, but also the implementation of certain rules that are impractical. Apart from this, no GCC country has a residual clause indicating that children of its nationals who would otherwise be stateless will not receive nationality, nor are there any provisions protecting children born in their territory that would otherwise be stateless.<sup>82</sup> This means that a female of such a child is helpless in conferring nationality thus causing a new generation of stateless individuals.<sup>83</sup>

#### 4.3.1.2 Gender Discrimination in Civil Registration Laws

Family and personal status laws, such as civil registration laws and marriage, are governed by the Islamic Sharia.<sup>84</sup> Sharia is the religious law controlling women's mobility and personal rights, it essentially:

validates a broadly accepted definition of women's status as not entitled to equal basic rights and having less than full participation in all social and political spheres.<sup>85</sup>

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<sup>80</sup> 'Fact Sheet: Nationality Law' (2010) 129-130 *Al-Raida Journal: Citizenship and Gender in the Arab World* 70.

<sup>81</sup> Knop K and Chinkin C (2001) 22.

<sup>82</sup> See Fisher BL (2016) 282-283; instead of implementing long term solutions, the UAE announced that it intended to grant over 2,000 children nationality based on their mother's Emirati nationality. This is not reflective of a policy change, but rather a quick fix to a long-term problem.

<sup>83</sup> Fisher BL (2015) 4.

<sup>84</sup> In its Islamic context, Sharia may be defined as the totality of Allah's (God) commands and exhortations, intended to regulate all aspects of human conduct and guide believers on the path of eternal salvation. Muslims generally believe that Allah at various times in human history chose to send his messengers, the prophets, to reveal the Sharia to the peoples of this world and that the Prophet Mohammed (peace be upon him) is the last messenger through whom Allah revealed the most perfect and complete version of Sharia. The original sources of Sharia are the Qur'an and the Hadith (practices of the last Prophet (peace be upon him)). See Library of Congress 'What is Sharia Law?' available at <https://www.loc.gov/law/help/sharia-law.php> (accessed 20 June 2018).

Gender discrimination in civil registration law transpires when mothers have less of an opportunity than fathers to register the birth of their children.<sup>86</sup> This restraint bars a woman's ability to register her child's birth on an equal footing with men, thus limiting her child from attaining a nationality and essentially being at risk of becoming stateless.<sup>87</sup>

Every GCC State's civil status provides a list of individuals responsible for documenting the child's birth, with legal responsibility falling to each individual in the order they are listed.<sup>88</sup> Each State in the GCC prioritises male relatives over female relatives.<sup>89</sup> This is clear in the following synopsis; under Kuwait civil registration law, there is no way for a woman to register the birth of her child.<sup>90</sup> In Oman's Civil Status Law, the responsibility for registration falls first on the father and then on a variety of other male individuals in a specified order.<sup>91</sup> The reasoning behind this is that nationality is derived from the father, and women who are married to non-nationals may not transmit nationality to their children.<sup>92</sup> The mother is therefore the last on the list of eligible persons who may register her child's birth, which must be done within two weeks of birth.<sup>93</sup> Not only is it an unequal law, it also fails to take into

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<sup>85</sup> Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs Women's Rights and Gender Equality *The Situation of Women in the Gulf States* (2014) 17.

<sup>86</sup> Institute on Statelessness and Inclusion *Fisher L.B Statelessness in the GCC: Gender Discrimination beyond Nationality Law* (Statelessness Working Paper Series No. 2015/01) 3 available at [https://www.institutesi.org/WP2015\\_01.pdf](https://www.institutesi.org/WP2015_01.pdf) (accessed 30 May 2018).

<sup>87</sup> Fisher BL (2016) 284-285.

<sup>88</sup> Institute on Statelessness and Inclusion *Fisher LB Statelessness in the GCC: Gender Discrimination beyond Nationality Law* (Statelessness Working Paper Series No. 2015/01) 3 available at [https://www.institutesi.org/WP2015\\_01.pdf](https://www.institutesi.org/WP2015_01.pdf) (accessed 30 May 2018).

<sup>89</sup> United Kingdom: Home Office 'Country Information and Guidance - Kuwait: Bidoon' July 2016, Version 2.0, available at <http://www.refworld.org/docid/5853da784.html> (accessed 20 June 2018).

<sup>90</sup> Institute on Statelessness and Inclusion *Fisher L.B Statelessness in the GCC: Gender Discrimination beyond Nationality Law* (Statelessness Working Paper Series No. 2015/01) 3 available at [https://www.institutesi.org/WP2015\\_01.pdf](https://www.institutesi.org/WP2015_01.pdf) (accessed 30 May 2018).

<sup>91</sup> Fisher BL (2016) 286.

<sup>92</sup> United States Department of State Bureau of Democracy, Human Rights and Labour 'Country Reports on Human Rights Practices fir 2011' available at <https://www.state.gov/documents/organization/186654.pdf> (accessed 20 June 2018).

<sup>93</sup> Fisher BL (2016) 286.

consideration that if a woman is the only one who can register her child's birth, she is still recovering from giving birth in the time limit specified.

In Qatar, Saudi Arabia and the United Arab Emirates, marriage certificates are required in order to register the child.<sup>94</sup> In Saudi Arabia, civil registration law gives health institutions primary responsibility for reporting births.<sup>95</sup> The law does explicitly mention that mothers can only register the births of her child if health facilities, delivering doctors and midwives, and fathers are each unavailable.<sup>96</sup> Essentially, a female is disregarded almost entirely as a person of importance in the registration of her own child. Her deprivation insults and violates international norms forbidding gender discrimination.<sup>97</sup> Apart from not being able to register her child, a pregnant woman's liberty is at stake where there is no marriage certificate available.

In Kuwait, if a pregnant woman comes to the hospital without a marriage certificate, she is placed in a separate ward until the certificate is presented.<sup>98</sup> One of two things can happen; first, if she is an unmarried Kuwaiti national, the police will arrest the father, if the DNA test provides that he is indeed the father, he will be forced to marry her.<sup>99</sup> Secondly, if the DNA test provides that he is not the father, then she will go to jail until the court decides what will

<sup>94</sup> Dhal S 'Registration woes for babies conceived before marriage in UAE' Gulf News 5 December 2013 available at <https://gulfnews.com/news/uae/general/registration-woes-for-babies-conceived-before-marriage-in-uae-1.1263585> (accessed 21 June 2018); according to UAE law, if a child is delivered less than 180 days from the date of the marriage certificate, the child will not be given a birth certificate, and the matter is referred to court.

<sup>95</sup> Fisher BL (2016) 286.

<sup>96</sup> Department of Economic and Social Affairs Statistics Division, Demographic and Social Statistics Branch 'Status of Civil Registration and Vital Statistics: ESCWA Region' Executive Summary: Saudi Arabia (2009) available at [https://unstats.un.org/unsd/demographicsocial/crvs/documents/Technical\\_report\\_ESCWA\\_Final.pdf](https://unstats.un.org/unsd/demographicsocial/crvs/documents/Technical_report_ESCWA_Final.pdf) (accessed 20 June 2018); Citizenship derives from the father, and only the father can register a birth.

<sup>97</sup> Fisher BL (2016) 289.

<sup>98</sup> Intergra Global *The IntergraGlobal Health Guide to Kuwait* (2014) 12; If a woman wants to receive health care services in the gynaecology and obstetrics clinic she must provide a marriage certificate, being pregnant and unmarried is a serious offence and could result in imprisonment. In addition, the original civil IDs of both parents have to be shown.

<sup>99</sup> Fattahova N 'Innocence lost' Kuwait Times 20 March 2014 available at <http://news.kuwaittimes.net/innocence-lost/> (accessed 20 June 2018).

happen to her.<sup>100</sup> In the first instance, her autonomy is violated and she has no voice in the matter, she is simply subjected to marriage. In the latter instance, she is deprived of her liberty because she cannot furnish evidence of who the father is.<sup>101</sup> This could be as a result of her being raped and not knowing who the rapist is. However, instead of protecting her, the State punishes her. In both instances, she is not only deprived of her liberty, but she is also deprived of her right to choose.

#### 4.3.1.3 Restriction on Marriages

The GCC States further violate international principles of non-discrimination by placing limitations on marriages between their citizens and foreigners. In addition to this restriction, the law itself is gender discriminatory because the limitation is applied more strictly to one gender than it is to others.<sup>102</sup> While a woman may be able to maintain her original nationality when marrying someone of a different nationality, her legal identity will remain subsidiary to his.<sup>103</sup> By putting restrictions on marriages, a woman is indirectly encouraged to marry within her nationality in order not to risk changing or losing her nationality.<sup>104</sup> One such example is that the United Arab Emirates makes it peremptory on an Emirati woman to seek governmental approval prior to marrying a foreign man.<sup>105</sup> If she does not, she may be denationalised, and if her husband's country does not afford her nationality, she is at risk of

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<sup>100</sup> Fisher BL (2016) 293.

<sup>101</sup> Fisher BL (2015) 4; there are no provisions which include situations in which a woman knows who the father is, but it is not married to the father. Thus, if a child results from adultery or even non-consensual sexual contact, the child would not take the mother's nationality because the father is not known.

<sup>102</sup> Fisher B.L 'Gender Discrimination and Statelessness in the Gulf Cooperation Council States' (2016) 23 *Michigan Journal of Gender and Law* 296. See Palo S 'Still Citizens after Marriage: Exploring violations of women's nationality rights' (2009) 30 *Women's Rights Law Reporter* 684; [w]omen in the MENA States [which include the GCC States] face severe consequences for marrying non-nationals which is only magnified by the fact that most women are unaware of these discriminatory consequences until they or their children find themselves without country or with differing nationalities upon divorce, the death of their husbands, or when the family tries to travel over State lines.

<sup>103</sup> Batchelor CA (2004) 13.

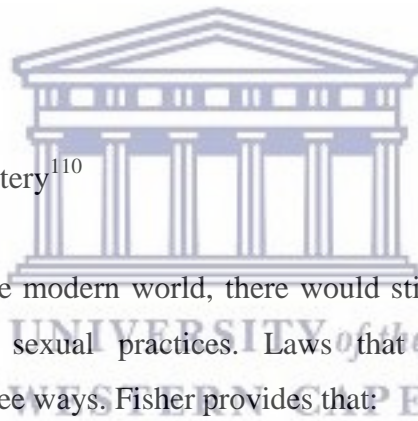
<sup>104</sup> Sharom A, Purnama H.R, Mullen M, Asuchion M and Hayes M *An Introduction to Human Rights in Southeast Asia* vol 1 (2016) 157; [f]or example, some countries, [such as in the GCC States] force wives to renounce their citizenship upon marriage to a foreigner, but such women cannot retrieve this nationality if the marriage fails.

<sup>105</sup> Fisher BL (2016) 299-300.



becoming stateless.<sup>106</sup> Emirati men are, on the other hand, free to marry foreign woman and not suffer the same misfortune as Emirati woman.<sup>107</sup>

This blatant disregard of equality in nationality laws relating to marriages creates an imbalance of equality that should be afforded to women while simultaneously creating potential cases of statelessness. Restrictions on marriages and conferral of nationality to a female's spouse play a significant role in limiting the possibilities for women freely to choose their spouse, their place of residence, their work, and their options for passing their legal identity on to their children.<sup>108</sup> Apart from the fact that a woman suffers as a result of nationality laws internally when she is married to a foreign national, it is not easy for her if she leaves her foreign husband or if he passes and she returns to her State. Some women have been ostracised and abused when they return to their country only because they married a foreign national.<sup>109</sup>



#### 4.3.1.4 Criminalisation of adultery<sup>110</sup>

It is unconventional that in the modern world, there would still be provisions which punish humans for unconventional sexual practices. Laws that criminalise adultery violate international law in at least three ways. Fisher provides that:

[f]irst, adultery prohibitions violate an individual's right to privacy and family life. Secondly, when drafted or implemented in ways that discriminate women, which is usually the case, adultery prohibitions violate the international norm of non-discrimination on the basis of gender. Thirdly, if a parent must choose between abandoning the child and facing criminal penalties, the parent is forced to choose

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<sup>106</sup> Equality Now *The State We're in: Ending Sexism in Nationality Laws* (2016) 101.

<sup>107</sup> Fisher BL (2016) 299-300.

<sup>108</sup> Batchelor CA (2004) 13.

<sup>109</sup> Taylor S *Nationality, Refugee Status and State Protection: Explorations of the Gap between Man and Citizen* (2005) 27.

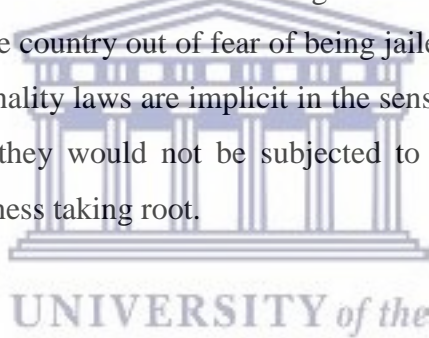
<sup>110</sup> Fisher BL (2015) 5; in many countries in the [GCC] region, sexual relations outside of marriage are punishable by fine, imprisonment, or corporal punishment.

between [either the] fundamental human rights of the child's nationality, [or] family unity.<sup>111</sup>

Adultery laws disproportionately burden women, who are more easily determined to be parents and whose sexuality is more often the subject of scrutiny and societal control.<sup>112</sup> The punishments imposed in States where adultery is a crime amounts to lashing, imprisonment or death by stoning.<sup>113</sup> The United Nations Working Group on Women in Law and Practice has stated that:

[t]he mere fact of maintaining adultery as a criminal offence, even when it applies to both women and men, means in practice that women mainly will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality.<sup>114</sup>

The violation of a female is so extensive in this regard that she often chooses to either abandon her child<sup>115</sup> or flee the country out of fear of being jailed or even worse, being given a death sentence.<sup>116</sup> The nationality laws are implicit in the sense that if females could confer nationality to their children, they would not be subjected to such hostile laws and could prevent new cases of statelessness taking root.



Apart from laws criminalising adultery, governmental institutions lay out campaigns in order to sabotage its own nationals. In 2010, the United Arab Emirates launched a door-to-door

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<sup>111</sup> Fisher BL (2016) 300-301.

<sup>112</sup> Kozma L 'The silence of the pregnant bride: Non-marital sex in Middle Eastern Societies' in Singer A, Neumann C and Somel S.A *Untold Histories of the Middle East: Recovering Voices from the 19<sup>th</sup> and 20<sup>th</sup> Centuries* (2010) 70,73.

<sup>113</sup> Fisher BL (2016) 301-302.

<sup>114</sup> United Nations High Commissioner for Human Rights, Joint Statement by the United Nations Working Group on Discrimination Against Women in Law and in Practice (Oct. 18, 2012), available at <http://newsarchive.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E> (accessed 30 May 2018).

<sup>115</sup> Fisher BL (2016) 303.

<sup>116</sup> Fisher BL (2016) 307; this is the position in Saudi Arabia; sexual contact outside of marriage can carry a death sentence. This applies not only to women who has Saudi nationality, but also to foreign migrants who may have children out of wedlock.

campaign intending to locate and persecute unmarried couples living together.<sup>117</sup> Then again in 2012, it made an announcement that the country would provide amnesty to any residents who had overstayed their visa's and promised that individuals with expired visas could simply come forward and be sent home.<sup>118</sup> However, when non-Emirati mothers came forward with their children, they were imprisoned for adultery.<sup>119</sup> When women give birth in prison, their babies are at risk of statelessness as a result of inequality in nationality laws, or as a result of not being able to register the child's birth timeously.<sup>120</sup>

In the GCC region, it is not only the State's archaic and gender discriminatory laws which cause statelessness. It is the intersection of discrimination in nationality laws, criminalisation of adultery, and stigmatisation of births outside of marriage, which creates a breeding ground for a new generation of stateless individuals.<sup>121</sup> Once States enact faulty nationality laws which contribute to statelessness, there are specific human rights abuses which harm her holistically. In being stateless, she is essentially a human with no right to have rights and is actively violated in many ways by the State and the community.

#### 4.3.2 Stateless Females: The Exclusive Human Rights Abuses

Discrimination against women and girls in nationality laws which has caused statelessness, has far-reaching consequences. It includes, but in no way is limited to, arbitrary arrest and detention, early and forced marriages, diminished access to education and health care,

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<sup>117</sup> Setrakian L 'UAE Morality Cops Hunt for Cohabiting Couples' *Abc News* 22 April 2010 available at <https://abcnews.go.com/International/police-arrest-unmarried-couples-united-arab-emirates/story?id=10448135> (accessed 21 June 2018).

<sup>118</sup> Issa W 'Children jailed with the mothers in UAE visa amnesty' *The National* 31 March 2013 available at <https://www.thenational.ae/uae/children-jailed-with-their-mothers-in-uae-visa-amnesty-1.327881> (accessed 20 June 2018); [a]ll the women are between 20 and 30 and their children range in age from 3 to 7. "These mothers delivered their children at home and the children lack any legal documents," said Mr Brismo. "They came forward during the amnesty and adultery cases were registered against them."

<sup>119</sup> Fisher BL (2016) 308.

<sup>120</sup> Townhead L 'Preventing childhood statelessness of children of prisoners' available at <http://children.worldstateless.org/3/safeguarding-against-childhood-statelessness/preventing-childhoodstatelessness-of-children-of-prisoners.htm> (accessed 20 June 2018).

<sup>121</sup> Fisher BL (2015) 4.

economic hardship and human trafficking.<sup>122</sup> Each of these abuses affect the growth of women both physically and psychologically. The disregard for her humanity further harmfully affects the growth of her surrounding community. The abuses are therefore exclusive to her integrity, but also inclusive of the overall growth of humanity.

#### 4.3.2.1 Arbitrary Arrest and Detention

Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals would normally possess.<sup>123</sup> It is therefore not a paranormal occurrence if a stateless person is undocumented. However, this logic is not that obvious to State officials. Stateless persons habitually get caught up in immigration detention facilities because of her inability to produce documentation she does not have.<sup>124</sup> In certain jurisdictions, there are limitations placed on how long non-nationals may be detained while awaiting deportation.<sup>125</sup> Upon being released, a stateless person is given notice to leave the country within a specified time period, because a stateless person has nowhere to go and no country to that accepts them, they are often arrested again.<sup>126</sup> The incidence of lengthy, repeated and hopeless periods of detention<sup>127</sup> cannot be considered as justifiable once it has been established that a person is stateless and cannot be removed from the territory.<sup>128</sup> If her

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<sup>122</sup> UN Human Rights Council, *The right to a nationality: women's equal nationality rights in law and in practice: resolution / adopted by the Human Rights Council*, 18 July 2016, A/HRC/RES/32/7, available at: <http://www.refworld.org/docid/57e910044.html> (accessed 22 May 2018).

<sup>123</sup> Lawyers for Human Rights *Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide* (2014) 136.

<sup>124</sup> The Equal Rights Trust Project "Stateless Persons in Detention" *Research Working Paper: The Protection of Stateless Persons in Detention* (2009) 8; [s]tateless migrants appear more vulnerable to a range of forms of detention and restriction of liberty in the country of transit or destination. In particular, they face increased risk of administrative detention for purposes of status determination or pending deportation as well as criminal detention in relation to breach of immigration regulations.

<sup>125</sup> Under the Immigration Act of South Africa, section 34 (1) provides that an immigration officer may arrest an illegal foreigner and detain her while she awaits deportation. The section further provides under (d) that such an individual cannot be detained for a period longer than 120 days before she has to be released.

<sup>126</sup> United Nations High Commissioner for Refugees *Mapping Statelessness in the Netherlands* (2011) 35.

<sup>127</sup> National Human Rights Commission of Thailand and UNHCR *Discussion Paper Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia* (2010) 29.

<sup>128</sup> Lawyers for Human Rights (2014) 138.

detention continues, it is an arbitrary arrest that has no basis.<sup>129</sup> The UN Secretary-General has noted:

[S]tateless persons are also uniquely vulnerable to prolonged detention and States should be sensitized to respect the rights of stateless persons to be free from arbitrary detention as a result of their stateless status<sup>130</sup>

The practice of being detained for months, in a regime sometimes no different from criminal prisons, leads to excessive human rights violations. This vicious cycle has tremendously detrimental effects on the mental state of stateless persons.<sup>131</sup> Apart from this, females suffer uniquely as they require more immediate access to health and sanitary which is often overlooked by the authorities who detained these individuals. And because detention of stateless people are overlooked and forgotten, there is no time limit on how long she silently suffers.<sup>132</sup>

#### 4.3.2.2 Sexual Exploitation, Human Trafficking, and Forced Marriages

By far, the most gruesome violation of any human is to be exploited in such a way that disregards your humanity. Sexual exploitation is omnipresent in situations where vulnerable women are being subjugated. It is the one thing the patriarchal dominated world has used as a means of dehumanising females in all aspects of life.

In Myanmar, there are at least one million stateless people, many of them Rohingya Muslims who live on the border of Myanmar and Bangladesh, and who have been denied nationality by each State.<sup>133</sup> Fleeing from communal violence, boatloads of Rohingya have been turned

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<sup>129</sup> Lawyers for Human Rights (2014) 138.

<sup>130</sup> UN Secretary-General, 99 Guidance Note of the Secretary-General: The United Nations and Statelessness, June 2011, available at: <http://www.unhcr.org/refworld/docid/4e11d5092.html> (accessed 30 May 2018) p. 6.

<sup>131</sup> United Nations High Commissioner for Refugees *Mapping Statelessness in the Netherlands* (2011) 35.

<sup>132</sup> European Network on Statelessness *Protecting Stateless Persons Arbitrary Detention* (2017) 10.

<sup>133</sup> Pitman T 'Myanmar conflict spurs hatred for Asia's outcasts' The San Diego Union-Tribune 14 June 2012 available at <http://www.sandiegouniontribune.com/sdut-myanmar-conflict-spurs-hatred-for-asias-outcasts-2012jun14-story.html> (accessed 21 June 2018).

back by coast guard units in Bangladesh and elsewhere.<sup>134</sup> One of the reasons why they are turned back is as a result of a Burmese policy restricting women between the ages of 16 and 25 from crossing into Thailand without a legal guardian.<sup>135</sup> This is not only discriminatory, but it also intensifies the number of victims who cannot flee from gender-related persecution such as rape or sexual slavery at the hands of Burmese military.<sup>136</sup> In 2017, as the violent tyranny in Myanmar sent Rohingya's bolting into Bangladesh, women were subjected to what UN officials described as a 'frenzy of sexual violence'.<sup>137</sup> During the relentless onslaught of the Rohingya Muslims, their homes were looted, villages were razed and civilians by the dozens were killed.<sup>138</sup> The scene was described as a 'textbook example of ethnic cleansing', and, unfortunately the priority target was women.<sup>139</sup> Sexual violence in conflict, such as using rape as a weapon of war, is the most underreported human rights violations.<sup>140</sup>

In her report to the Security Council, Ms Patten explained what her communication was like with victims who suffered at the hands of the authorities in Myanmar:

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<sup>134</sup> Fullerton M 'Comparative Perspectives on Statelessness and Persecution' (2015) 63 *Kansas Law Review* 871.

<sup>135</sup> Lee TL 'Gender Aspects of Statelessness and Irregular Migrant Workers from Burma in Thailand' (2003) 22 *ISIL Year Book of International Humanitarian and Refugee Law Articles* 42.

<sup>136</sup> The Shan Human Rights Foundation and The Shan Women's Action Network 'License to Rape: The Burmese military regime's use of sexual violence in the on-going war in Shan State' (May 2002) available at [http://www.shanland.org/shrf/License to Rape/Rape%20Site.jpg \(2 of 2\) \[8/9/2002 4:37:12 PM\]](http://www.shanland.org/shrf/License_to_Rape/Rape%20Site.jpg) (accessed 21 June 2018); [there is a reported estimate of about] 173 incidents of rape and other forms of sexual violence, involving 625 girls and women, committed by Burmese army troops in Shan State, mostly between 1996 and 2001. It should be noted that due to the stigma attached to rape, many women do not report incidents of sexual violence. Information on human rights abuses in Shan State is gained from refugees arriving at the Thai-Burma border. Therefore the figures are likely to be far lower than the reality.

<sup>137</sup> Arnold R 'For Rohingya refugees, imminent surge in births is traumatic legacy of sexual violence – special report' *UN News Global Perspective Human Stories* 11 May 2018 available at <https://news.un.org/en/story/2018/05/1009372> (accessed 30 May 2018).

<sup>138</sup> Human Rights Watch "All you can do is Pray" *Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* (2013) 4.

<sup>139</sup> AFP 'Situation in Myanmar 'textbook example of ethnic cleansing': UN' *The Express Tribune* 11 September 2017 available at <https://tribune.com.pk/story/1503524/situation-myanmar-textbook-example-ethnic-cleansing-un/> (accessed 21 June 2018).

<sup>140</sup> Arnold R 'For Rohingya refugees, imminent surge in births is traumatic legacy of sexual violence – special report' *UN News Global Perspective Human Stories* 11 May 2018 available at <https://news.un.org/en/story/2018/05/1009372> (accessed 30 May 2018).

I met a number of profoundly traumatised women who related how their daughters were allegedly raped inside their home and left to perish when their houses were torched. Some witnesses reported [women] being tied to either a rock or a tree before multiple soldiers literally raped them to death. Many reported having witnessed family members, friends and neighbours being slaughtered in front of them. The two words that echoed across every account I heard were 'slaughter' and 'rape'.<sup>141</sup>

In his latest report, the Secretary-General recounted the atrocities carried out by the Myanmar Armed Forces. They used rape, gang rape, forced public nudity and other sexual attacks as part of a strategy to drive the Rohingya Muslims from their homes.<sup>142</sup> Those who have been fortunate enough to escape the intense violations of the Myanmar Armed Forces to refugee camps, now face the plight of becoming victims of human trafficking.<sup>143</sup>

Human trafficking can arise in one of three instances where nationality matters are concerned; first, there is no nationality and she is stateless. Secondly, a woman may have her documents taken from her either before or after she is trafficked.<sup>144</sup> Or lastly, as pointed out above, she may be placed in a refugee camp, and because she might not have any documents, her absence will not be considered a legal loss. The abuses suffered by woman in the crime of human trafficking can undoubtedly be retraced back to the several gender discriminatory laws that so many States all around the world implement.

When she is trafficked and held against her own will in an entirely different State but manages to escape from her captors, it is not always likely that she will get the help she so desperately needs. Should she manage to make contact with local authorities, she would be

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<sup>141</sup> Arnold R 'For Rohingya refugees, imminent surge in births is traumatic legacy of sexual violence – special report' *UN News Global Perspective Human Stories* 11 May 2018 available at <https://news.un.org/en/story/2018/05/1009372> (accessed 30 May 2018).

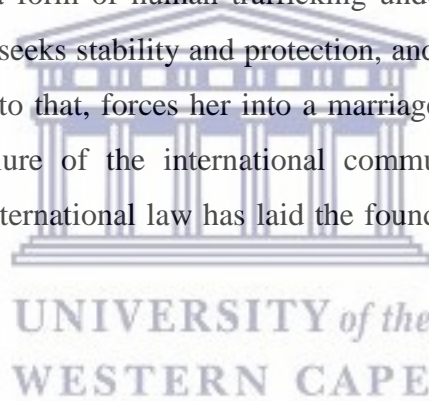
<sup>142</sup> UN Security Council 'Report of the Secretary-General on Conflict-related sexual violence 23 March 2018 (S/2018/250) [EN/AR] available at <https://reliefweb.int/report/world/report-secretary-general-conflict-related-sexual-violence-s2018250-enar> (accessed 30 May 2018).

<sup>143</sup> Arnold R 'For Rohingya refugees, imminent surge in births is traumatic legacy of sexual violence – special report' *UN News Global Perspective Human Stories* 11 May 2018 available at <https://news.un.org/en/story/2018/05/1009372> (accessed 30 May 2018).

<sup>144</sup> Batchelor CA (2004) 31.

requested to furnish proof of her legal identity.<sup>145</sup> Whether she is stateless or possesses a nationality, in both instances, she cannot produce documentation.<sup>146</sup> She is therefore protected in no way and will simply just be sent away back into a system where she will fall prey to sexual predators. It is an almost exclusive violation of a female's right to be human when she is not only being raped to death, or sold off to be raped, but when her own family has to sell her off to be another man's possession.

It was earlier reported that the Burmese military junta is infamous for their deliberate and systematic use of rape and sexual violence against ethnic and minority women as a tactic of retaining control.<sup>147</sup> Sexual violence is used by the Burmese government as a weapon of war. In order to save what little they have left, parents are often forced to sell off their female children in exchange for the hope that they will not fall victim to potential sexual violence.<sup>148</sup> This must be interpreted as a form of human trafficking under international and domestic laws. The paradox is that she seeks stability and protection, and the people who are meant to provide her with reassurance to that, forces her into a marriage which could have the worst outcome. Ultimately the failure of the international community in furnishing adequate protection to women under international law has laid the foundation for forced marriages to prosper.<sup>149</sup>



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<sup>145</sup> Batchelor CA (2004) 31.

<sup>146</sup> Knop K and Chinkin C (2001) 538; even where an individual has a nationality, she is not always able to document it. For example, Polish women who have been a part of the recent wave of women trafficked from central and Eastern Europe into Western Europe to work in the sex trade. For these women, nationality is not a means to diplomatic protection because often their passports have been taken away by a pimp or a brothel owner, and they cannot prove their nationality.

<sup>147</sup> Hoben B 'Burma refuses to relinquish rape as a weapon of war' *WMC Women Under Siege* 2 October 2013 available at <http://www.womensmediacenter.com/women-under-siege/burma-refuses-to-relinquish-rape-as-weapon-of-war> (accessed 21 June 2018).

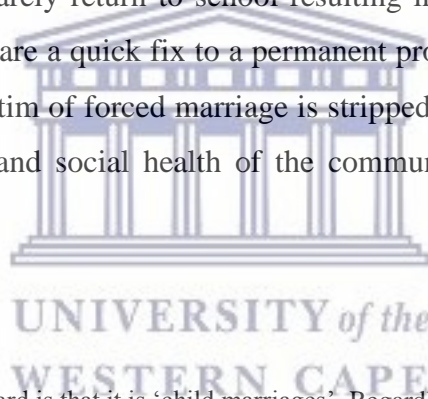
<sup>148</sup> Menz S 'Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community' (2016) 104 *California Law Review* 499; Khatu's (a young Rohingya female) parents were afraid that they could no longer protect her, an unmarried single woman, from potential sexual violence. Instead of risking such violence, her parents informed her that they had already paid a band of human smugglers to take her to Malaysia, where they believed she would be safe.

<sup>149</sup> Menz S (2016) 501.



Forced<sup>150</sup> marriages are a global epidemic.<sup>151</sup> The United Nations Population Fund has provided that if the situation is not brought under control, an estimated amount of 142 million females will be married before reaching the age of eighteen between the years of 2011-2020 – this is more than fourteen million females per year.<sup>152</sup>

Early, forced marriages have dire consequences for females and the families they raise. The victims are often underdeveloped and undernourished, and early childbirth renders them susceptible to reproductive and maternal health issues.<sup>153</sup> One in nine females – five million each year – is married before the age of fifteen, and females who give birth before their fifteenth birthday are five times more likely to die in childbirth than women in their twenties.<sup>154</sup> Females this young are also at a greater risk of contracting HIV/AIDS from older husbands and they may experience higher levels of domestic violence.<sup>155</sup> In addition to this, victims of forced marriages rarely return to school resulting in a higher risk of them being illiterate.<sup>156</sup> Forced marriages are a quick fix to a permanent problem for both the female and the community at large. A victim of forced marriage is stripped of fundamental human rights which cripple the economic and social health of the communities in which she may find



<sup>150</sup> The accepted international standard is that it is ‘child marriages’. Regardless of whether it is a girl or a woman, she is a female whose autonomy has been violated. And at the end of the day, a marriage where there is no free and mutual consent, irrespective of it being a girl or a woman, is a forced marriage.

<sup>151</sup> Thompson Reuters Foundations ‘Child Marriage Facts and Figures’ 31 March 2011 available at <http://news.trust.org/item/20110331000700-nh2a1/> (accessed 30 May 2018).

<sup>152</sup> Office of the Secretary-General’s Envoy on Youth ‘Child Marriages: 39,000 Every Day than 140 million girls will marry between 2011 and 2020’ (7 March 2013) available at <https://www.un.org/youthenvoy/2013/09/child-marriages-39000-every-day-more-than-140-million-girls-will-marry-between-2011-and-2020/> (accessed 21 June 2018).

<sup>153</sup> Thompson Reuters Foundations ‘Child Marriage Facts and Figures’ 31 March 2011 available at <http://news.trust.org/item/20110331000700-nh2a1/> (accessed 30 May 2018).

<sup>154</sup> Menz S (2016) 104.

<sup>155</sup> Menz S (2016) 514.

<sup>156</sup> Office of the Secretary-General’s Envoy on Youth ‘Child Marriages: 39,000 Every Day than 140 million girls will marry between 2011 and 2020’ (7 March 2013) available at <https://www.un.org/youthenvoy/2013/09/child-marriages-39000-every-day-more-than-140-million-girls-will-marry-between-2011-and-2020/> (accessed 21 June 2018).

herself.<sup>157</sup> Essentially, forced marriages are symptomatic of women rights violations and gender inequality<sup>158</sup> in all laws, even those concerning nationality.

The UNHCR's interviews with women who suffer as a result of the gender discriminatory nationality laws which leave them stateless or undocumented and vulnerable to the abovementioned violations has revealed the following. Apart from the exclusion from education, health care, and social services, there are psychological effects such as depression, anxiety, posttraumatic stress disorder and increased risk-taking behaviour.<sup>159</sup>

#### 4.4 ACCOUNTABILITY: WHO SHOULD BE HELD ACCOUNTABLE?

The perception of universal protection of human rights is crucial to the system of international protection of human rights. However, one of the issues is whether claims concerning protection of the rights of women have been adequately addressed.<sup>160</sup> Denials of individual rights on the basis of them being female constitute human rights violations, therefore State practices that:

expose women to degradation, indignity, and oppression on account of their sex must be independently identified, condemned, compensated, and preferably, prevented.<sup>161</sup>

The United Nations has laid a foundation for an international women's law of human rights that transcends the borders of national, religious and customary law.<sup>162</sup> The most successful is the CEDAW,<sup>163</sup> which ultimately aims to eradicate discrimination against women.<sup>164</sup>

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<sup>157</sup> Menz S (2016) 514-515.

<sup>158</sup> Jensen R and Thornton R 'Early female marriage in the developing world' (2003) 11 (2) *Gender and Development* 14.

<sup>159</sup> Menz S (2016) 531.

<sup>160</sup> Beyani C 'Toward a More Effective Guarantee of Women's Rights in the African Human Rights System' in Cook RJ *Human Rights of Women National and International Perspectives* (1994) 287.

<sup>161</sup> Cook RJ 'State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women' in Cook R.J *Human Rights of Women National and International Perspectives* (1994) 228.

<sup>162</sup> Hellum A and Stewart JE *Women's Human Rights and Legal Pluralism in Africa* 2<sup>nd</sup> Ed (1999) 21.

<sup>163</sup> Buergental T *International Human Rights* 2<sup>nd</sup> Ed (1995) 68.

CEDAW is a socio-legal tool which within a single and unified framework is intended to help women fit into social, economic and political modernisation processes in all parts of the world.<sup>165</sup> The Convention requires State parties to take a series of measures in the political, social, economic and cultural realm to advance the enjoyment of equal rights by women<sup>166</sup> in the private as well as the public sphere.<sup>167</sup>

One right that ultimately gives access to all other rights is the right to a nationality. Without a right to nationality, a woman may be unable to exercise all her other human rights.<sup>168</sup> Article 9 of CEDAW provides the right of a woman to acquire a nationality on an equal basis with men. The Human Rights Council has called upon:

[S]tates to ensure that effective and appropriate remedies are available to all persons, in particular women and children, whose right to a nationality has been violated. This includes the restoration of nationality, where it has been wrongfully and arbitrarily taken away, as well as the expedient provision of the documentary proof of nationality by the State responsible for the violation. It further encourages relevant special procedures of the Human Rights Council, including the Working Group on the issue of discrimination against women in law and in practice; as well as the specialised agencies, funds and programmes and UN entities, and invites treaty bodies, in coordination with the office of the UNHCR, to address and highlight issues relating to the right to nationality and statelessness.<sup>169</sup>

States are therefore encouraged to address women's equal nationality rights, and the challenge of statelessness and vulnerability that emerges when they are not fully respected and implemented.<sup>170</sup> This vulnerability of women occurs as a result of the discrimination

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<sup>164</sup> See article 1 of CEDAW for the definition of “discrimination against women” and article 2 of CEDAW on the steps States have to take in order to adequately attain the eradication of discrimination.

<sup>165</sup> Hellum A and Stewart JE (1999) 22.

<sup>166</sup> Buergental T (1995) 69.

<sup>167</sup> Hellum A and Stewart JE (1999) 22.

<sup>168</sup> Palo S (2009) 674.

<sup>169</sup> UN Human Rights Council, The right to a nationality: women's equal nationality rights in law and in practice: resolution / adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/7, available at: <http://www.refworld.org/docid/57e910044.html> (accessed 22 May 2018).

<sup>170</sup> UN Human Rights Council, The right to a nationality: women's equal nationality rights in law and in practice: resolution / adopted by the Human Rights Council, 18 July 2016, A/HRC/RES/32/7, available at:

States embody in their law. One important aspect about understanding discrimination is that even where inequality with men is not obvious, women may nevertheless face discrimination for which they may not find adequate redress.<sup>171</sup> It is thus important to ascertain a basis for the aggrieved to seek redress. It is proposed that Article 9 of CEDAW is utilised for this purpose.

#### 4.4.1 Article 9 of CEDAW: Basis for State Accountability

State responsibility provides that a State is legally accountable for breaches of international obligations that are attributable or imputable to the State.<sup>172</sup> By becoming State parties to CEDAW, States agree to “condemn discrimination in all its forms”.<sup>173</sup> CEDAW emphasises sexual non-discrimination, but its drive is not simply to achieve gender neutrality; it recognises that the distinguishing characteristics of women and that their exposures to discrimination merit a specific legal response.<sup>174</sup>

Gender equality has become an issue of considerable importance internationally and CEDAW has become a benchmark for assessing a State’s commitment to this issue.<sup>175</sup> This Convention is often referred to as the “women’s bill of rights” since its primary goal is the gender-based discrimination by equal rights for men and women.<sup>176</sup> Male approaches towards

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<http://www.refworld.org/docid/57e910044.html> (accessed 22 May 2018).

<sup>171</sup> Lee TL ‘Refugees from Bhutan: Nationality, Statelessness and the Right to Return’ (1998) 118 *International Journal of Refugee Law* 142.

<sup>172</sup> Cook RJ ‘State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women’ in Cook R.J *Human Rights of Women National and International Perspectives* (1994) 229; it is important to understand that legal responsibility denotes liability for breach of the law, but accountability is a wider concept that requires a State to explain an apparent violation and to offer an exculpatory explanation if it can.

<sup>173</sup> Article 2 of CEDAW. See further Cook RJ (1994) 241; [t]his requires [the States] understanding [of the] perceptions of practices as discriminatory.

<sup>174</sup> Cook RJ (1994) 235.

<sup>175</sup> Banks AM ‘CEDAW, compliance, and custom: Human rights enforcement in sub-Saharan Africa’ (2009) 32 *Fordham International Law Journal* 804.

<sup>176</sup> Banks AM (2009) 807.

the consideration of women have subjugated the formation of human rights, and pervaded its application to women unevenly.<sup>177</sup>

CEDAW commits all signatories to; promote gender equality, develop laws and practical protections against discrimination, and take actions to stop discrimination against women on the basis of their sex within their territory.<sup>178</sup> CEDAW further requires that State parties grant all women a legal capacity identical to that of men and that they are afforded the same opportunities to exercise that capacity.<sup>179</sup> One of the downfalls of interpreting the Convention in this way is that it does not take into consideration the distinguishing needs of women.

Although CEDAW is universally ratified, it has an excessive amount of reservations attached to it.<sup>180</sup> The reservations allow countries to maintain gender-discriminatory laws resulting in the instrument being powerless when it comes to enforcing the rights of women against the State in which they reside.<sup>181</sup> Countries are permitted to make broad and categorical reservations to critical treaty provisions on human rights treaties.<sup>182</sup> There are currently 188 countries that have ratified the Convention – such as Malaysia and Jordan – have made reservations to Article 9, but have refused to enforce the Convention.<sup>183</sup>

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<sup>177</sup> Beyani C ‘Toward a More Effective Guarantee of Women’s Rights in the African Human Rights System’ in Cook R.J *Human Rights of Women National and International Perspectives* (1994) 288.

<sup>178</sup> Palo S (2009) 676. See article 4 of CEDAW.

<sup>179</sup> Banks AM (2009) 785-786. Article 2(a) of CEDAW.

<sup>180</sup> United Nations Treaty Collections ‘Chapter IV: Human Rights Status of the Convention on the Elimination of All Forms of Discrimination against Women’ available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (accessed 25 June 2018). The only countries which have not ratified CEDAW is the US, Iran, Somalia and Sudan.

<sup>181</sup> Menz S (2016) 521.

<sup>182</sup> United Nations Entity for Gender Equality and the Empowerment of Women ‘Convention on the Elimination of All Forms of Discrimination against Women: Reservations to CEDAW’ available at <http://www.un.org/womenwatch/daw/cedaw/reservations.htm> (accessed 25 June 2018).

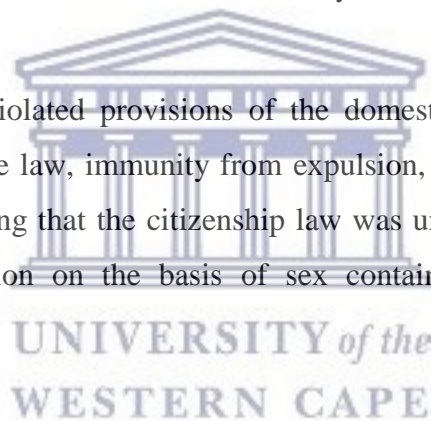
<sup>183</sup> Menz S (2016) 522. Jordan is a signatory to CEDAW, but has also made a reservation to article 9’s prohibition on discriminatory nationality laws. In doing so, Jordanian authorities claim that the Kingdom is not bound by this provision regarding gender equality in nationality laws. Jordan’s reservation impacts more than sixty-five thousand Jordanian-national women. See United Nations Treaty Collections ‘Chapter IV: Human Rights Status of the Convention on the Elimination of All Forms of Discrimination against Women’ available at

Even without reservations, the disregard for Article 9 is still evident. Nepal has ratified CEDAW without any reservations.<sup>184</sup> Despite its ratification, Nepal's discriminatory nationality law, poor education system, and pervasive gender inequality leave women, particularly stateless women, subject to severe insecurity.<sup>185</sup> The gender discrimination of laws within a State means that women cannot always rely on domestic law in order to attain justice. This is why reliance on Article 9 of CEDAW is proposed as the most suitable manner of attaching accountability to those who are guilty.

One case which was successful in using Article 9 of CEDAW against the State's gender discriminatory laws was the case of *Dow v Attorney General of Botswana*.<sup>186</sup> Under the Botswana Citizenship Act of 1984 (the Act):

[t]he nationality of a child born on Botswana soil would be determined exclusively by that of the father, as dictated within Tswana customary law.<sup>187</sup>

Dow claimed that the Act violated provisions of the domestic Constitution guaranteeing liberty, equal protection of the law, immunity from expulsion, and the right to be free from degrading treatment.<sup>188</sup> Arguing that the citizenship law was unconstitutional, Dow invoked the right of non-discrimination on the basis of sex contained in the CEDAW.<sup>189</sup> The



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[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (accessed 25 June 2018).

<sup>184</sup> United Nations Treaty Collections 'Chapter IV: Human Rights Status of the Convention on the Elimination of All Forms of Discrimination against Women' available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (accessed 25 June 2018).

<sup>185</sup> Menz S (2016) 532; in the mid 1990's, Nepal has an estimated amount of 3.4 million stateless persons.

<sup>186</sup> *Dow v Attorney General* 1991 BLR 233 (HC).

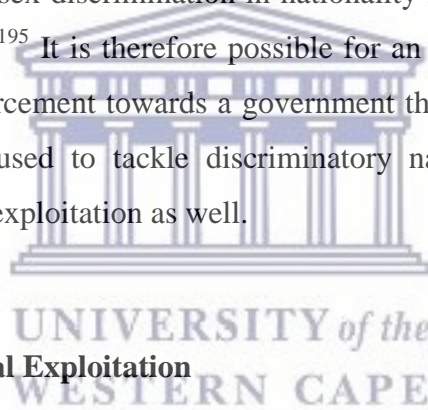
<sup>187</sup> Palo S (2009) 679-680; [t]his new law went unchallenged until Unity Dow, a Botswanan who was married to an American man, brought her case before Botswanan high court in 1990. Her challenge involved their three children, two of them were born after the Botswanan Citizenship Act of 1984 was passed. Under the Act, these two children required residence permits to stay in the country only on their father's passport, would not be allowed to vote, and would be denied the free university education available to citizens.

<sup>188</sup> *Dow v Attorney General* 1991 BLR 233 (HC) at page 243.

<sup>189</sup> Knop K and Chinkin C (2001) 533.

government took the position that international treaties became part of the law in Botswana only when incorporated by legislation.<sup>190</sup>

The government stated that at most they are an interpretive aid when the meaning of a local statute is unclear.<sup>191</sup> In response to this argument provided by the government, the High Court decided that in light of the current treaty law and the modern role of women in society, the Constitution was best interpreted as prohibiting sex discrimination.<sup>192</sup> Both the lower court and the appeal court instead agreed with Dow's argument.<sup>193</sup> It used international standards and obligations to find that a law allowing only a father or an unmarried mother to pass Botswana citizenship to his or her children born in Botswana was unconstitutional on the grounds of sex discrimination.<sup>194</sup> Although customary international law fails to provide an explicit prohibition against such discrimination, it forms a continuously evolving body of law which may arguably prohibit sex discrimination in nationality laws that is becoming a more widely accepted human right.<sup>195</sup> It is therefore possible for an individual to use Article 9 of CEDAW as a section of enforcement towards a government that practices gender-bias laws. Not only can Article 9 be used to tackle discriminatory nationality laws, it should be considered in cases of sexual exploitation as well.



#### **4.4.2 Statelessness and Sexual Exploitation**

States cannot think that providing a justice system that is seemingly gender neutral is enough. Both the State and the international community must come to understand that females suffer a myriad of abuses based solely on their gender.<sup>196</sup> This includes inter alia, female infanticide, female genital cutting, bride burning, dowry death, honour killings, sex trafficking and

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<sup>190</sup> Stratton LS 'The Right to Have Rights: Gender Discrimination in Nationality Laws' (1992) 77 *Minnesota Law Review* 228.

<sup>191</sup> Stratton LS (1992) 228.

<sup>192</sup> Palo S (2009) 680. See *Dow v Attorney General* 1991 BLR 233 (HC) at page 234.

<sup>193</sup> Knop K and Chinkin C (2001) 532-533.

<sup>194</sup> Knop K and Chinkin (2001) 532-533.

<sup>195</sup> Stratton LS (1992) 234.

<sup>196</sup> Menz S (2016) 538.

prostitution, and forced marriages.<sup>197</sup> Therefore substantive equality requires States to recognise that women are differently situated from men.<sup>198</sup> This is as a result of deeply entrenched and systematic discrimination due to prevailing gender biases and sex stereotypes.<sup>199</sup>

One has to realise that in certain instances, a stateless population has been intentionally created by the government under whose control they find themselves. One such group are the Rohingya Muslims of Myanmar.<sup>200</sup> The situation in Myanmar has been explained as a ‘textbook example ethnic cleansing’.<sup>201</sup> By being deprived of nationality, they have been exposed to severe police brutality by police forces<sup>202</sup> including sexual aggression as a tool in advancing political repression.<sup>203</sup> Sexual violence has been historically used as a primary method of destruction.<sup>204</sup> Governments using sexual violence in order to alter ethnic

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<sup>197</sup> Menz S (2016) 538.

<sup>198</sup> Van der Poll L ‘Torture and Sexual Violence as *Jus Cogens*? A Critical Reflection on the Emerging Norms in International (Humanitarian) Law’ (2010) 1 *Speculum Juris* 5; [s]exual violence perpetrated against women is of particular relevance. The failure of international law to recognise many of the gender specific experiences of women...increase their vulnerability.

<sup>199</sup> Menz S (2016) 538.

<sup>200</sup> The Rohingya Muslims are a religious and ethnic minority in Myanmar who are the world’s most persecuted minority group. This persecution goes back to 1948, the year when the country achieved independence from the British colonizers and enacted their own nationality laws which expressly excluded the Rohingya as an ethnic group from its citizenship laws. See Abdelkader E ‘The history of the persecution of Myanmar’s Rohingya’ *The Conversation* 21 September 2017 available at <https://theconversation.com/the-history-of-the-persecution-of-myanmars-rohingya-84040> (accessed 31 May 2018).

<sup>201</sup> Abdelkader E ‘The history of the persecution of Myanmar’s Rohingya’ *The Conversation* 21 September 2017 available at <https://theconversation.com/the-history-of-the-persecution-of-myanmars-rohingya-84040> (accessed 31 May 2018). See also Nebehey S and Lewis S ‘UN brands Myanmar violence a ‘textbook’ example of ethnic cleansing’ *Reuters* 11 September 2017 available at <https://www.reuters.com/article/us-myanmar-rohingya/u-n-brands-myanmar-violence-a-textbook-example-of-ethnic-cleansing-idUSKCN1BM00F> (accessed 31 May 2018).

<sup>202</sup> Global Perspective Human stories ‘News In Brief 26 February 2018’ *UN News* 26 February 2018 available at <https://news.un.org/en/audio/2018/02/1003592> (accessed 31 May 2018).

<sup>203</sup> United Nations ‘Pramila Patten on preventing sexual violence in conflict – Security Council, 8234<sup>th</sup> meeting’ available at <http://www.youtube.com/watch?v=6Uu9Zc2tWu4> (accessed 30 May 2018).

<sup>204</sup> Van der Poll L ‘The Emerging Jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict’ (2007) *African Yearbook of International Humanitarian Law* 24.



groups<sup>205</sup> in order to change demographics has been normalised due to the frequency and impunity with which it is committed.<sup>206</sup>

The international community typically either allows the State to continue these violations because it does not consider the issue a priority, or fears speaking against the violator's actors for fear of being politically incorrect.<sup>207</sup> It has therefore been emphasised that all international parties concerned are responsible to always protect civilians and civilian infrastructure.<sup>208</sup>

This emphasis has prompted the international community into recognising their responsibility in addressing these atrocities.<sup>209</sup> In matters of sexual exploitation coupled with statelessness, the following has been recommended. First, the international community should consider establishing a reparation fund to survivors of conflict ridden sexual violence; this will help them to rebuild their lives and livelihood.<sup>210</sup> Secondly, with the stigma attached to victims of sexual violence, the civilian community's response can often be a continuous danger to women.<sup>211</sup> The UN strongly recommended that States initiate special projects that will help

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<sup>205</sup> During the Rwandan genocide, sexual exploitation was used as a means of eradicating and dominating. At the time, one of the survivors of rape, Levine, relives her story. Levine and other young women in Kibilizi, 80 miles south of the capital, Kigali, were forced to assemble on the village playing field. The *Interahamwe*, the Hutu militia that spearheaded the massacres of Tutsis, picked those they wanted, forcing them into the surrounding banana and millet patches to be gang-raped. "Rape was a reward the leaders gave those who killed," said Levine. See Hilsum L 'Rwanda 20 years on: the tragic testimony of the children of rape' Rwanda: The Observer 7 June 2014 available at <https://www.theguardian.com/world/2014/jun/08/rwanda-20-years-genocide-rape-children> (accessed 22 June 2018).

<sup>206</sup> United Nations 'Pramila Patten on preventing sexual violence in conflict – Security Council, 8234<sup>th</sup> meeting' available at <http://www.youtube.com/watch?v=6Uu9Zc2tWu4> (accessed 30 May 2018).

<sup>207</sup> Palo S (2009) 687.

<sup>208</sup> Global Perspective Human stories 'News In Brief 26 February 2018' *UN News* 26 February 2018 available at <https://news.un.org/en/audio/2018/02/1003592> (accessed 31 May 2018).

<sup>209</sup> United Nations 'Pramila Patten on preventing sexual violence in conflict – Security Council, 8234<sup>th</sup> meeting' available at <http://www.youtube.com/watch?v=6Uu9Zc2tWu4> (accessed 30 May 2018).

<sup>210</sup> United Nations Secretary General Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual violence (2014) 9-10; [r]eparations may also affect development, for example, by addressing the consequences of gender-based violence, and reparations programmes may empower women who, in turn, can participate in development decision-making and benefit more directly from development programmes, including in the fields of labour and education.

<sup>211</sup> Shanks L and Schull MJ 'Rape in war: the humanitarian response' (2000) 163 (9) *Canadian Medical*

relocate victims to safer places.<sup>212</sup> Lastly, where there is a lack of funds, it amounts to a lack of resources, ultimately limiting adequate protection.<sup>213</sup> A fund should be set up that allocates a sufficient amount of resources to the on-going progression into combating sexual abuses.<sup>214</sup> These recommendations may not eradicate the violations perpetrated against victims, but it can help alleviate their burdens. It can also aid in ensuring that the culture of impunity is slowly done away with, allowing survivors of these atrocities to come forward more willingly if they know that something might be done about the violations they suffered.

#### 4.5 CONCLUDING REMARKS

This chapter has critically analysed that the understanding of gender has been moulded by societal and cultural viewpoints. This understanding of gender has unfortunately created a discriminatory pattern within in nationality laws. The modern day fortress of gender discriminatory nationality laws and practices are the GCC States. In unpacking its gender bias laws and practices, the analysis revealed that the persistent enforcement and implementation of such laws and practices has caused generational statelessness within the region. It further causes the risk of creating many new cases of statelessness.

One thing is certain, unless the problem of statelessness is remedied or there is at least a concerted effort in attempting to work on the problem – it will be a problem that affects every entity.<sup>215</sup> It will continue to make women more vulnerable than what they already are by

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*Association Journal* 1153; [w]omen are often stigmatised by societal and cultural norms that view the victim as defiled. They may be rejected outright by their families and left destitute. Not surprisingly, many survivors end up debilitated by post-traumatic stress disorder.

<sup>212</sup> United Nations ‘Pramila Patten on preventing sexual violence in conflict – Security Council, 8234<sup>th</sup> meeting’ available at <http://www.youtube.com/watch?v=6Uu9Zc2tWu4> (accessed 30 May 2018).

<sup>213</sup> Kilonzo N, Dartnall E and Obbayi M *Briefing Paper: Policy and practice requirements for bringing to scale sexual violence services in low resource settings* (2013) 2; [o]ften sexual violence services are delivered as projects by non-government providers potentially constraining the services access to national supply systems, budgets and other resources [essentially the services provided for to survivors of sexual violence is provided for by non-profit organisations, the funding they get in order to effectively carry out their work is limited which inevitably means that they cannot reach all survivors].

<sup>214</sup> United Nations ‘Pramila Patten on preventing sexual violence in conflict – Security Council, 8234<sup>th</sup> meeting’ available at <http://www.youtube.com/watch?v=6Uu9Zc2tWu4> (accessed 30 May 2018).

<sup>215</sup> Lee TL ‘Refugees from Bhutan: Nationality, Statelessness and the Right to Return’ (1998) 118 *International Journal of Refugee Law* 142.

subjecting them to a pool of human rights abuses. Statelessness is essentially a source of political and socio-economic tension which affects the country of origin, the country of residence and neighbouring countries,<sup>216</sup> but most importantly, affects the entirety of the woman. The perpetrators of human rights violations escape impunity due to the fact that there is no reliable basis of accountability. It was therefore recommended that Article 9 of CEDAW is utilised for this purpose. It should be available to survivors of human rights abuses to hold States accountable.



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<sup>216</sup> Lee TL (1998) 142.

## CHAPTER 5

### RECOMMENDATIONS AND CONCLUSION

*The issue of statelessness has been left to fester in the shadows for far too long. It is time to take the necessary steps to rid the world of a bureaucratic malaise that is, in reality, not so difficult to resolve. It is simply a question of political will and legislative energy.<sup>1</sup>*

#### 5.1 INTRODUCTION

The UNHCR developed a Global Action Plan (Action Plan) where lists of actions aimed at ending statelessness by 2024 were proposed.<sup>2</sup> In order to assist in providing context to these actions, this chapter will aim to provide recommendations that will contribute to the successful implementation of these actions. The actions provided for in the Action Plan are not in order of application, precedence or rank.<sup>3</sup> It is proposed that the lack of the aforementioned does not provide States with a plan on how to inevitably end statelessness entirely. It is proposed that in order to achieve a complete eradication of statelessness, the issue of gender discriminatory nationality laws must be addressed. It is for this very reason that the concluding chapter provides recommendations on how to work towards ending statelessness by proposing that the discrimination towards women in nationality laws are dealt with effectively in States where it is still evident.

The recommendations can be utilised in all regions where statelessness is present. It is most important at this juncture to mention that the recommendations specifically call for the removal of gender discriminatory nationality laws, as well as the prevention of new cases of statelessness. It is further argued that there should be a reformation of laws. To achieve these objectives, this chapter will be divided into two parts where the recommendations will

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<sup>1</sup> Guterres A and Arbour L 'The hidden world of stateless people' Reliefweb 28 November 2007 available at <https://reliefweb.int/report/nepal/hidden-world-stateless-people-ant%C3%B3nio-guterres-and-louise-arbour> (accessed 12 June 2018).

<sup>2</sup> UNHCR Division of International Protection *Global Action Plan to End Statelessness: 2014 – 2024* (2014) 4.

<sup>3</sup> UNHCR Division of International Protection (2014) 4.

provide understanding to the list of actions and devising an order in which it could work most effectively.

Part one will look at procedural guidelines on how the international community and States can effectively gather adequate data on the numbers of stateless persons in the world. It further considers the role-players responsible for overseeing the implementation of a system that could gather this information. It is further important to consider who will be most suited in overseeing the implementation of any recommendations provided. These recommendations will assist in satisfying the following actions in the Action Plan. Action Plan 9 requires States to accede to the Statelessness Conventions.<sup>4</sup> Action Plan 6 necessitates that States grant protection status to stateless migrants and facilitate their naturalisation.<sup>5</sup> Action Plan 10, which is important for effectively gathering statistical information, requires States to improve quantitative and qualitative data on stateless populations.<sup>6</sup> Action Plan 1 requires that States resolve existing major situations of statelessness.<sup>7</sup> Lastly Action Plan 8 requires States to issue nationality documentation to those who have an entitlement to it.<sup>8</sup> It is the responsibility of all States to ensure that they effectively implement and enforce the change that is required for statelessness to diminish and inevitably reach its demise. However, the only way in which successful implementation can be achieved is if there is a knowledgeable body. The organisation responsible should have the necessary expertise and resources who will have the overall responsibility of monitoring States and their progression with regard to recommendations.

Once adequate data and a suitable body is provided, the amount of stateless people in the world can be sufficiently accorded, and effective planning can go into addressing the causes of statelessness. This is why part two will consider substantive goals that States can work on

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<sup>4</sup> UNHCR Division of International Protection (2014) 23.

<sup>5</sup> UNHCR Division of International Protection (2014) 16.

<sup>6</sup> UNHCR Division of International Protection (2014) 24.

<sup>7</sup> UNHCR Division of International Protection (2014) 7.

<sup>8</sup> UNHCR Division of International Protection (2014) 21.

in order to reduce the number of stateless persons by resolving the reasons of statelessness, specifically the gender discrimination within a State. The Action Plans that will be affected are; Action Plan 3 which calls for the removal of gender discriminatory nationality laws.<sup>9</sup> Action Plan 4 further requires that States work towards preventing the denial, loss or deprivation of nationality on discriminatory grounds.<sup>10</sup> Understanding the substantive goals required to address the reasons for statelessness affords States the opportunity to identify what the problem is. Essentially, with a system in place that accommodates the effective implementation of procedural and substantive goals, statelessness can over time cease to exist.

## **5.2 PART ONE: PROCEDURAL GUIDELINES**

In order to achieve a substantial goal, an effective procedure needs to be put in place. For the eradication of statelessness to be effective the procedure that should be utilised should compromise of the following; a suitable authority tasked with overseeing that the recommendations are adequately met. In order to offer suitable and holistic recommendations to any given problem, the solution can only be substantial if the data provided is approximate to the magnitude of the problem. This is why States should endeavour to assess a close approximate of the amount of stateless people within their territory.

### **5.2.1 Compatible institution**

There is no specified body tasked with the responsibility of overseeing all the tasks associated with statelessness. The UNHCR has had some responsibility for stateless persons since its establishment in 1950, but the authority to act did not immediately come into effect because there was a lack of understanding of the scope and nature of statelessness.<sup>11</sup>

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<sup>9</sup> UNHCR Division of International Protection (2014) 12. The recommendations provided for this action is essentially applicable to action seven as well. Action Plan 7 requires that States ensure birth registration for the prevention of statelessness. It making recommendations in this regard, States need to eradicate gender discriminatory nationality laws which prevent mothers from conferring nationality to their children on an equal basis to men. The recommendations are also applicable to Action Plan 2 which requires that all States make the necessary arrangements to ensure that no child is born stateless.

<sup>10</sup> UNHCR Division of International Protection (2014) 13.

<sup>11</sup> Manly M 'UNHCR's mandate and activities to address statelessness' in Edwards A and van Waas L

Despite this, the UNHCR continued to work towards gathering an understanding of what it entailed. To this end, the General Assembly noted that:

the work of the High Commissioner in regard to identifying stateless persons, preventing and reducing statelessness, and protecting stateless persons, and urges the Office of the High Commissioner to continue to work in this area in accordance with relevant General Assembly resolutions and Executive Committee conclusions.<sup>12</sup>

The role of the UNHCR is implicit in the Reduction of Statelessness Convention and verified by the General Assembly as the body referred to in Article 11 to which an aggrieved person can apply to in order to examine a claim, and to assist in presenting it to the appropriate authority.<sup>13</sup> It is therefore recommended that States officially recognise that the UNHCR is the authorised institution that has the necessary mandate to deal with all matters dealing with statelessness.

### 5.2.2 Gathering adequate data on statelessness

There are many stateless people in States who have not been afforded the protection provided for by the Statelessness Conventions. The main reason for this is that those individuals have not been determined as stateless. One of the reasons why there is no accurate amount of statelessness is because of the practices of certain States. For example the Netherlands labels people living within in their territory all their lives who do not have Dutch nationality or another State as a protector, as people of “unknown nationality” rather than as being stateless.<sup>14</sup>

In order to resolve this dilemma, it is recommended that States introduce a statelessness determination procedure. An effective statelessness determination mechanism is an

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*Nationality and Statelessness under international law* (2014) 88.

<sup>12</sup> UN General Assembly resolution 61/137 ‘Office of the High Commissioner for Refugees’ (25 January 2006) para 4.

<sup>13</sup> Manly M (2014) 90.

<sup>14</sup> Fisher BL (2015) 257.

indispensable pre-condition of any effort aimed at the protection of stateless persons.<sup>15</sup> Any protection measure requires the proper identification of those entitled to it.<sup>16</sup> A determination procedure would assist in resolving problems related to the unclear status of stateless persons.<sup>17</sup> Experiences in countries which have instituted a statelessness determination procedure such as France, Hungary, and Spain, demonstrate that procedural improvements enhance awareness, protection standards, and the identification of stateless persons.<sup>18</sup>

#### 5.2.2.1 Statelessness determination procedure

A statelessness determination procedure will offer the stateless individual with protection. This means that a stateless person has access to and can enjoy the rights embedded in the Stateless Persons Convention while the official recognition as a stateless person ensures the proper enjoyment of rights in the Convention.<sup>19</sup> A dedicated procedure can identify stateless persons, thereby allowing for a more tailored protection measure. This will improve improving statistical awareness of the actual scope of the problem, and enhance the States' ability to fulfil its international obligations under the Stateless Persons Convention.<sup>20</sup> In order to develop a statelessness determination procedure, States has to accede to the Stateless Persons Convention, and adhere to its object and purpose which provides that all:

[h]uman beings shall enjoy fundamental rights and freedoms without discrimination ... desirable to regulate and improve the status of statelessness persons by an international agreement.<sup>21</sup>

The Convention in threefold - it aims to promote universal enjoyment of fundamental human rights free of discrimination, to standardise the status of stateless persons, and to improve that

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<sup>15</sup> Gyulai G 'The determination of statelessness and the establishment of a statelessness-specific protection regime' in Edwards A and van Waas L *Nationality and Statelessness under international law* (2014) 116.

<sup>16</sup> UNHCR *Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons at the National Level: Summary Conclusions* (2010) para 1.

<sup>17</sup> United Nations High Commissioner for Refugees *Mapping Statelessness in the Netherlands* (2011) 57.

<sup>18</sup> United Nations High Commissioner for Refugees (2011) 57.

<sup>19</sup> Gyulai G (2014) 117.

<sup>20</sup> United Nations High Commissioner for Refugees *Mapping Statelessness in the Netherlands* (2011) 59.

<sup>21</sup> Preamble of the 1954 Convention.



status.<sup>22</sup> The Stateless Persons Convention therefore obliges State parties to provide protection to those who are stateless<sup>23</sup> while creating a firm basis for the creation of a statelessness-specific regime.<sup>24</sup>

Accession to the Stateless Persons Convention is a strong and vital step in demonstrating nationality. It ensures that the treatment of stateless people adhere to important minimum standards. Many States that have assented to the Stateless Persons Convention have established statelessness determination procedures based on the definition of a stateless person.<sup>25</sup> It is therefore recommended that all States who have not assented to the Stateless Persons Convention do so with immediate effect. This would enable them to implement a statelessness determination procedure. The following should be taken into consideration when implementing a statelessness determination procedure.

#### 5.2.2.1.1 *Factors to consider when establishing a stateless determination procedure*

##### (i) Institutional framework

It is imperative that one centralised, independent authority who has the necessary expertise in statelessness and nationality matters, is appointed.<sup>26</sup> The specialisation of officers dealing with statelessness determination should be supported by other key players.<sup>27</sup> This requires that partnerships are developed through identification and mobilisation of relevant stakeholders at international, regional and local levels that take into account the capacities, mandates and interests of each potential actor.<sup>28</sup> One of the most important factors that should

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<sup>22</sup> Fisher BL (2015) 266.

<sup>23</sup> Article 1 of the 1954 Convention.

<sup>24</sup> Gyulai G (2014) 121.

<sup>25</sup> Fisher BL (2015) 255.

<sup>26</sup> United Nations High Commissioner for Refugees (2011) 59.

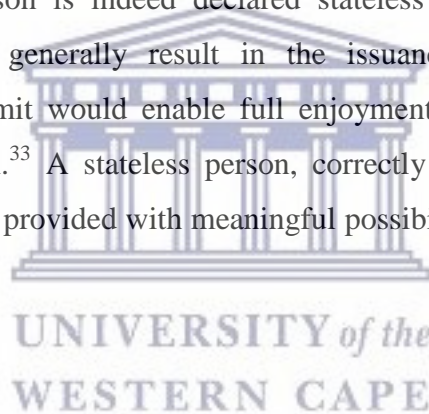
<sup>27</sup> UNHCR *Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons* (2014) para 63.

<sup>28</sup> UNHCR *Meeting Report: Regional Expert Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 7.

be considered is that affected populations should be involved in the negotiations towards change. Women, children, the elderly and community leaders should be given an opportunity to play an active part in processes, activities and decisions that concern them.<sup>29</sup> This ensures that there is visibility of the issue of statelessness and stateless populations.

(ii) Procedural framework

Unreasonably short procedural deadlines can result in serious difficulties and a failure to meet the aim of effective determination.<sup>30</sup> Fundamental rights are at stake, therefore States need to incorporate procedural safeguards in determination procedures. States should first, refrain from removing the applicant from the territory pending the outcome. The UNHCR recommends that during a statelessness determination procedure, applicants should be issued an identity document, so they can identify themselves to authorities.<sup>31</sup> Once the determination has been made and the person is indeed declared stateless it is recommended that the recognition of statelessness generally result in the issuance of a residence permit.<sup>32</sup> Possession of a resident permit would enable full enjoyment of the rights set out in the Stateless Persons Convention.<sup>33</sup> A stateless person, correctly determined as one can gain access to rights and should be provided with meaningful possibilities for economic and social integration.<sup>34</sup>



Secondly, the applicant should have access to free and fair legal assistance. The statelessness determination procedure should not be non-adversarial and ensure due process guarantees, including access to free legal advice and the right to an effective remedy where an application is rejected.<sup>35</sup> Any administrative fees levied on statelessness applications should be

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<sup>29</sup> UNHCR *Meeting Report: Regional Expert Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 7.

<sup>30</sup> Gyulai G (2014) 136.

<sup>31</sup> United Nations High Commissioner for Refugees (2011) 62.

<sup>32</sup> Fisher BL (2015) 268.

<sup>33</sup> United Nations High Commissioner for Refugees (2011)62.

<sup>34</sup> Gyulai G (2014) 126.

<sup>35</sup> United Nations High Commissioner for Refugees (2011) 60.

reasonable and not act as a deterrent to a stateless person seeking protection, the applicant should further be afforded the right to appeal a decision arbitrarily made.<sup>36</sup> It is therefore important that specialised training on nationality law and practice, international standards and statelessness be provided to officials responsible for making a statelessness determination.<sup>37</sup>

Lastly, decisions that have been made should be communicated to the applicant within a reasonable period. This communication should be in writing and in a language that the applicant understands, it should further be accompanied with adequate and substantial reasons.<sup>38</sup>

### (iii) Evidentiary framework

A protection mechanism has no actual impact if those in need of the protection are prevented from accessing it.<sup>39</sup> It is important to bear in mind that statelessness is an objective condition, which does not need to be underpinned by a subjective fear or other specific conditions.<sup>40</sup> To effectively address the situation of stateless persons and in order to develop appropriate strategies for tackling the issues, a good understanding of both the best practices and the potential obstacles must be identified.<sup>41</sup> This can only be done by gathering evidence from the victims of statelessness.

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If evidentiary rules are too strict, this can easily undermine the protection objective of the Stateless Persons Convention.<sup>42</sup> The determination procedures should adopt an approach to evidence which takes into account the challenges inherent in establishing whether a person is

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<sup>36</sup> United Nations High Commissioner for Refugees (2011) 60.

<sup>37</sup> United Nations High Commissioner for Refugees (2011) 60.

<sup>38</sup> UNHCR *Statelessness determination procedures: Identifying and protecting stateless persons* (2014) 6.

<sup>39</sup> Gyulai G (2014) 126.

<sup>40</sup> UNHCR *Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons at the National Level: Summary Conclusions* (2010) para 21.

<sup>41</sup> UNHCR *Meeting Report: Regional Expert Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 29.

<sup>42</sup> Gyulai G (2014) 137.

stateless.<sup>43</sup> It is not easy for people to prove that they are stateless and if the processes are difficult, it could prevent people from bringing their cases forward as stateless people may not necessarily have documentation. It is therefore important that both the applicant and the determination authority cooperate in order to obtain evidence to establish the facts. Authorities must consider all available evidence including oral or written with regard to a claim.<sup>44</sup> It is also important that applicants throughout the country have easy access to a determination procedure and that they are informed of the existence of the procedure.<sup>45</sup> Specific legislation aimed at stateless persons and a determination procedure would also enable all parties to know where to turn for legal guidance.<sup>46</sup>

It is vital to understand that demystifying and depoliticising statelessness should be a priority in the design of research, advocacy and awareness-raising activities.<sup>47</sup> A stateless determination aids this by assessing the size and situation of the stateless population amongst migrant populations on the territory. In identifying and documenting a stateless person allows States to regulate the persons stay in the country.<sup>48</sup> In granting stateless persons basic rights allows them to fully participate and contribute to the society in which they live which reduces costs and security risks related to the marginalisation of stateless persons.<sup>49</sup> Dispelling the perception of statelessness as a complex and politically sensitive issue can aid in its demise, but this can only be done if States actively partake in changing the further growth of statelessness.

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<sup>43</sup> UNHCR *Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons at the National Level: Summary Conclusions* (2010) para 14.

<sup>44</sup> UNHCR *Statelessness determination procedures: Identifying and protecting stateless persons* (2014) 5.

<sup>45</sup> UNHCR *Statelessness determination procedures: Identifying and protecting stateless persons* (2014) 6.

<sup>46</sup> Gyulai G (2014) 125.

<sup>47</sup> UNHCR *Meeting Report: Regional Expert Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 8.

<sup>48</sup> UNHCR *Statelessness determination procedures: Identifying and protecting stateless persons* (2014) 3.

<sup>49</sup> UNHCR *Statelessness determination procedures: Identifying and protecting stateless persons* (2014) 3.

### 5.3 RESOLVING REASONS FOR THE CAUSES OF STATELESSNESS

States continue enacting, implementing and enforcing gender-bias law which is a major contributing factor to statelessness. The elimination of discrimination against women in nationality laws helps reduce causes of statelessness.<sup>50</sup> By eliminating gender discriminatory nationality laws, States promote a more engaged citizenry, and promote greater nationality stability, economic development, good health and prosperity.<sup>51</sup> In order to eradicate gender discriminatory nationality laws, States need to actively work towards reforming the already existing nationality laws. Majority of the partiality of gender applies in the nationality laws regulating acquisition, conferral and retention of nationality upon marriage. States should introduce greater gender equality in the enjoyment of nationality laws – this measure can serve the purpose of not only lowering the risk of future statelessness, but also resolve existing cases of statelessness through retroactive application of the law.<sup>52</sup>

#### 5.3.1 Action Plan 3 and Action Plan 4 of the Global Action Plan

In order to achieve these actions, all stakeholders need to get involved with effectively implementing change. To ensure that obligations are met at an international level, CEDAW's provisions can be utilised. Article 2 of CEDAW is the general undertaking Article that applies with rights recognised in, *inter alia*, Article 9 of the Convention. The Article essentially requires that States ensure they meet their obligations in treating women fairly in all legal provisions and practices.<sup>53</sup> States are obligated to identify and eliminate all forms of discrimination against women which requires understanding perceptions of women in all walks of life and how they perceive laws, policies and practices as discriminatory.<sup>54</sup>

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<sup>50</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 4.

<sup>51</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 6. See Global Campaign for Equal Nationality Rights 'The Problem' available at <http://equalnationalityrights.org/the-issue/the-problem> (accessed 5 July 2018).

<sup>52</sup> UNHCR *Meeting Report: Regional Expert Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa* (2010) 15-16.

<sup>53</sup> Cook RJ (1994) 230-231.

<sup>54</sup> Cook RJ (1994) 241.

It is recommended that States who still practice gender discriminatory nationality laws implement programmatic reforms. Programmatic reforms are changes involving policy or programme development that may assist in arranging a procedural plan for developing substantive goals such as eradicating gender discriminatory laws which create statelessness.<sup>55</sup> To achieve this and to ensure impartiality and non-discrimination, the following is recommended.

### **5.3.2 Eradicating gender-discriminatory nationality laws**

A State should develop a constitution that clearly provides for the principles of equality, non-discrimination, the equality of all citizens regardless of how they acquired their nationality, and the notion that no citizen shall be arbitrarily deprived of her nationality.<sup>56</sup> Whenever any law or legal practice is introduced, it is imperative to bear in mind that transparency is a key concept of the rule of law. A clear presentation of the platform on which the specific laws are founded on can help avoid significant confusion, frivolous cases, and hardships for individuals who may have an entitlement under that law.

As many nationality laws do not specifically refer to gender, but, rather, to a spouse or to a parent, there can be a tendency in practice for those administering the law to provide their own interpretation of the provisions based on the former tradition or biases, with one approach adopted for women and an alternate approach for men. One way to avoid these problems is to include a chapter with general information on principles which underlie all provisions of the law and with regard to which all provisions must be understood and applied.<sup>57</sup>

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<sup>55</sup> Banks AM (2009) 808.

<sup>56</sup> Batchelor CA (2004) 18-19.

<sup>57</sup> Batchelor CA (2004) 20.

It is not enough that the law is reformed only; its successful implementation is dependent on the consistent monitoring and review from the authorities tasked with overseeing it.<sup>58</sup> Another important component of eradicating discrimination in nationality laws is ensuring that its implications are understood. Therefore, governments may wish to work with civil societies, including women's organisations, human rights organisations and the media in order to raise awareness with stakeholders and the public on the significant and social costs of discrimination.<sup>59</sup> The potential benefits of reform for those affected persons, their families as well as the countries at large, need to be explained to the citizenry.<sup>60</sup> A concerted effort should be made to educate and raise awareness that target men and women at all levels of society.<sup>61</sup>

The successful implementation of reformed laws further requires that those who are tasked with its mandate have the necessary insight. States should therefore conduct gender-sensitive training of public officials, including judges and local leaders.<sup>62</sup> However, it is impractical to expect effective change when the problem is considered from a male perspective. It is thus a strong recommendation that when States enforce reform, they involve a majority of women who have been impacted by the discriminatory laws, and who has the necessary knowledge in the field, in decision-making positions and political bodies.<sup>63</sup>

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When this is achieved the most important consideration for States to consistently monitor is that there is effective implementation of laws after it has been introduced into legislation. This requires awareness raising and capacity-building of duty-bearers as well as right-

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<sup>58</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 9.

<sup>59</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 11.

<sup>60</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 11.

<sup>61</sup> Banks AM (2009) 808.

<sup>62</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 14.

<sup>63</sup> Banks AM (2009) 813.

holders.<sup>64</sup> A combined effort should be made to eliminate practical and administrative obstacles for women to exercise their rights under the reformed laws.<sup>65</sup> States should further provide access to justice and effective remedies in cases of violations subsequent to the enactment of the reformed laws.<sup>66</sup> When a gender-bias nationality law is reformed and effectively implemented, and a problem arises, a survivor of such discrimination should have a right to access another avenue to seek legal recourse.

### **5.3.3 Assessing a grievance of gender discriminatory nationality law that has caused statelessness**

It has been a rule of law that the process of dealing with a human rights violation has various levels of authority. Before a domestic grievance can be heard at an international level, local remedies must usually be exhausted.<sup>67</sup> However, a stateless person might not always get the help of the local authorities. In order to assist with effectively implementing this, Article 24 of CEDAW affords States the preference to adopt methods that suit the political traditions, constitutional conventions and peculiarities of their legal and political orders for the purpose of moving towards achievement of the equality goals of CEDAW.<sup>68</sup> It is therefore possible for States to create a local body that deals with gender discriminatory nationality laws which cause statelessness in such a manner that the reform of law can still take place in a participatory manner ensuring that the women's rights become an essential factor to the States understanding of legal progression.

Several States have taken the step to constitute a Nationality Commission, an advisory body responsible for developing expertise in this field, which can provide perspectives to

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<sup>64</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 2.

<sup>65</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 2.

<sup>66</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 2.

<sup>67</sup> Cook RJ (1994) 244.

<sup>68</sup> Cook RJ (1994) 247.



responsible government agencies.<sup>69</sup> Such a body would have the authority to explain provisions of the law and, develop internally and externally with other States in order to promote an effective application of the law.<sup>70</sup>

In order to develop a successful and accessible complaints procedure, there has to be structural reforms. This could be in the form of changes to State institutions such as administrative agencies, government ministries, or the judiciary.<sup>71</sup> When the highest level of authority is seen to not only respect and understand the scope of the problem but to also actively work towards combating it, the result is that the reform will be welcomed and the stigma and penalties attached to it will inevitably be eradicated.<sup>72</sup>

### 5.3 CONCLUSION

This thesis has looked at what the factors are that contribute to the growth of statelessness. Nationality has been considered a political decision to be made by States, while statelessness has been introduced as a failure of international law's failure to implement guidelines for States in their enactment of nationality laws. One prime reason for statelessness has been the persistence of gender-based discriminatory nationality laws. It is for this very reason that the concluding of this thesis has provided insight on how statelessness can effectively be dealt with if the Action Plans are separated into procedural and substantive guidelines. This takes into consideration the gender discrimination and how it should be procedurally handled.

Statelessness has been causing an influx of human rights violations. It is a problem that need to be attacked from the core. It is inconceivable that we continue calling ourselves a human race while excluding a populace of humans and categorising them as 'illegal humans' only because they have no nationality.

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<sup>69</sup> Batchelor CA (2004) 22.

<sup>70</sup> Batchelor CA (2004) 22.

<sup>71</sup> Banks AM (2009) 808.

<sup>72</sup> UNHCR *Background Note: Expert Workshop on the best practices to promote women's equal nationality rights in law and in practice* (2017) 14.

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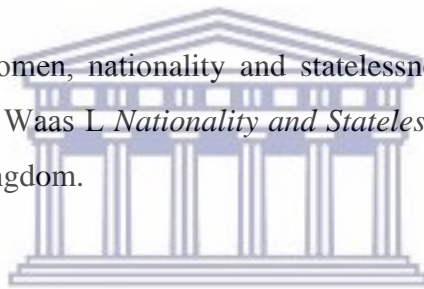
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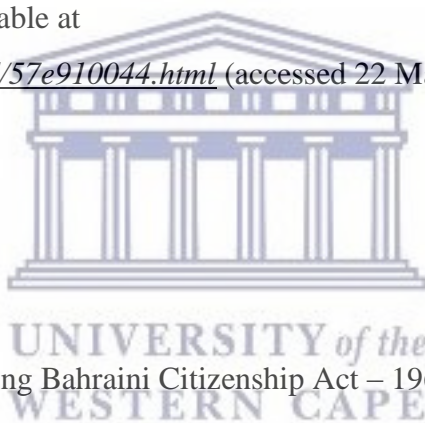
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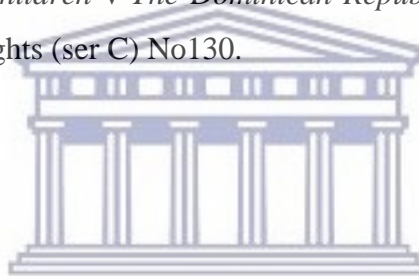
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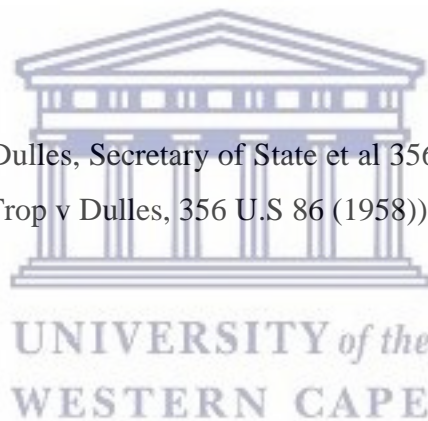
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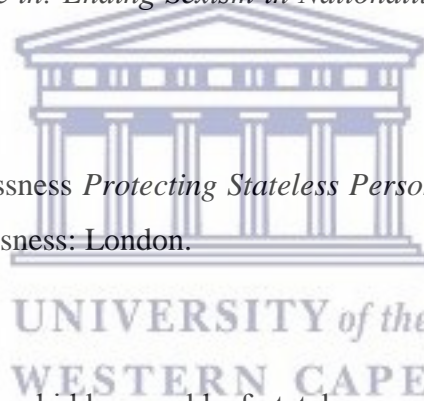
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