

**ERADICATING STATELESSNESS: UNIVERSAL BIRTH REGISTRATION AS A
MEANS OF REALISING THE RIGHT TO NAME AND NATIONALITY IN ZAMBIA**

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ABSTRACT

Zambia has one of the lowest birth registration rates in the world. Most children rarely have their births officially recorded. Lack of birth registration negatively impacts children. This research seeks to critically scrutinise the efficacy of Zambia's legal framework concerning statelessness, birth registration, the right to name, identity and acquisition of nationality. The research determines that Zambia's legal framework does not protect stateless persons. Neither does it provide for the right to nationality, nor address the problem of statelessness. The research highlights gaps in the Zambian legal system, which falls short of recognising the existence of stateless persons. The laws on birth registration are restricted and only applicable to Zambians by birth, descent, registration and those adopted. Despite Zambia having ratified several international conventions protecting stateless persons, majority of them have never been incorporated into the national legal system. Thus, the right of a child to nationality, identity, birth registration as provided by the UNCRC cannot be effectively realised by most children in Zambia. The research concludes by providing recommendations such as legal reforms to include specific provisions to facilitate the identification, prevention and protection of stateless persons in Zambia. Ratification and domestication of specific key conventions intended to curb statelessness.

LIST OF ACRONYMS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and People's Rights
AU	African Union
BDRA	Births and Deaths Registration Act
CEDAW	Convention on Elimination of all Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	United Nations Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRCCP	Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure
CRPD	Convention on the Rights of Persons with Disabilities
GC	General Comment
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRM	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
INRIS	Integrated National Registration and Information System
NGO	Non-Governmental Organisation
NRC	National Registration Card
PCIJ	Permanent Court of International Justice
SDGs	United Nations Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
ZDHS	Zambia Demographic Health Survey

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CHAPTER ONE: INTRODUCING THE PROBLEM

1.1 INTRODUCTION

This research aims to critically analyse the efficacy of Zambia’s legal framework relating to birth registration, right to name, identity and acquisition of nationality. It seeks to identify the gaps in the law, to ascertain how best to enhance birth registration implementation countrywide. This is imperative to eradicate and prevent statelessness. There is a direct connection between birth registration, the rights to name and nationality.¹ The right to nationality has been described as an enabling right, meaning that, acquiring the right enables the child to enjoy other rights enshrined in the United Nations Convention on the Rights of the Child (CRC).² A case study analysis of the legal framework relating to birth registration, rights to name and nationality in Zambia is adopted for the purpose of establishing the best practices of how Zambia can attain universal birth registration. It is essential to ensure every child’s right to birth registration is implemented. Zambia signed the CRC on the 30th of September 1990 and ratified it on 6th December 1991.³ This implies Zambia is obliged to implement the CRC provisions into its national legal system. This chapter provides an overview of the research. It considers the background to the study, the statement of the problem, research aims, objectives and questions. The chapter further addresses the significance of the study, literature review, research methodology, the scope and the structure of the study. To establish context for the study, the next section considers the background.

1.2 Background

On 30th April 2024, the Constitutional Court of Zambia, in Lusaka, Zambia, dismissed an application in the case, *Hastie Sibanda v the Attorney General* in which the applicant sought interpretation of the constitutional provisions on citizenship as addressed in the Constitution of the Republic of Zambia.⁴ The applicant sought determination of two questions: whether the origin of a person’s name, language and tribe is an issue to be established when acquiring citizenship; and whether registration of overseas settlements,

¹ MJR Vela ‘An interview with Benyam Mezmur’ (2017) in “The World’s Stateless: Children”. Institute for Statelessness and Inclusion. 131.

² *Ibid*, United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC).

³ UNCRC <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en>

⁴ *Hastie Sibanda v the Attorney General* 2023/CCZ/002 (*Hastie Sibanda*), Constitution of Zambia Chapter 1 as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (Constitution of Zambia), articles 34, 35(1), 36, 37 (1) a, b & c.

districts and countries on the National Registration Card (NRC) of Zambian citizens based on the origins of the citizen's name, language and tribe was compatible with the Constitution.⁵

The Constitutional Court dismissed the application on the grounds of jurisdiction.⁶ The Court argued that its jurisdiction was restricted to addressing constitutional questions that could be determined by the interpretation of the Constitution alone and not legislation or regulations.⁷ The reasoning for dismissing the application was that in the instance case, the factual basis of the arguments raised by the applicant were based on the Citizenship Act and the National Registration Act and not the Constitution.⁸ Article 128(1) (a) of the Constitution provides that the Constitutional Court is vested with original and final jurisdiction to consider matters concerning the interpretation of the Constitution. Thus, the Constitutional Court did not consider the matter substantively. This is because it was impossible to address the issues raised adequately without referring to legislation and regulations.

Consequently, this research seeks to address the issues raised by the *Hastie Sibanda* case within the context of statelessness, access to birth registration, rights to name, identity and citizenship or nationality. It seeks to critically analyse the efficacy of the existing laws and policies to assess Zambia's compliancy with its international obligations. Therefore, the research intends to take a step further from where the Constitutional Court left off, by addressing, clarifying and developing the law on matters relating to birth registration, rights to name, citizenship or nationality within the Zambian context.

Zambia recently submitted its period reports to the Committee on the Rights of the Child (CRC Committee), in its endeavour to provide an overview on the progress made towards the implementation of the CRC.⁹ The CRC Committee, in its previous concluding observations, urged Zambia, to reinforce its efforts to eradicate discrimination against children in marginalised and deprived situations, including girls, children that live in rural

⁵ *Hastie Sibanda* para 1 & 2.

⁶ *Ibid* para. 27, 31, 32, 33.

⁷ *Ibid* para. 26.

⁸ *Ibid* para 27.

⁹ CRC/C/ZMB/5-7 Combined fifth to seventh periodic reports submitted by Zambia under article 44 of the Convention June 2021.

areas, children born at home, refugee children, children without legal identity, migrant and unaccompanied children.¹⁰ With regards to birth registration and nationality in accordance with CRC articles 7, 8, 13-17 on civil rights and freedoms, the Committee commended Zambia on the progress it had made so far in extending the birth certification to the ten provincial headquarters, that is registration of births in hospitals; the development of the new birth registration under the Integrated National Registration and Information System (INRIS).¹¹

However, despite these developments, Zambia is far from attaining universal birth registration. For instance, according to Zambia's latest reports, the Zambia Demographic Health Survey (ZDHS) birth registration for children below the age of five increased from 11% to 14% between 2013/2014 and 2018/2019.¹² Clearly, birth registration in Zambia is generally unsystematic. Most children and adults have never had their birth registered, neither do they have birth certificates. The CRC committee raised concerns about the fact that children born at home, refugee children, may be omitted from the birth registration exercise.¹³ On this basis, the CRC Committee recommended that Zambia strengthen its efforts to develop and implement free birth registration procedures and issuance of birth registration especially for children in rural areas and marginalised groups such as refugee children.¹⁴ Other measures that were recommended include: decentralisation of the birth registration system, the need to increase birth registration, public understanding about the significance of birth registration, sufficient personnel and resources.¹⁵ The concerns raised by the CRC Committee have recently been reaffirmed in the United Nations Children's Fund (UNICEF) 2024 Report.¹⁶ Despite a global surge in birth registration rates, in Zambia, 86 per cent of children's births are unregistered.¹⁷ The report highlights the following key issues, that birth registration rate of children under five remains at 14 per cent, making it

¹⁰ CRC/C/ZMB/CO/2-4 Concluding observations on the combined second to fourth periodic reports of Zambia, March 2016, para 26, CRC/C/ZMB/CO/5-7 Concluding observations on the combined fifth to seventh periodic reports of Zambia, June 2022, para. 18 (a).

¹¹ CRC/C/ZMB/CO/5-7 para. 21(d).

¹² *Ibid* para 58.

¹³ CRC/C/ZMB/CO/2-4, para 31.

¹⁴ *Ibid* 32 a-b.

¹⁵ *Ibid* 32 c-d.

¹⁶ UNICEF 'The right starts in life global levels and trends in birth registration' (2024)

<<https://www.unicef.org/zambia/press-releases/birth-registration-steadily-increases-worldwide-yet-86-children-zambia-still-lack>>

¹⁷ *Ibid*.

*one of the world's lowest, only 6 per cent of children [in Zambia] have birth certificates.*¹⁸ The implication is that, majority of children under the age of five *lack official identity or legal documentation*, hence remain *unrecognised and invisible* to the State.¹⁹ According to UNICEF Executive Director, Catherine Russell:

Birth registration ensures children are immediately recognised under the law, providing an identity and foundation for protection from harm and exploitation, as well as access to essential services like vaccines, healthcare, and education. As UNICEF marks 78 years of championing children's rights today, we celebrate the progress made for millions of children in gaining their legal identity, while calling for stronger efforts to ensure that every child, everywhere, is registered at birth.²⁰

This implies that it is imperative to ensure Zambia improves the rate of birth registration and provision of birth certificates for children under the age of 5. In accordance with section 16.9 of the United Nations Sustainable Development Goals (UNSDGs) targets, Zambia is expected to commence the implementation of the Integrated National Registration Information System (INRIS).²¹ This is a centralised digitalised management system for the national and civil registration, the purpose is for the state to provide biometric-enabled National Registration Cards (NRCs), issuance of birth and death certificates by the Ministry of Home Affairs and Security, through the Department of National Registration, Passport and Citizenship.²² The plan is to connect the system with smart care information management system at the Ministry of Health.²³ Other expectations include provision of health facility registration desk country wide, availability of necessary resources such as birth notification forms, digitalisation of the birth notification system at health services for the purpose of merging the birth notification for health and civil purposes.²⁴ Zambia was also urged to consider ratifying the Convention on the Reduction of Statelessness of 1961 and to amend the law for the purposes of ensuring the problem of statelessness is averted and addressed.²⁵

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ CRC/C/ZMB/CO/5-7 para. 21 (a).

²² J Mwiimbu Ministerial Statement issued by Home Affairs and Internal Security, On the Implementation of the Integrated National Registration Information System 10 March 2022 <
https://www.parliament.gov.zm/sites/default/files/images/publication_docs/INRIS%20IMPLEMENTATION%20-%20Mr%20Mwiimbu.pdf>

²³ CRC/C/ZMB/CO/5-7 para. 21 (a).

²⁴ *Ibid* para. 21 (b).

²⁵ *Ibid* para. 21(d).

The 2016 Constitutional amendments incorporate some progressive provisions on non-discrimination.²⁶ For instance, article 8 (a) of the Constitution recognises non-discrimination as a national value and principle. Article 9 provides that ‘the national values and principles apply to the interpretation of the Constitution, enactment and interpretation of law, development and implementation of state policy.’²⁷ This implies that legislation, policies and judicial decisions relating to birth registration, access to the rights of a name and nationality, must comply with the principle of non-discrimination. Article 35 (2) of the Constitution provides that ‘A child found in Zambia who is, or appears to be, of not more than eight years of age and whose nationality and parents are not known, shall be presumed to be a citizen by birth.’²⁸ Foundling refers to children found on the territory of a state whose parents are unidentified.²⁹ This provision is restricted to children not more than eight years, which implies that children above the age of eight are not protected by the law. This is contrary to the CRC definition of the child, which defines a child as every human being below the age of eighteen.³⁰ The constitutional provision is thus discriminatory as it disregards children aged eight and above.

Similarly, article 266 of the Constitution of Zambia provides that a child is any person aged eighteen years or below. Article 35(2) is therefore discriminatory because the Constitution defines discrimination as ‘directly or indirectly treating a person differently on the basis of that person’s birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health or marital, ethnic, social or economic status.’³¹ The obligation to extend and accord nationality to foundling was also recognised in the Convention on Conflicts of Nationality Laws (1930).³² It specifically refers to children who are stateless and those whose parents are unknown. That set aside, the Constitution does provide for some progressive provisions such as article 38, which states that ‘A child who is not a citizen and who is adopted by a citizen shall be a citizen on the date of the

²⁶ Constitution of Zambia.

²⁷ *Ibid* article 9(1).

²⁸ *Ibid* article 35(2).

²⁹ Convention on the Reduction of Statelessness adopted 30th August 1961, entered into force on 13 December 1975, (1961 Convention on Statelessness) art 2.

³⁰ CRC article 1.

³¹ Constitution of Zambia, art 266.

³² Convention on Certain Questions Relating to the Conflict of Nationality Laws Apr. 12, 1930, 179 L.N.T.S. 89 (Convention on Conflicts of Nationality) arts 1, 14 – 15.

adoption.³³ Zambia is obliged to eliminate discrimination prevalent in its laws and policies in accordance with the Constitution and its international obligations.

A study conducted by Manby has highlighted that most citizenship laws in Africa are not inclusive enough to integrate all persons affected consequently majority of people are at risk of statelessness.³⁴ In addition, the majority of states lack the means of ascertaining the number of stateless persons within their territories due to lack of measures intended to monitor such statistics.³⁵ Accordingly, stateless persons are vulnerable and they lack capacity to participate in other essential activities such as voting, education, capacity to own property, access to employment in public services, lack of protection as they are always at risk of being abused.³⁶ The study concludes that few African states make provision for the right to nationality contrary to international conventions and instruments.³⁷ Neither have efforts being made to address the problem of statelessness.³⁸ Consequently, stateless persons are not protected nor considered by most African legal systems, lack of existence of measures that allows for the identification of stateless persons within a territory, lack of detailed procedures to enable stateless persons acquire access to nationality, existence of ‘excessive executive discretion’ in terms of decision of granting recognition of nationality or not.³⁹ The lack of approved procedures thus allows for the possibilities of individuals to exercise discretion.⁴⁰ Manby contends that such an approach is dangerous as it risks resulting in individuals making arbitrary decisions that could if effected result in violating individuals’ fundamental rights and freedoms due to informality and inconsistency in terms of how nationality ought to be granted.⁴¹

Low rates of civil registration, existence of discriminatory laws is among the reasons provided for the absence of provisions of nationality laws in most African states.⁴² However, despite the existing gaps in the national legal systems of majority of African states, international law addresses the concepts of statelessness, universal birth registration,

³³ Constitution of Zambia.

³⁴ B Manby *Citizenship Law in Africa* 3rd edition (2016) 1.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Manby (note 32 above) 2.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

legal identity and the rights to name and nationality. An overview of the Conventions and instruments is provided below.

Article 15 of the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly, provides: ‘everyone a right to a nationality.’⁴³ Article 15(2) provides that ‘No one shall be arbitrary deprived of a nationality nor denied the right to change a nationality.’⁴⁴ Apart from the UDHR, the rights to nationality and identity have been integrated in several instruments thus reaffirming its importance as a human right.⁴⁵ Similarly, legal identity as a human right is established and guaranteed by major human rights instruments such as the UDHR,⁴⁶ and the ICCPR.⁴⁷ Article 16 of the ICCPR provides that ‘everyone shall have the right to recognition everywhere as a person before the law.’ This implies that every person is entitled to a legal identity by virtue of being human. At the regional level, the African Charter on Human and Peoples’ Rights (Banjul Charter) provides that human rights are sacrosanct.⁴⁸ The Banjul Charter describes the family as a ‘natural unit’ and the ‘basis of society.’⁴⁹ The state is accorded the onus to assist the family and to eradicate every discrimination against women and children.⁵⁰ Thus, the family is perceived as an important entity of the continent. The African Charter on the Rights and Welfare of the Child (ACRWC) guarantees every child a name, registration after birth, and nationality.⁵¹ Accordingly,

⁴³ Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 (10 December 1948) (UDHR) art 15(1).

⁴⁴ UDHR art 15(2).

⁴⁵ Conflict of Nationality (note 30 above), art 1, Protocol Relating to a Certain Case of Statelessness Apr. 12, 1930, 179 L.N.T.S art. 1; U.N. Secretary-General, Human Rights and Arbitrary Deprivation of Nationality, 27, U.N. Doc. A/HRC/25/28 (Dec. 19, 2013) 2, art. 2, International Convention on the Elimination of All Forms of Racial Discrimination Dec. 21, 1965, 660 U.N.T.S. 195,(CERD), art 5 (d) iii, International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 A (XXI) (ICCPR) arts 12(4) & 23 (4), Convention on the Elimination of Discrimination against Women U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW) art 9, CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, (1994) art. 9, Convention on the Nationality of Married Women Aug. 11, 1958, 309 U.N.T.S. 65, arts 1-3, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3, (ICRM), art. 29, Convention on the Rights of Persons with Disability adopted 12 Dec 2006 UNGA Res/6/10, (CRPD), art 18, CRC arts 7, 8.

⁴⁶ UDHR art 6.

⁴⁷ ICCPR art 16.

⁴⁸ African Charter on Human and Peoples’ Rights (Banjul Charter), (adopted June 27, 1981, OAU DOC. CAB/LEG/67/3rev. 5,211.L.M 58 (1982), art 4.

⁴⁹ Banjul Charter art 18(1).

⁵⁰ *Ibid* arts 18(1) & 18(3).

⁵¹ African Charter on the Rights and Welfare of the Child adopted 11 July 1990, OAU Doc CAB/LEG/24.9/49) entered into force 29 November 1999 (ACRWC), art 6.

Every child shall have the right from his birth to a name. Every child shall be registered immediately after birth. Every child has the right to acquire a nationality. State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth is not granted nationality by any other State in accordance with its laws.⁵²

Hence, article 6 of the ACRWC clearly provides that every child is entitled to a name, birth registration without delay, and a right to attain nationality. States parties are obliged to ensure national laws recognise the principles that enable the child to acquire nationality in the country of birth if no other state is able to grant the child nationality.⁵³ The importance of granting the child nationality is recognised by the General Comment on Article 6, that the rights of the child are interdependent and indivisible.⁵⁴ More recently, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights Relating to the specific aspects of the Right to a nationality and the eradication of statelessness in Africa (African Protocol on Statelessness).⁵⁵ Though the Protocol has not yet come into force due to its recent adoption, its approval signifies the importance of the right to nationality or citizenship and the need for African states to eradicate the problem of statelessness.

Citizenship or nationality is a fundamental qualification for effective enjoyment of human rights of any person.⁵⁶ The terms citizenship and nationality are used interchangeably throughout this research to refer to the legal connection between an individual and the state. The terms refer to circumstances in which a state acknowledges its obligations to protect the individual as well as to safeguard the individual's rights and freedoms.⁵⁷ Individuals in return owe allegiance to the state or states whose nationalities they hold. The International Court of Justice (ICJ) in the 1955 *Nottebohm* decision defined nationality as follows: '[a] ccording to the

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ General Comment No 2 on article 6 of the ACRWC the rights to a name, registration at birth and to acquire a nationality ACERWC/GC/02/2014 adopted by the Committee at its twenty-third Ordinary Session (07 -16 April 2014).

⁵⁵ Protocol to the African Charter on Human and Peoples' Rights relating to the Specific aspects of the Right to Nationality and the Eradication of Statelessness in Africa adopted by the Assembly at the Thirty- Seventh Ordinary Session on 18 February 2024, Addis Ababa, Ethiopia (African Protocol on Statelessness) < <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-relating-specific-aspects-right>> The Protocol is considered in depth in Chapter 3 of this Dissertation.

⁵⁶ Committee on the Elimination of all forms of Discrimination against women 'General Recommendation No 32 on the Gender Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women.' Committee EDAW UN DOC. CEDAW/C/GC/32 para 51.

⁵⁷ Manby (note 32 above) ix.

practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.’⁵⁸

This is in a case in which Liechtenstein requested a ruling from the ICJ, seeking to compel Guatemala to recognise Friedrich Nottebohm as a Liechtenstein national. Though the definition raises several issues in international law, this research adopts a human rights approach to the concept of statelessness, nationality, identity and birth registration as rights which states are obliged to recognise and accord to individuals within their territories. The premise of the research is that birth registration is directly linked to identity (name) and nationality. Consequently, denying the child the right to name and nationality could lead to further violations of other rights as provided in CRC, and the ACRWC, such as the right to protection, education, movement and social security, among others.

Though it is imperative to note that the terms citizenship and nationality have been used differently within the commonwealth states, whilst citizenship refers to rights and duties, nationality is popularly adopted in civil countries.⁵⁹ Statelessness is a concept that is often not extensively considered in Africa.⁶⁰ Though the continent can be linked to challenges associated with statelessness such as forced displacement, internal armed conflict, international armed conflict, state failure and national disasters.⁶¹ Statelessness refers to any ‘person who is not considered as a national by any state in the operation of its law.’⁶² This definition is considered part of customary international law.⁶³ In the Advisory Opinion on *the Nationality Decrees issued in Tunis and Morocco* in 1923, the Permanent Court of International Justice (PCIJ) held that questions of nationality were within the reserved domain of countries.⁶⁴ This implies that determinations of whether a person is regarded as a national by the state under the setup of its laws involves a careful scrutiny of how a state employs its domestic laws.

⁵⁸ *Liechtenstein v. Guatemala* ICJ Reports, 1955, p. 23, C A Batchelor ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10 *International Journal of Refugee Law* 159–160.

⁵⁹ Manby (note 32 above) ix.

⁶⁰ A Hale and F M’Cormack-Hale ‘Statelessness, nationality and citizenship in Sierra Leone’ (2018) 35(2) *Journal of Global South Studies* 311.

⁶¹ *Ibid.*

⁶² Convention Relating to the Status of Stateless Persons (adopted 28 September 1954 entered into force 6 June 1960) 189 UNTS 117 (1954 Convention on Stateless Persons) art. 1.

⁶³ International Law Commission (ILC), Draft Articles on Diplomatic Protection with Commentaries, as contained in ‘Report of the ILC: fifty-Eighth session’ UN doc A/61/10, 1 Octo 2006, 48 -49

⁶⁴ *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Series B No. 4.

However, international instruments generally prohibit discrimination against the right to nationality. For instance, the CRC not only addresses issues pertaining to rights to name and nationality but also recognises non-discrimination as a fundamental principle of the CRC.⁶⁵ Articles 9 and 16 of CEDAW provides for equality in the application of nationality laws to both women and men. The ICRPD imposes an obligation on states to recognise the right to nationality of persons with disabilities on an equal basis with other persons.⁶⁶ Similarly, CERD provides that the right to nationality must be accorded to every person regardless of race, colour, nationality and ethnic origin.⁶⁷ The CERD further prohibits certain forms of discrimination particularly, ‘distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens, legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any nationality.’⁶⁸

Thus, discrimination within the context of nationality laws and procedures is generally prohibited by international human rights conventions.⁶⁹ This is further affirmed with the adoption of the 2005 General Recommendation on discrimination against non-citizens, by the UN Committee on the Elimination of Racial Discrimination, which provides for responsibilities of States in terms of access to nationality.⁷⁰ The General Recommendation particularly refers to specific obligations of states’ parties in terms of access to citizenship. These can be summarised as follows: non-citizens must not be discriminated against in terms of access to nationality or naturalisation,⁷¹ states parties are obliged to address any prevailing hurdles to naturalisation for permanent or long-term inhabitants.⁷² States parties must acknowledge that the denial of nationality on the basis of ‘race, colour, descent or national ethnic origin’ is contrary to the Convention’s obligation to uphold the principle of non-discrimination in terms of the enjoyment of the right to citizenship.⁷³ Additionally, States parties must recognise that instances of deprivation of citizenship are detrimental in the realisation of ‘access to employment and social benefits’ contrary to the non- discrimination

⁶⁵ CRC arts 7, 8, 2, 3, 6 and 12.

⁶⁶ CRPD art 18.

⁶⁷ CERD art 5.

⁶⁸ *Ibid* arts 1(1) and (1)(2).

⁶⁹ Manby (note 32 above) 24.

⁷⁰ Committee on the Elimination Racial Discrimination General Recommendation No 30 Discrimination against Non-Citizens (64th Session 23 Feb – 12 March 2004) CERD/C/64? MISC.II rev.3. paras 1, 3 , 4.

⁷¹ *Ibid* para 13.

⁷² *Ibid*.

⁷³ *Ibid* para 14.

principle as guaranteed in the convention.⁷⁴ Other obligations include the need to diminish statelessness among children by supporting parents or guardians by urging them to make applications for nationality on their behalf, to permit both parents to transfer their nationality to children,⁷⁵ and finally, to legalise the status of formerly foreign nationals that live within the territory of the state party.⁷⁶

The international legal framework for statelessness is provided by the 1954 Convention on Stateless Persons,⁷⁷ and the Convention on the Reduction of Statelessness 1961 (1961 Convention Stateless Persons).⁷⁸ While Zambia is a party to the 1954 Convention, it is not a state party to the 1961 Convention on Statelessness. The United Nations High Commissioner for Refugees (UNHCR) has clarified that matters of whether a person is regarded as a national of a state under the operation of its law involves a comprehensive analysis of how the State applies its nationality laws on a case-by-case basis.⁷⁹ For this reason, part of this research will involve scrutinising the Zambian legal framework underlying acquisition of nationality.

1.3 Statement of the Problem

The number of stateless persons in Zambia is unknown.⁸⁰ Zambia has a low rate of birth registration, that is between 14 and 16 per cent among children under 5 years.⁸¹ Births of vulnerable children such as girls, those in rural areas, children born outside health facilities, refugee, undocumented migrants, and unaccompanied minors are rarely recorded.⁸² This also implies that it is rare for children to have birth certificates. Lack of birth registration negatively impacts children. For instance, Stateless persons lack legal protection.⁸³ Statelessness has the potential of affecting other rights such as their ability to enjoy the rights to name and acquisition of nationality, thus affecting their right to education, identity, protection, movement, and

⁷⁴ *Ibid* para 15.

⁷⁵ *Ibid* para 16.

⁷⁶ *Ibid* para 17.

⁷⁷ 1954 Convention on Stateless Persons, arts 22 -26.

⁷⁸ 1961 Convention on Statelessness arts 1-4.

⁷⁹ UNHCR Handbook on Protection of Stateless Persons (30 June 2014) paras 23, 24 <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>

⁸⁰ CRC/C/ZMB/5-7 para 185.

⁸¹ *Ibid* para 59, UNICEF ‘The right starts in life global levels and trends in birth registration’ (2024) <<https://www.unicef.org/zambia/press-releases/birth-registration-steadily-increases-worldwide-yet-86-children-zambia-still-lack>>

⁸² CRC/C/ZMB/CO/2-4, para 26, 31, CRC/C/ZMB/CO/5-7 para. 18 (a).

⁸³ C Evans *The Right to Reparations in International law for Victims of Armed Conflict* (2012) 92- 93.

participation among others.⁸⁴ In addition, children without legal documentation are more prone to be discriminated against contrary to article 2 of the CRC. Zambia's low rate of birth registration is detrimental to the child. It is imperative for the State to adopt measures to enhance birth registration for the purpose of combating statelessness and to ensure every child enjoys the rights as guaranteed in the CRC. The failure to officially record child births could lead to a deprivation of the requisite legal documents, vital for the purposes of identification. Consequently, a child could be denied access and the capacity to enjoy the CRC rights. Other challenges are that such children are subjected to indefinite discrimination, contrary to international human rights standards.

1.4 Purpose of the Research

The purpose of this research is to critically analyse the efficacy of Zambia's legal framework relating to statelessness, birth registration, right to name and acquisition of nationality.

1.5 Objectives of the Research

The objectives of the research are as follows:

- (i) To critically analyse the legal framework governing statelessness, birth registration, the rights to name and nationality.
- (ii) To evaluate the efficacy of the national legal framework in addressing statelessness and promoting universal birth registration, rights to name and nationality for children in Zambia.
- (iii) To ascertain how international and regional human rights law can be utilised to facilitate the interpretation, reforms and the development of the law on birth registration, rights to name and nationality in Zambia.
- (iv) To identify best practices and how the Zambian legal framework could be improved to enhance the situation of the child with reference to access to universal birth registration, name or identity and eradication of statelessness in Zambia.

1.6 Research Questions

- (i) What is the legal framework governing statelessness, birth registration, rights to name and to nationality?
- (ii) How can international human rights law be utilised to inform the interpretation, reforming and development of Zambia's laws and policies?

⁸⁴ R Fortuin and S Lutchman 'The right of children born to undocumented migrants to have their best interests given paramount importance: Reimagining the South African birth registration process' 2023 *Acta Juridica* 217, 219, 222.

- (iii) How effective is the Zambian legal system in curbing statelessness?
- (iv) What are the best practices that can be adopted to eradicate statelessness and enhance birth registration in Zambia?

1.7 Significance of the Research

Arendt contended that the right to nationality is the ‘right to have rights.’⁸⁵ Similarly, the United States Court, in *Trop v Dulles*, ruled that an individual denied ‘nationality had lost the right to have rights.’⁸⁶ It is crucial for this research to be conducted to critically assess what Zambia can do to address statelessness and enhance birth registration. The rights provided in the CRC apply to all children regardless of nationality.⁸⁷ Statelessness can negatively impact children and affect their ability to access health care, education, work.⁸⁸ Stateless persons lack formal identification thus not entitled to protection, the right to vote, nor access to other social services.⁸⁹ As a result of their invisibility, stateless persons lack protection consequently are normally at risk of being subjected to all sorts of exploitation, violence or abuse.⁹⁰ Therefore, the right to a nationality also referred to as ‘the right to have rights’ as contended by Stein is an essential right.⁹¹ This research is significant as it is intended to inform policy makers, academics, politicians, legal practitioners, researchers, Non-Governmental Organisations (NGOs), United Nations Agents and other stakeholders with an interest on eradicating statelessness, on the nexus between birth registration and the rights to name and acquisition of nationality. This is essential in order to eradicate and prevent statelessness and to ensure no child is marginalised.

1.8 Literature Review

Having a nationality is a crucial requirement for the enjoyment of fundamental rights and freedoms.⁹² Nationality is defined as a ‘legal and political bond’ that connects a person to a particular state, enabling the person to acquire rights and responsibilities intrinsic in ‘membership in a political community.’⁹³ Nationality is a qualification for the realisation

⁸⁵ H Arendt *The origins of Totalitarianism* 2 ed (1958) 296.

⁸⁶ *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

⁸⁷ CRC art 2.

⁸⁸ J Stein ‘The Prevention of Child Statelessness at Birth the UNCRC Committee’s Role and Potential’ 2016 (24) *International Journal of Children’s Rights* 600.

⁸⁹ F T Temprosa ‘Statelessness as Rhetoric: The Case for Revisioning Statelessness in our Statist World (2020) 38 (2) *Berkeley Journal of International Law* 262.

⁹⁰ J Stein (note 85 above) 600.

⁹¹ *Ibid.*

⁹² W T Worster ‘The Obligation to Grant Nationality to Stateless Children under Customary International Law’ (2019) 27 (3) *Michigan State International Law Review* 452

⁹³ *Ibid.*

of certain rights such as legal identity, birth registration, rights to movement, protection, and employment, among other rights.⁹⁴ To illustrate the significance of legal identity, birth registration, universal birth registration, Manby notes that universal birth registration has been a goal for agencies that deal with child protection related issues such as UNICEF.⁹⁵

Universal birth registration refers to ‘continuous permanent, compulsory and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements.’⁹⁶ Birth registration is crucial for ensuring the well-being of children and their rights, as it stipulates confirmation of facts necessary for attainment of nationality for the child concerned.⁹⁷ Article 8 of the CRC provides for the all-embracing concept of ‘identity.’ Accordingly, the child has a right to ‘preserve his or her identity, including nationality, name and family relations as recognised by law’⁹⁸ The provision imposed an obligation on states to re-ascertain the identity of the child, in circumstances where the child is unlawfully denied some or all features of his or her identity. The CRC adopts a wide notion of identity to include a wide range of issues beyond name, nationality and family associations.⁹⁹ Manby contends quite rightly that the right of a person’s recognition before the law is different from the right to legal identity and birth registration, however the rights are closely linked and all essential for a persons’ ability to claim and assert the rights.¹⁰⁰

⁹⁴ Proposed Amendments to the *Inst. for Human Rights & Dev. in Africa (IHRDA) v. Kenya*, No. Com/002/2009, Decision, 46, 57 (African Union, Mar. 22, 2011); U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, 4, U.N.Doc. A/HRC/19/43 (Dec. 19, 2011), Human rights and arbitrary deprivation of nationality (Dec. 19, 2011)]; U.N. Secretary-General, *Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, inter alia, of the Country in Which They are Born, if They Otherwise Would be Stateless*, 3, U.N. Doc. A/HRC/31/29 (Dec. 16, 2015); African Union, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, 83, ACERWC/GC/02 (Apr.7-16, 2014).

⁹⁵ B Manby ‘The Sustainable Development Goals and ‘Legal Identity for all’: ‘First, do no harm’ 139 105343 (2021) 2.

⁹⁶ UNICEF. (2002). *Birth Registration Right from the Start* (Innocenti Digest No. 9). United Nations <<https://www.unicef-irc.org/publications/pdf/digest9e.pdf>>

⁹⁷ UNICEF. (2013). *A Passport to Protection: A guide to birth registration programming*. United Nations. <https://www.unicef.org/media/files/UNICEF_BRHandbook_Web_single_pages.pdf> UN Human Rights

Council. (2014). *Birth registration and the right of everyone to recognition everywhere as a person before the law: Report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/27/22)*. United Nations. <<http://www.ohchr.org/Documents/Issues/Children/BirthRegistration/ReportBirthRegistration.pdf>>

⁹⁸ CRC art 8.

⁹⁹ J E Doek ‘Article 8: The right to preservation of identity; Article 9: The right not to be separated from his or Her Parents’ In A Alen, J Van de Lanotte, E Verhellen, F Ang, E Berghmans & M Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) <<https://doi.org/10.1163/ej.9789004148642.i-32>>

¹⁰⁰ Manby (note 92 above) 2.

The protection of stateless persons has often been perceived as a problem for the international community.¹⁰¹ Foster and Lambert underline Goodwin-Gill's plea for the international community to refocus its responsiveness and efforts on the predicament and safeguarding of specific needs of stateless persons.¹⁰² According to Goodwin-Gill, the perceptions of many is restricted to the fact that statelessness is a 'technical problem' that can be resolved by the 'harmonisation of laws and co-ordination of rules.'¹⁰³ The main contention of Goodwin-Gill's contribution is the idea that stateless is more than just a technical problem, it is a broad human rights issue.¹⁰⁴ According to Goodwin-Gill, the international community had advanced to a high-level that has necessitated the need to reconceptualise the problem of statelessness and a transformed focus on its identification and suppression.¹⁰⁵

So far, the responsibility for establishing a link between an individual and a state is vested on the state concerned. Weiss, the leading authority on the laws on nationality and the Convention relating to the Status of Refugees 1951 (Refugee Convention) classified two aspects of nationality; that is nationality as a legal concept and nationality as a factual concept.¹⁰⁶ Weiss argues that nationality is a 'politico-legal term' symbolising 'membership of a State.'¹⁰⁷ The term nationality and citizenship accentuate two different aspects of state membership.¹⁰⁸ While nationality emphasises the international, citizenship focuses on the national.¹⁰⁹ In practice, nationality often represents an extension of citizenship in international law.¹¹⁰ The capacity of the state to issue nationality is closely linked to the concept of state sovereignty.¹¹¹ In international law, matters of nationality have long been issues that can only be dealt with by the state concerned. Thus, nationality can

¹⁰¹ M Foster and H Lambert 'Statelessness as a human rights issue: a concept whose time has come' (2016) 28 (4) *International Journal of Refugee Law* 564.

¹⁰² *Ibid.*

¹⁰³ G S Goodwin-Gill 'The rights of refugees and stateless persons' in KP Saksena (ed) *Human rights perspective and challenges in 1990 and beyond* (1994) 390.

¹⁰⁴ *Ibid.*

¹⁰⁵ M Foster and H Lambert (note 98 above) 565.

¹⁰⁶ E Fripp 'Deprivation of nationality 'the country of his nationality' in article 1A(2) of the Refugee Convention and Non -Recognition in international law' (2016) 28 *International Journal Refugee Law* 459, United Nations Convention Relating to the Status of Refugees 1951 U.N.T.S. 137 (Refugee Convention).

¹⁰⁷ P Weiss *Nationality and statelessness in international law* 2 ed (1979) 3.

¹⁰⁸ *Ibid* 5.

¹⁰⁹ *Ibid.*

¹¹⁰ Fripp (note 103 above) 461.

¹¹¹ *Ibid.*

only be determined by the national laws of a particular country. However this does not necessary prevent tribunals or national courts from raising questions about the matter.¹¹²

Nationality or citizenship described as an ‘membership to an imagined communities’ is a concept that was established by states.¹¹³ For instance, Connolly writes about how one of the oldest civilisations, the Rome, commenced as an association which was originally composed of stateless people.¹¹⁴ Similarly, Ignatieffs focuses on the ‘myth of citizenship’ which is described as a ‘noble myth’ which accordingly based on its conception is reminder that ‘citizenship is an ‘exclusionary category’ that warrants the forced rule of those incorporated over the excepted.¹¹⁵ Citizenship also referred to as nationality is thus constructed by states, meaning so is statelessness.¹¹⁶ On this basis, Noora Lori contends that since the world’s outlier inhabitants do not efficiently bring into line with the state structures, as most states have inhabitants that do not fit their invented societies, of what states should look like.¹¹⁷ Subsequently, states respond to their inhabitants in three ways: that is to ‘incorporate, expel or ignore.’¹¹⁸ The plight of those that are ignored is that they become ‘invisible in the state’s legal self -imagine.’¹¹⁹ This refers to a situation when a state has gaps in its legislation and policies to the extent that it does not consider stateless people. Such a system has no means of addressing the plight of stateless persons and offers no means finding redress within the system that does not recognise them. Such a situation results in creation of a state with only the state’s imagined inhabitants, the stateless are excluded from membership due to limitations of the legal frameworks.¹²⁰

The only way of addressing such a situation is introducing stateless determination processes to allow for states to recreate the imagined communities.¹²¹ It is states who decide on who can be a national of a particular state and who cannot be a national. Thus, the problem of

¹¹² R Jennings and A Watts *Oppenheim's International Law* 9 ed (1992) pt 1, 853 56, s 378.

¹¹³ Temprosa (note 86 above) 264.

¹¹⁴ J Connolly *The State of Speech Rhetoric and Political Thought in Ancient Rome* (2007) 87.

¹¹⁵ M Ignatieff ‘The Myth of Citizenship’ in R Bellamy & M Kennedy-Macfoy (eds) *Citizenship: Critical Concepts in Political Science* (2014) 137, 140.

¹¹⁶ Temprosa (note 86 above) 264.

¹¹⁷ N A Lori ‘Statelessness, 'In-Between' Statuses, and Precarious Citizenship’ in A Shachar et al. (eds) *The Oxford Handbook of Citizenship* (2017) 743, 748.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Temprosa (note 86 above) 264.

¹²¹ *Ibid.*

statelessness is a human creation that can be easily solved with the requisite political will and determination.

As observed by Foster and Lambert, majority of states have failed to implement and enforce the provisions of the 1954 and 1961 Conventions.¹²² They argue that the problem of statelessness exist because states' arbitrary deprivation of nationality based on racial and gender discrimination.¹²³ Hence, the problem of statelessness can easily be eradicated by states if only they could do their part, in line with the existing international legal framework for protection of stateless persons. Correspondingly, arbitrary deprivation of nationality could be the practice of failure to grant nationality or retraction of nationality arbitrary or on a discriminatory basis.¹²⁴ Foster and Lambert's paper further acknowledges that the issue of statelessness is now a human rights issue, this is because of the consequences of statelessness.¹²⁵

The consequences of the stateless status include discrimination in terms of one's ability to access human rights such as the right to work, health care, education. The violation of these rights has a potential of making persons affected vulnerable to other human rights violations such as being trafficked.¹²⁶ At times stateless persons find themselves in hopeless situations in their country of origin that, they end up having no choice but to migrate to other countries, in search for a better future.¹²⁷ Within the context of this research, it is imperative that Zambia introduces measures to ensure every birth is registered; availability of means for determining the status of stateless and provision of protection for stateless persons. One of the ways in which stateless persons can be guaranteed protection is to ensure that States have the requisite laws in place to ensure that such persons are protected. It is on this basis that this research seeks to interrogate the Zambian legal framework for birth registration and to ascertain how the problem of statelessness could be eradicated.

¹²² M Foster and H Lambert (note 98 above) 567.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ UN Human Rights Council (UNHRC), 'Resolution 20/4: The Right to a Nationality: Women and Children, UN doc A/HRC/RES/20/4, 16 July 2012.

¹²⁷ S Nonnenmacher and R Cholewinski 'The Nexus between Statelessness and Migration' in A Edwards and L van Waas (eds) *Nationality and Statelessness under International Law* (2014) 247, 249.

1.9 Methodology

The study adopts a human rights approach. Focusing on the theoretical and doctrinal approaches to human rights law, the research adopts the rights-based approach from the perspective of the child as a rights bearer. The idea that every human being is both a person and a rights holder, vested with the capacity to claim the rights against the duty bearer (state).¹²⁸ Tobin justifies the reasoning for the adoption of a rights-based approach in issues concerning children as follows: ‘[u]ltimately the fundamental aim of a rights-based approach is to transform the way in which States (and indeed all other actors that impact on the enjoyment of children's rights) perform their role by demanding that every issue is examined and responded to through a human rights lens.’¹²⁹

The human rights approach is adopted towards the analysis of the national, regional and international human rights frameworks. Recourse is also made to primary and secondary sources of law such as judicial decisions, legislation, journal articles, textbooks, policies and reports. The object is that the analysis of international, regional and national legal frameworks relating to statelessness, will contribute towards the identification of gaps and flaws in Zambia’s legal framework. This approach will facilitate the determining of recommendations that could be adopted to address the problem of enhancing the situation in Zambia.

1.10 Scope of Research

The study considers the legal framework relating to statelessness at an international, regional and national levels. The national level is restricted to Zambia. The idea is to make propositions on how best Zambia can eradicate statelessness and enhance the situation for every child on the territory of Zambia.

1.11 Structure

This dissertation comprises of five chapters, with this chapter one, which is the introduction. It provides key information relating to the research including the background,

¹²⁸ M Morel *The right not to be displaced in international law* (2014) 24, UN Special Rapporteur on the human rights of migrants, report of the special rapporteur on the human rights of migrants (special rapporteur on the rights of migrants 2016 UN Doc A/HRC/28/5 para 30.

¹²⁹ J Tobin ‘Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations’ in A Invernizzi & J Williams (eds) *The Human Rights of Children: From Visions of Implementation* (2011) 62-98, F Khan ‘Exploring Childhood Statelessness in South Africa’ (2020) 23 *Potchefstroom Electronic Law Journal* 3.

statement of the problem, purpose of the study, research objectives, questions, significance, literature review, research methodology, scope and the structure.

Chapter Two critically analyses the international legal framework governing statelessness, birth registration, the rights to name and nationality in international law. The analysis will be based on the international human rights law. The chapter will include the analysis of the concept of statelessness, the significance of birth registration, the nexus between birth registration and nationality.

Chapter Three critically analyses the African regional legal framework governing statelessness, birth registration, the rights to name and nationality. It considers the best practices, to enhance universal birth registration and eradication of statelessness in the region.

Chapter four is an evaluation of the efficacy of Zambia's national legal framework relating to statelessness, birth registration, rights to name and nationality for children in Zambia. The laws and policies will be evaluated to identify the gaps in the legal framework. The chapter will further illustrate how the inadequacies of birth registration can negatively impact children living in Zambia.

Chapter Five concludes the study. It provides recommendations on the best practices and way forward.

1.12 Conclusion

This chapter has provided key information essential for the research on the quest to eradicate statelessness in Zambia. The chapter introduces the research, by providing an overview. It provides an introduction to the research, research aim, objectives and research questions. The main objective is to to conduct a review of Zambia legal framework relating to statelessness and to ascertain how best Zambia can respond to the problem of statelessness. This is imperative for the purpose of enhancing the situation of children in Zambia.

CHAPTER TWO : THE INTERNATIONAL LEGAL FRAMEWORK GOVERNING STATELESSNESS BIRTH REGISTRATION THE RIGHT TO NATIONALITY

2.1 INTRODUCTION

This chapter critically analyses the international legal framework governing statelessness, birth registration, the rights to name (identify) and nationality in international law. The analysis is conducted based on a forward-looking approach of the child's rights perspective. The contention is that a forward-looking child's rights approach is essential to evade statelessness, such an approach entails focusing on the habitual residence of the child and not parent for purposes of granting nationality.¹ Accordingly, states are obliged to integrate 'forward looking assessments' of links and belonging in the determination matters relating to nationality and in undertaking their duties to circumvent child statelessness. This approach focuses on ensuring nationality is accorded to every child to secure the future well-being, opportunities and address potential risks and challenges that the child could face if left stateless.² The chapter begins with an evaluation of the international legal framework on statelessness. Reference is also made to examples of cases on the right to nationality to illustrate how the law has evolved. It concludes with a summary that deals with the key issues raised in the chapter and the implications to the research aims and objectives. The key arguments underlying this chapter is that international human rights law provides for a clear International legal framework governing statelessness and that the essence of granting nationality is to avoid childhood statelessness and ensure that every child is guaranteed protection by virtue of being a human being.

2.2 The International legal Framework on Statelessness, Rights to Nationality, Birth Registration

Statelessness is an old occurrence, with examples ranges from as far back as the nineteenth century.³ Though, the concept has never been defined until 1954.⁴ States established the concept of statelessness as a top-down approach perception because states are the only entities that had discretion to determine nationality.⁵ According to the UNHCR's Global Report, approximately 70,000 children born, are unable to acquire nationality.⁶ Yousafzai *et al*, argue

¹ J Bhabha 'Editorial' (2022) 4 (1) *statelessness and citizenship Review* 3.

² *Ibid.*

³ F T Temprosa 'Statelessness as Rhetoric: The Case for Revisioning Statelessness in our Statist World (2020) 38 (2) *Berkeley Journal of International Law* 249 – 250.

⁴ 1954 Stateless Convention, art. 1.

⁵ A Hale and F M'Cormack-Hale 'Statelessness, Nationality, and Citizenship in Sierra Leone' (2018) 35 *Journal of Global South Studies* 311.

⁶ UNHCR I am here I belong The Urgent need to end Childhood statelessness

<https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG15-web.pdf>

that these numbers cover up the reality that majority of children experience challenges in obtaining legal documentation for their birth thus, rendering them effectively, stateless.⁷ Also, UNICEF, argues that one out of four children below the age of 5, do not officially exist due to lack of birth registration.⁸

Lack of birth registration is recognised as a factor that has contributed to statelessness.⁹ Yousafzai *et al.*, contend that statelessness arises due to several reasons, among them is the failure to record a birth, movement from the country of birth or the denunciation of one right to citizenship ‘where the parents have a different nationality from the place of birth.’¹⁰ The UNHCR has advised states to embrace birth registration and statelessness determination processes, revise national law and observe the 1961 Convention on the Reduction of Statelessness (1961 Convention).¹¹ Worster asserts that as a result of the UNHCR’s works and efforts, it could be argued that ‘the state practice and *opinion juris* support a norm that states have an obligation to grant nationality to children born in territories when the child would otherwise be stateless.’¹² Though, it could also be argued that this obligation is already established by treaty law under the 1961 Convention.¹³

Additionally, the ICCPR and other international treaties such as the CRC provide the right to a nationality.¹⁴ However, not all states have signed and ratified the 1961 Convention. Worster contends that states that are not a party to the 1961 Convention also have an obligation to grant nationality and undertake birth registration for children that would otherwise be deemed to be stateless on the basis of customary international law.¹⁵ Such an approach will enable the children to have access to nationality and all the other benefits that come with it such as identity, right to education among other rights. However, whether there is sufficient evidence to establish state practice and *opinion juris*, it would be necessary to conduct research to ascertain this by scrutinising the state practice of states and the reasoning thereof. The reasoning for the state practice ought to be based on the existence of specific legislation under the national level

⁷ AK Yousafzai, J Lombardi, M Erum & T Hyder “Statelessness and young children’ (2022) 4(1) *Statelessness and Citizenship Review* 154.

⁸ UNICEF 'Birth Registration', <<https://data.unicef.org/topic/child-protection/birth-registration/>>.

⁹ AK Yousafzai (note 7 above) 154.

¹⁰ *ibid.*

¹¹ W T Worster ‘Customary International Law Requiring States to Grant Nationality to Stateless Children Born in their Territory’ (2022) 4 (1) *Statelessness and Citizenship Review* 114.

¹² *ibid.*

¹³ 1961 Convention on Statelessness art 1.

¹⁴ ICCPR art 24, CRC art 7.

¹⁵ Worster (note 11 above) 114.

framework, existence of declarations or statements ascertaining the practice and observance to treaties.¹⁶

The notion of nationality has been in existence even before the definition of the concept of statehood. For instance, in the quest for States to resolve challenges relating to statelessness and questions concerning nationality, in 1930, an international conference for the codification of international law was held in The Hague under the portents of the League of Nations. This occasioned the adoption of the Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws, 1930 (Convention on Conflict of Nationality Convention).¹⁷ Article 1 of the Convention of Conflict of Nationality provides:

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2

Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.

This implies that States are vested with the capacities of dealing with matters of nationality. The ideas represented in the Conflict of Nationality Convention have not transformed significantly. Article 14 of the Hague Convention states:

A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known. A foundling is, until the contrary is proved, presumed to have been born in the territory of the State in which it was found.

The Hague Convention is deemed to have made provision for what is referred to as 'one of the longest-standing norms' on the prevention of statelessness for children who are unable to secure the parents' nationality in the State where they are found, for children whose parents are unknown.¹⁸

¹⁶ *Ibid* 120.

¹⁷ Convention on Certain Questions Relating to the Conflict of Nationality Laws Apr. 12, 1930, 179 L.N.T.S. 89.

¹⁸ B Manby *Citizenship Law in Africa* 3rd edition (2016) 22.

As acknowledged by Fripp, only States have a capacity to establish a link of nationality.¹⁹ The traditional definition of a state and its elements is provided article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention), which was convened by the American States.²⁰ Accordingly, a ‘State as a person of international law should possess the following qualifications: (a) permanent population; (b) defined territory ; (c) a government and (d) capacity to enter into relations with other states.’ States are the main subject of international law. A subject of law is a ‘person’ qualified of having international rights and duties and vested with the ability to sustain rights by bringing assertions in international law.²¹ Thus, the ability of states to establish linkage between an individual and a nation is a right which historically has been restricted to states.

Over the years, international law has evolved, such as states are no longer the only actors in international law. The emergence of human rights law integrated individuals as subjects of international law. Within the context of statelessness, international human rights law guarantees everyone, including children, the right to nationality.²²

The fact that several treaties address the issue of nationality signifies its importance. It is imperative for every person to be connected to a state for the purpose of ensuring protection. Statelessness has an ability to affect the child’s rights generally and especially the rights to non-discrimination, education, protection, health, identity and the right to freedom of movement, among others.²³ It is thus imperative for every state to recognise the importance of the right to nationality. This is because as contended by Mezmur, ‘the right to acquire a nationality is an enabling right that is similar to the right to education.’²⁴ This is because access to a nationality

¹⁹ E Fripp ‘Deprivation of nationality, ‘the country of his nationality’ in article 1A(2) of the Refugee Convention, and Non -Recognition in international law’ (2016) 28 *International Journal Refugee Law* 454.

²⁰ Montevideo Convention on the Rights and Duties of States signed at Montevideo 26 December 1933 entered into force 26 December 1934 (Montevideo Convention).

²¹ J R Crawford *Brownlie’s Principles of Public International law* 8th ed (2012) 57.

²² UDHR art 15, United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (CRC) art 7, International Covenant on Civil and Political Rights opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR), art 24(3); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 7 March 1966, 660 UNTS 1 (entered into force 4 January 1969) (ICERD) art 5(d)(iii); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 1 (entered into force 3 September 1981) (CEDAW) art 9; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) (ICPRM) art 29 and Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD) art 18.

²³ BD Mezmur ‘Making their days count the 1961 Convention on the Reduction of Statelessness and the Convention on the Rights of the Child’ (2022) 4 (1) *Statelessness and Citizenship Review* 200.

²⁴ *Ibid.*

result in the capacity of the child to access other rights raised above. Thus, in the quest to address the problem of statelessness, the 1954 Convention on the Status of Stateless Persons (1954 Stateless Convention)²⁵ and the 1961 Convention on the Reduction of Statelessness (1961 Reduction of Stateless Convention)²⁶ jointly constitute the basis of the international legal framework on statelessness.²⁷ According to the ICJ, in the *Nottebohm*:²⁸ ‘Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.’ Nationality is thus regarded to be a legal status.

Following the end of the second World War, several people were stateless and exiled across Europe.²⁹ As a response to the situation, the UN Secretary General initiated a study on statelessness which was published in 1949.³⁰ Subsequently, an *Ad Hoc* Committee was established for the purpose of formulating a treaty that was intended to inhibit statelessness and to protect stateless persons.³¹ Eventually, in 1954 the Convention on the Status of Stateless Person was devised.³² In 1961, the Convention on the reduction of Statelessness was adopted in order to protect stateless persons.³³

International Law recognises that states as sovereign entities have the right to formulate their own nationality laws.³⁴ There are several reasons for childhood statelessness, such as the existence of discriminatory laws within a legal system.³⁵ Other reasons include gaps in national legislation, policies, arbitrary withdrawal of nationality and state succession.³⁶ The 1954 Stateless Convention is intended to enhance the situation for stateless persons generally, by providing for rights and a standard of treatment.³⁷ It defines a stateless person as ‘a person who

²⁵ Convention relating to the status of stateless persons (adopted 28 September 1954 entered into force 6 June 1960) 189 UNTS 117 (1954 Stateless Convention).

²⁶ Convention on the reduction of statelessness 1961 (adopted 30 August 1961) entered into force 13 December 1975) 989 UNTS 175 (1961 Stateless Convention).

²⁷ M Foster and H Lambert ‘Statelessness as a human rights issue: a concept whose time has come’ (2016) 28(4) *International Journal of Refugee Law* 566.

²⁸ *Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Reports 1955, p. 4 23.

²⁹ M Foster and H Lambert *International Refugee Law and the Protection of Stateless Persons* (2019) 25-26.

³⁰ A Study of Statelessness, UN Doc E/1112; E/1112/Add. 1 (August 1949).

³¹ UN Economic and Social Council, *A Study of Statelessness*, UN Doc E/RES/248(IX) (8 December 1949, adopted 8 August 1949) 60.

³² 1954 Stateless Convention.

³³ 1961 Stateless Convention.

³⁴ M Foster and H Lambert (note 29 above) 53.

³⁵ BD Mezmur (note 23 above) 200.

³⁶ M Foster ‘The 1961 Convention on the Reduction of Statelessness: History, Evolution and Relevance’ (2022) 4(1) *Statelessness and Citizenship Review* 189 188 -193.

³⁷ 1954 Stateless Convention arts 7(1), 12, 22, 23 & 27.

is not considered as a national by any State under the operation of its law.’³⁸ However, the Convention does not address the issue of childhood statelessness therefore it does not consider the specific needs of children. The Convention fails to recognise the importance and urgent need to address the challenges of childhood statelessness.

The issue of statelessness has not always been perceived as a serious problem by states and therefore not requiring the urgent attention of states. This could easily be attributed to the slow ratification of the 1961 Stateless Convention. For instance, during the first period the treaty was available for signature and ratification at the United Nations, it was only signed by five states, that is Dominican Republic, France, Israel, the Netherlands, the United Kingdom of Britain (United Kingdom) and Northern Ireland.³⁹ Out of the five states, the treaty was ratified by only two states, that is United Kingdom and Sweden.⁴⁰ But, since 1991, the UNHCR has attained a precise obligation to promote compliance to the 1961 Convention and matters relating to statelessness in general.⁴¹ This implies that the UNHCR has been able to sensitise and urge states that were not a party to the 1961 Convention to sign and ratify it. Subsequently, the number of ratifications to the convention has since increased to 81 states as of today.⁴²

Nevertheless, the 1961 Stateless Convention is intended to supplement the 1954 Convention, that was adopted to evade the prevalence of statelessness.⁴³ It makes provisions for guidelines relating to ‘the bestowal and ‘non-withdrawal of citizenship’ to avert statelessness.⁴⁴ In doing so, it effectively integrates article 15 of the UDHR which guarantees every person the right to a nationality.⁴⁵ The 1961 Convention imposes a positive obligation on States to grant nationality based on *jus soli* in certain situations.⁴⁶ This applies particularly to foundlings and those born on board of ships or aircrafts. Though, the Convention can be criticised for its failure to provide the individual a general right of nationality. The purpose of the Convention is merely to reduce instances of statelessness by imposing positive obligations on states to grant nationality under specific instances. The 1961 Convention does not have universal

³⁸ *Ibid* art. 1.

³⁹ United Nations '4 Convention on the Reduction of Statelessness', United Nations Treaty Collection < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5>

⁴⁰ M Khanna & M Rouweler 'Taking Stock of the Relevance and Impact of the 1961 Convention on the Reduction of Statelessness' (2022) 4 (1) *Statelessness and Citizenship Review* 194.

⁴¹ *Ibid* 195.

⁴² CRS 1961 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5

⁴³ UNHCR Introductory note 1961 Reduction of Stateless Convention para 1.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ M Foster and H Lambert (note 27 above) 567, 1961 Stateless Convention arts 1, 2, 3, 4.

ratification.⁴⁷ African states that have signed and ratified the 1961 Convention include Angola, Burkina Faso, Chad, Congo, Côte d'Ivoire, Eswatini, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Sudan, Sierra Leone, Togo and Tunisia. Zambia is not a state party to the 1961 Convention.

According to Worster, the right to nationality is interpreted as an obligation to grant nationality to those in 'stateless at birth' circumstances.⁴⁸ Despite that the 1961 Stateless Convention not having attained universal ratifications, it has had some influences on states that are not parties to it. For instance, though Uganda is not a state party to the Convention, the High Court in the decision on 18th March 2022, referred to it and Uganda's responsibility to avoid and reduce statelessness.⁴⁹ There is a general human right to nationality.⁵⁰ Several international human rights treaties guarantee the right to nationality.⁵¹ The right to nationality is further extended to children.

According to the Human Rights Committee, States are obliged to implement procedures and to cooperate with other states and agencies to guarantee all children have a nationality at birth.⁵² Yet, the 1961 Convention is silent on birth registration, a crucial feature that can play a vital role at enhancing the process of proof and acquisition of nationality.⁵³ Birth registration can contribute towards the authenticating proofs about the birth, including the identity of the

⁴⁷ Human Rights Council (HRC), *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/19/43 (19 December 2011) 3-4 [4]; HRC, *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/25/28 (19 December 2013) 12-13 [28].

⁴⁸ W T Worster (note 11 above) 120.

⁴⁹ *Hussein and Others v Attorney General* (High Court of Uganda at Kampala (Civil Division), Ssekaana Musa J, 18 March 2022) 17 arguing, inter alia, that nationality is the 'Right to have rights', '*Court Okays Petitioners of Somali Origin to Get Citizenship*', *The Independent* (2022) <<https://www.independent.co.ug/court-okays-petitioners-of-somali-origin-to-get-citizenship>>.

⁵⁰ UDHR art 15(1), ICCPR art 24(3), CRC art 7, ICERD 5(d)(iii).

⁵¹ Conference for Security Cooperation in Europe, Helsinki Document, Europe Summit, 9-10 July 1992; HRC *Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary-General*, UN Doc A/HRC/19/43 (19 December 2012) 3-4 [4].

⁵² ICCPR art 24; *Case of Expelled Dominicans and Haitians v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 282, 28 August 2014) 83[253], *Case of the Yean and Bosico Children v Dominican Republic (Judgment)* (Inter-American Court of Human Rights, Series C No 130, 8 September 2005) 57-58 [137]; *Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica (Advisory Opinion)* (Inter-American Court of Human Rights, Series A No 4, 19 January 1984) 9 [32]-[33] ('*Proposed Amendments Advisory Opinion*'); African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa and Open Society on behalf of Children of Nubian Descent in Kenya v Government of Kenya (Merits)* (Communication No Com/002/2009, 22 March 2011) 10 [46], 12-13 [57]; ACERWC, General Comment 2 on Art 6 of the African Charter on the Rights and Welfare of the Child, AU Doc ACERWC/GC/02 (2014), *Nubian Children Case* 9 [42]: 'a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth'; Human Rights Committee, Concluding Observations: Colombia, UN Doc A/52/40 (21 September 1997) 306.

⁵³ BD Mezmur (note 23 above) 201.

lineages, location and time of birth.⁵⁴ It is therefore necessary for states to ensure birth registration processes are straight forward and simplified. Birth registration should be available to every child without discrimination. While birth registration does not necessarily imply proof of nationality, it is a critical element in determining nationality.⁵⁵ The significance of birth registration in the context of statelessness and the right to nationality is considered further in the section below.

2.2.1 The significance of Birth Registration and Legal Identity

The UNHCR is vested with the mandate of supporting stateless migrants since its creation on January 1st, 1951.⁵⁶ This mandate was restricted to supporting stateless persons who were refugees.⁵⁷ In the mid 1970s, the mandate of the UNHCR was extended to incorporate individuals addressed under the 1961 Conventions.⁵⁸ This was following UNHCR's efforts to 'engage states on statelessness during the cold war' contrary to its mandate, thus states persisted unresponsiveness.⁵⁹ In December, 1995 the mandate of the UNHCR was finally expanded to cover other stateless persons generally.⁶⁰

The UN Human Rights Commission (UNHRC) in its decision of *Zhao v the Netherlands* held that the states have a duty to grant nationality to children born within its territory who would otherwise be stateless.⁶¹ This was in a matter in which the HRC interpreted article 24(3) of the ICCPR which affords 'every child the right to acquire nationality.'⁶² Netherlands had initially determined whether or not the applicant was stateless, contending that he was of an 'unknown nationality' and thus not eligible to citizenship in the Netherlands despite being born there.⁶³ The HRC concluded that the Netherlands was in breach of articles 24(3) of the ICCPR on the basis that every child has a right to acquire nationality.⁶⁴

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Introductory note to the 1954 Convention para 5.

⁵⁷ Refugee Convention.

⁵⁸ United Nations General Assembly Resolution 3274 (XXIX), 9 Dec 1974, and United Nations General Assembly Resolution 31/37, 30 Nov 1976, pursuant to articles 11 & 20 of the 1961 Convention.

⁵⁹ M Seet, 'The Origins of UNHCR's Global Mandate on Statelessness' (2016) 28 *International Journal of Refugee Law* 7, 7.

⁶⁰ UNGA resolution S0/152, 9 Feb 1996, which endorsed the UNHCR Executive Committee's (ExCom) Conclusion No 78 (XLVI) on 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons' (1995), as contained in UNHCR ExCom, 'Report of the Forty-Sixth Session of the Executive Committee of the High Commissioner's Programme', UN doc A/AC.96/860, 23 Oct 1995.

⁶¹ HRC, *Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2918/2016*, UN Doc CCPR/C/130/D/2918/2016 (20 January 2021) (*Zhao v Netherlands*).

⁶² ICCPR art 24(3).

⁶³ *Zhao v Netherlands* paragraphs 2 [2.3], 3 [2.5].

⁶⁴ *Ibid* paragraphs 7 [8.2]-[8.3].

Birth registration is a requirement for obtaining a nationality as it ascertains the connection between an individual and the country.⁶⁵ Article 7(2) of the CRC provides that a child shall be registered immediately after birth. This implies that states parties are obliged to ensure the existence of measures to allow for birth registration. States parties must ensure that the implementation of birth registration system which is free of charge and accessible to everyone.⁶⁶ The system must consider the specific circumstances of the concerned families, registration fees must be waived, availability of a wide range of modes of registration such as mobile registration offices in schools for unregistered children.⁶⁷ All births must be registered without discrimination.⁶⁸ Vulnerable children such as child with disabilities or children affected with HIV may not be excluded.⁶⁹ In order to ensure no children are excluded from accessing birth registration, the CRC committee has urged states parties to consult with communities and introduce measures to improve birth registration such as periodic birth registration sensitisation.⁷⁰ Therefore, clear guidance on how states parties could implement the rights to birth registration has been provided. It is thus left with the states to ensure the right is implemented.

Birth registration enables a person to ‘acquires an identity as a human being and a legal status as a person.’⁷¹ A lack of birth registration has a potential of negatively impacting an individual’s life resulting in ‘inequity, discrimination, marginalisation and poor health.’⁷² The details collected during birth registration can facilitate one to secure a nationality. The details are thus essential and constitutes a legal record that can contribute towards implementation of social policies and for planning purposes.⁷³ According to Brolan and Gouda, benefits of birth registration include:

Registration helps displaced individuals avoid statelessness and facilitate the acquisition of a nationality, Registration can assist unaccompanied children separated from their families be reunited, birth registration will lead to people experiencing same benefits, treatment before the

⁶⁵ J Stein ‘The Prevention of Child Statelessness at Birth the UNCRC Committee’s Role and Potential’ (2016) 24 *International Journal of Children’s Rights* 606

⁶⁶ CRC General Comment No. 7, 2005: para. 25; CRC GC No 11, 2009: para. 41.

⁶⁷ CRC General Comment No. 9, 2007: para. 36.

⁶⁸ CRC GC 7, 2005 (note 66 above) para. 25.

⁶⁹ CRC GC No. 9, 2006: para. 35.

⁷⁰ CRC GC No. 11, 2009: para. 41–43.

⁷¹ CE Brolan and H Gouda ‘Civil Registration and vital Statistics Emergencies and International Law: Understanding the Intersection’ (2017) 25(2) *Medical Law Review Year* 316.

⁷² DE Phillips and others ‘A Composite Metric for Assessing Data on Mortality and Cause of Death: The Vital Statistics Performance Index’ (2014) 12 *Population Health Metrics* 2.

⁷³ CE Brolan and H Gouda (note 71 above).

law, for instance access to education and health services, inheritance and bank services, possession of appropriate documentation can help prevent human trafficking, Registration can help prevent or counter child marriage, child labour, and/or facilitate supports for former child soldiers.⁷⁴

The right to a name and nationality is not only essential but necessary to access services such as health and education.⁷⁵ The right is implemented through an efficient universal civil registration.⁷⁶ In order for birth registration to be realised, it is imperative that the child ought to have a name. Birth registration is necessary for the realisation of the child's right to name, identity and nationality.⁷⁷ According to UNICEF, 'birth registration is the official recording of a child's birth by the State. It is a permanent and official record of a child's existence'⁷⁸ Therefore, the act of birth registration constitutes a part of civil registration system that establishes the acknowledgement of a person's existence before the law, it creates family ties and allows for the tracking of major events relating to an individual's life from birth, marriage to eventually death.⁷⁹ Hence, the State's responsibility to register every birth of the child is unquestionable as specified in international human rights instruments.⁸⁰ Birth registration is vital as it provides for proof of identity, access to economic, social and cultural rights, healthcare services, education and nationality.⁸¹

2.2. 2 The nexus between Birth Registration and Nationality

Failure to record a birth results in a lack of official birth documentation or certificate. The lack of birth registration has a direct effect on the child's ability to access fundamental rights to protection, health, education, nutrition, among others.⁸² These rights are essential as they have an impact on the development of the child.⁸³ These rights are enshrined in the CRC, which by

⁷⁴ *Ibid* 318.

⁷⁵ M Harbitz, *The Civil Registry: A Neglected Dimension of International Development and Security* (Inter-American Development Bank 2012)

<<https://publications.iadb.org/bitstream/handle/11319/5928/The%20civil%20registry%3A%20A%20neglected%20dimension%20of%20international%20development.pdf?sequence%41>>

⁷⁶ *Ibid*.

⁷⁷ CE Brolan and H Gouda (note 71 above) 321.

⁷⁸ UNICEF, 'A Passport to Protection: A Guide to Birth Registration Programming', 2013

<https://www.unicef.org/protection/files/UNICEF_Birth_Registration_Handbook.pdf>

⁷⁹ *Ibid*.

⁸⁰ CRC arts 7 & 8, ICCPR art 24, 1961 Statelessness Convention arts 1,2,3 & 4, arts 2 & 5 of the CERD, CEDAW article 9, ICPRM 1990 art.29, UNCRPD article 18, UDHR article 15(1),

⁸¹ United Nations Committee on the Rights of the Child General Comment No 7: Implementing Child Rights in Early Childhood (2005) <https://www.refworld.org/docid/460bc5a62.html> para 25 UNICEF *Every Child's Birth Right Inequities and Trends in Birth Registration* (2013) 38 <<https://www.unicef.org/documents/every-childs-birth-right>>

⁸² AK Yousafzai (note 7 above) 155.

⁸³ *Ibid*.

virtue of its existence signifies the importance and the need to take children's rights seriously.⁸⁴ The CRC is not only comprehensive in nature but recognises children as rights holders, entitled to the inherent dignity and worth.⁸⁵ It incorporates both rights and fundamental principles that are crucial to the growth and development of every child. Within the context of this research, this refers to the rights to protection, health, nutrition, education, the child's evolving capacities, development and participation.⁸⁶ The CRC recognises the rights of the child to 'acquisition and preservation of a nationality.'⁸⁷

Access to children's rights has a significant impact on the life and future of the child generally. Despite the huge statistics of children that could be rendered statelessness, yet this is still not enough attention and measures to ensure the problem is addressed.⁸⁸ It is thus imperative that states, academics, advocates, relevant professions with an interest in child welfare, address issues relating to the plight of children living in such situations. States parties to the CRC are obliged to adopt 'all appropriate legislative, administrative and other measures' for the implementation of the CRC.⁸⁹ Also, the CRC Committee's General Comment No 5, provides that, States that ratify the CRC are obliged to implement it.⁹⁰ Implementation refers to the 'realisation of all rights in the Convention for all children in [the] jurisdiction.' Therefore, Zambia is obliged to ensure the rights to birth registration, name, identity and to acquire a nationality are realised by all children within the jurisdiction. The requisite measures must be adopted by Zambia in order to address the plight of stateless children and to enhance their situation. Zambia is further obliged to respect and ensure that the child's rights enshrined in the convention, are realised by all children within its jurisdiction without discrimination.⁹¹ In accordance with GC 5, implementation of the non-discrimination principle compels Zambia to aggressively recognise individual children and groups of children who might require specific measures to facilitate the realisation of the convention rights.⁹²

⁸⁴ M Freeman *Article 3 the best interests of the child* (2007).

⁸⁵ JE Doek *The human rights of children an introduction* (2018) 11.

⁸⁶ CRC arts 6, 19, 24, 28, & 2.

⁸⁷ CRC arts 7 – 8.

⁸⁸ A Vandekerckhove and J Aarssen, 'High Time to Put the Invisible Children on the Agenda: Supporting Refugee Families and Children through Quality ECEC' (2020) 28(1) *European Early Childhood Education Research Journal* 104.

⁸⁹ CRC art. 4.

⁹⁰ CRC Committee (2003) General comment no 5 general measures of implementation of the convention on the rights of the child. UN Doc CRC/GC/2003/5 para 1 (GC5).

⁹¹ CRC art 2.

⁹² GC 5 para 12.

Furthermore, GC No 7, which focuses on implementing child rights in the early childhood, recognises that early childhood is a critical stage for the implementation of the convention rights.⁹³ The CRC Committee defined ‘early childhood’ as ‘all young children, at birth, throughout infancy; during the preschool years, as well as during the transition to school.’⁹⁴ It is the period below the age of eight.⁹⁵ Within the context of this research, early childhood is a critical stage for the child as it is a period from birth, when the child is expected to have the birth documented. It further recognises the role of parents, guardians and the state, in the development of the child.⁹⁶

The Committee not only stresses the role of parents and guardians towards supporting the development and welfare of the child, but also clearly stipulate that the State, must also render a range of services that commence from birth and throughout the life of the child.⁹⁷ This includes the right of the child to birth registration.⁹⁸ The importance of Birth registration is illustrated by its integration in the United Nations Sustainable Development Goals (SDGs) number 16.9. The SDGs provides for compulsory registration for children under 5 years.⁹⁹ It advocates for ‘legal identity for all, including birth registration.’¹⁰⁰

It is therefore imperative that Zambia has satisfactory laws and policies in place, with the capacity of ensuring universal birth registration, to circumvent situations that could lead to statelessness. The CRC Committee reiterates that the CRC must be utilised ‘holistically in early childhood,’ considering the principle of the ‘universality, indivisibility and interdependence of all human rights.’¹⁰¹ The UNHCR has made recommendations on how the problem of statelessness could be eradicated.¹⁰² Accordingly, states should have specifications in their laws that provide for the following; nationality to stateless children born within their countries, foundlings; children born to their citizens abroad, who are not able to secure an alternative nationality.¹⁰³ States must collect disaggregated data in order to effectively

⁹³ General Comment No 7 (2005): *Implementing Child Rights in Early Childhood*, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) para. 1. (GC 7)

⁹⁴ *Ibid* para. 1 & 4.

⁹⁵ GC 7 para 4.

⁹⁶ *Ibid*.

⁹⁷ GC 7 para 1,15.

⁹⁸ GC 7 para 25.

⁹⁹ B Manby ‘The Sustainable Development Goals and ‘Legal Identity for all’: ‘First, do no harm’ (2021) 139 <*World Development, Vol. 139, 2021, <https://doi.org/10.1016/j.worlddev.2020.105343>*> 3.

¹⁰⁰ ‘Sustainable Development Goal 16’, *United Nations Department of Economic and Social Affairs Sustainable Development Knowledge Platform* (2015) <<https://sustainabledevelopment.un.org/sdg16>>.

¹⁰¹ GC7 para 3.

¹⁰² UNHCR, *Global Action Plan to End Statelessness 2014-2024* (Report, 2014) 10 (UNHCR Global Plan).

¹⁰³ *Ibid* 10 – 13.

addressed the problem of statelessness. States must have knowledge about the number of stateless persons within their territories. This information must determine the budget implementation of laws to address the problem.

2.3 Best Practices on the Interpretation of the Right to nationality under the CRC

The UNCRC recently issued a decision in the case of *Mkah v Switzerland* a matter that was before it based on the individual communication procedure.¹⁰⁴ Since the adoption of the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure, (CRCCP), the UNCRC has been able to consider communications referred to as complaints asserting infringement of the CRC.¹⁰⁵ The Protocol permits individuals or groups of individuals to submit communications to the UNCRC, on condition that the alleged violating state is a party to the protocol.¹⁰⁶ The decision of *Mkah v Switzerland* involved the expulsion of a Syrian mother and her stateless 12-year-old child, who was born in the Yarmouk refugee camp in the Syrian Arab Republic (Syria) who had been expelled from Swiss Confederation (Switzerland) to the Republic of Bulgaria, where they originally requested protection but were incarcerated under inhuman demeaning circumstances.¹⁰⁷ *Mkah's* mother was Syrian, and his father was Palestinian from the Hashemite Kingdom of Jordan.¹⁰⁸ The child left in 2017 and during the journey was subjected to all sorts of inhumane treatment including detention in mixed facilities with male adults, without food, nor water.¹⁰⁹ Accordingly, they were verbally and physically abused by the authorities, they were made to sleep on the floor, and held in facilities that had inadequate sanitary amenities.¹¹⁰

Even following the granting of subsidiary protection by Bulgaria, *Mkah* and the mother were obliged to stay in an insecure congested camp with insufficient food or education for a period of eight months.¹¹¹ Eventually, they made their way to Switzerland where they intended to join family and apply for asylum. The application clearly indicated that *Mkah* was stateless.¹¹² However, Switzerland rejected the asylum application and *Mkah* and the mother were ordered

¹⁰⁴ The Views adopted by the United Nations Committee on the rights of the child under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communication No. 95/2019, UN Doc CRC/C/88/D/95/2019 (3 November 2021) (*Mkah v Switzerland*).

¹⁰⁵ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, opened for signature 19 December 2011, 2983 UNTS 131 (entered into force 14 April 2014) (CRCCP).

¹⁰⁶ *Ibid.*

¹⁰⁷ P Cabral 'Mkah v Switzerland the right to a nationality in the Convention on the Rights of the Child' (2022) 4(2) *Statelessness and Citizenship Review* 293.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

to be returned to Bulgaria.¹¹³ In the course of the decision, and as established by the UNCRC, Switzerland did not ascertain whether the child would have access to a nationality upon been returned to Bulgaria.¹¹⁴

The UNCRC Committee concluded that Switzerland's asylum and return procedures were flawed. Thus, the Swiss authorities were deemed to have failed to consider relevant provisions of the CRC as part of the process of undertaking the decision to expel and return *Mkah*. Consequently, Switzerland was deemed to have infringed the best interests of the child,¹¹⁵ the right of the child to be heard¹¹⁶ and the failure by the authorities to conduct a risk assessment of the possibility of inhuman and degrading treatment that the child could face if returned to Bulgaria without a nationality or whether the child could be granted nationality by Bulgaria.¹¹⁷ The main argument was that returning *Mkah* to Bulgaria would not only be contrary to the CRC principles of best interests of the child and the right of the child to be heard but also be contrary to other rights guaranteed by the CRC especially the right to *Mkah's* survival and development,¹¹⁸ the right to a name and nationality,¹¹⁹ the right to privacy, family, home, correspondence and reputation,¹²⁰ the right to protect the child denied of a family environment,¹²¹ right to a standard of living,¹²² the rights to education,¹²³ prohibition against torture, or other cruel or inhuman degradation treatment or punishment, prevention of arbitrary or unlawful detention, preservation of the right to respect for dignity.¹²⁴ Article 39 of the CRC imposes an obligation on the State party to adopt suitable processes for the revitalisation and social rehabilitation of child victims of abandonment, mistreatment or ill-treatment, cruel, inhuman or humiliating treatment or punishment or armed conflicts.

On this basis, Cabral argues that this decision implies that states have a positive obligation to adopt pre-emptive measures to 'respect, protect and fulfil children's right to nationality including immigrants' children who were not born in their current country of habitation.'¹²⁵

¹¹³ Agreement on the Return of People in an Irregular Situation, Bulgaria-Switzerland, signed 21 November 2008 (entered into force 29 March 2009).

¹¹⁴ P Cabral (note 107 above) 293.

¹¹⁵ CRC art. 3(1).

¹¹⁶ CRC art. 12.

¹¹⁷ P Cabral (note 107 above) 293.

¹¹⁸ CRC art 6(2).

¹¹⁹ CRC art 7, P Cabral (note 107 above) 293.

¹²⁰ CRC art 16.

¹²¹ CRC art 22.

¹²² CRC art 27.

¹²³ CRC art 28.

¹²⁴ CRC art 37.

¹²⁵ P Cabral (Note 107 above) 294.

The *Mkah* decision is progressive as it provides a standard of what is expected of states parties to the CRC before making a determination of deportation of a stateless child. The case also signifies the importance of the right to nationality and the need by states to ensure the right is protected in accordance with the UNCRC. The decision if effectively implemented by the states has a potential of addressing childhood statelessness.

2.4 Conclusion

As demonstrated in this chapter, international human rights law provides every person a right to a nationality. However, States have not always perceived statelessness to be an urgent problem requiring urgent attention. It has been left unattended consequently many people today are stateless due to failure of states to integrate measures to address statelessness. Hence, the plight of statelessness children remains neglected. It is therefore necessary to ensure States are informed on a regular basis on the significance of eradicating statelessness. Dissemination of information about how a lack of access to the right to nationality can negatively impact the child, is necessary to ensure States parties take the matter seriously and adopt measures to address the problem. The issue of statelessness can be resolved with the necessary political will. This chapter has illustrated the importance of one being able to be affiliated with a state. The essence of such a connection is protection, followed by access to the rights guaranteed under the CRC and other key human rights treaties protecting the right of nationality and other relevant rights. The right to nationality has a direct link to other child's rights as demonstrated in the latest UNCRC committee decision in the *Mkah* case.

CHAPTER THREE: THE AFRICAN REGIONAL HUMAN RIGHTS FRAMEWORK ON STATELESSNESS BIRTH REGISTRATION THE RIGHTS TO NAME AND NATIONALITY

3.1 INTRODUCTION

This chapter critically analyses the African Regional Human Rights framework governing statelessness, birth registration, the rights to name (identity) and nationality. It considers the best practices, to enhance universal birth registration and eradication of statelessness in the region. It seeks to address the following questions: what is the African regional framework on statelessness? What are the nationality laws? How have the nationality laws been applied in the African region? The methodology adopted in the completion of the chapter involves the review and analysis of relevant instruments relating to statelessness, nationality, birth registrations and rights to name and identity. This chapter is divided into four parts. The first part is the introduction, the second part considers the African regional framework on statelessness, nationality, rights to name, identity and birth registration. This is done by undertaking an evaluation of the regional legal framework relating to statelessness. The third part considers examples of cases centering on statelessness and nationality and finally the fourth part concludes the chapter. It considers how best the region can enhance compliance with the regional conventions among states' parties.

3.2 The African regional framework on Statelessness, rights to name, identity, birth registration and nationality

Every child deserves to be born with an identity and a nationality regardless of where the child is born.¹ Statelessness is caused by numerous reasons such as lack of birth registration, movement from place of birth or repudiation of the right to national identity whereby, parent has a different citizenship from the place of birth.² According to a study conducted by UNHCR, approximately 70,000 children born in 'non-refugee situations' are stateless.³ Also research conducted by the UNICEF suggests that one in four children, below the age of five are undocumented on the basis that their birth was never registered.⁴ At the African regional level, the African human rights system is coordinated by the African Union.⁵ This refers to the 1981

¹ AK Yousafzai, J Lombardi, M Erum & T Hyder "Statelessness and young children' (2022) 4(1) *Statelessness and Citizenship Review* 154.

² *Ibid.*

³ UNHCR, Global Action Plan to End Statelessness 2014-2024 (Report, 2014) UNHCR Global Plan) 10.

⁴ UNICEF 'Birth Registration' <<https://data.unicef.org/topic/child-protection/birth-registration/>>.

⁵ Formerly known as the Organisation of African Unity. H Steiner, P Alston & R Goodman *International Human Rights Law in Context Law Politics Morals* 3rd ed (2008) 1063.

African Charter on Human and Peoples' Rights popularly referred to as the Banjul Charter,⁶ the 1999 African Charter on the Rights and Welfare of the Child,⁷ the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)⁸ and more recently the 2024 Protocol to the African Charter on Human and Peoples' Rights Relating to the specific aspects of the Right to a nationality and the eradication of statelessness in Africa (African Protocol on Statelessness).⁹ The instruments are considered comprehensively below.

3.2.1 The African Charter on Human and People's Rights

The African Charter on the Human and Peoples' Right (Banjul Charter) is the main instrument that affords human rights promotion and protection to persons on the African continent. The African Commission on Human and peoples' rights (African Commission) is vested with the responsibility of implementing the African Charter.¹⁰ The charter is silent on matters relating to statelessness and nationality. Though it guarantees every person the right to non-discrimination, dignity and equal protection before the law.¹¹ The African Commission has construed the effect of the Banjul Charter rights, as constituting an obligation for states parties to protect the right to national against arbitrary denial of nationality.¹² The contention is that the rights to dignity, non- discrimination, 'recognition of legal status'¹³ and equality¹⁴ together, infer the right not to be denied nationality arbitrary.¹⁵ The main argument is that the right to nationality is implied and addressed by article 5 of the charter which provides for the right to

⁶ African Charter on Human and Peoples' Rights adopted in Nairobi and opened for signature 27 June 1981, 1520, UNTS 217 (entered into force 21 October 1986) (Banjul Charter).

⁷ African Charter on the Rights and Welfare of the Child adopted 11 July 1990, OAU Doc CAB/LEG/24.9/49) entered into force 29 November 1999 (ACRWC).

⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf>>

⁹ Protocol to the African Charter on Human and Peoples' Rights relating to the Specific aspects of the right to Nationality and the Eradication of Statelessness in Africa adopted by the Assembly at the Thirty- Seventh Ordinary Session on 18 February 2024, Addis Ababa, Ethiopia <https://au.int/sites/default/files/treaties/44126-treaty-EN_Protocol_on_Citizenship_and_Nationality.pdf> (African Protocol on Statelessness), <<https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-relating-specific-aspects-right>>

¹⁰ TW Bennett and J Strug *Introduction to International law* (2013) 199

¹¹ Banjul Charter arts 2, 3 & 5.

¹² Banjul Charter arts 2, 3, 5 & 15, *African Commission on Human and Peoples' Rights* [Aft. Comm'n H.P.R.], 126 (May 11, 2000); *Modise v. Botswana*, No. 97/93, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], 88 (Nov. 6, 2000).

¹³ Banjul Charter art 5.

¹⁴ *Ibid* art 19.

¹⁵ *Malawi African Association and Others v Mauritania* (African Commission on Human and Peoples' Rights, App Nos 54/91, 61/91, 98/93, 164-196/97 and 210/98, 11 May 2000) 22[126]; *Modise v Botswana* (African Commission on Human and Peoples' Rights, App No 97/93, 6 November 2000) [88].

human dignity and the acknowledgement of legal status, which is crucial to the fulfilment of other fundamental rights and freedoms as stipulated in the Charter.¹⁶

This proposition was further reiterated in Resolution 234 on the Right to a nationality, which was adopted in April 2013, by the African Commission.¹⁷ Though this could be perceived as inadequate to afford protection and promotion against statelessness in Africa. This is further reflected by the subsequent decision of the African Commission, who a year later, proceeded to approve a study on nationality in accordance with Resolution 234.¹⁸ It was resolved to draft a protocol to the Banjul Charter focusing on the right to nationality, that was to be adopted by heads of State.¹⁹ The Protocol was adopted in 2024 and will be considered in depth in section 3.2.3 below. Apart from the Banjul Charter, the ACRWC also forms a basis of the African regional framework on the protection of statelessness and nationality laws. Details of how the ACRWC promotes nationality laws and protects statelessness is addressed below.

3.2.2 The African Charter on the Rights and Welfare of the Child

The main instrument that protects and promotes children's rights in Africa is the African Charter on the Rights and Welfare of the Child (ACRWC) 1999.²⁰ The ACRWC acknowledges that the African Union (AU), considers 'the paramountcy of human rights and the charter of human and peoples' rights and that everyone is entitled to all rights and freedoms guaranteed without distinction.'²¹ This essentially implies that the rights as stipulated by the ACRWC are intended for every child regardless of the race, ethnic group, place of birth or status. According to the ACRWC, States parties are obliged to adopt 'legislative and other measures' to give effect to the rights of the charter.²² A child is defined as any person below the age of 18 years.²³ The ACRWC provides for fundamental rights and duties that are crucial for the well-being and development of every child. For instance, article 3 incorporates the fundamental principle and right of non-discrimination, which accords every child the entitlements to enjoy the rights and

¹⁶ Lawyers for Human Rights & Save the Children South Africa, *Documentation of Children including unaccompanied and separated migrant children in South Africa: A Practical Guide* (2021) 11.

¹⁷ Resolution 234 on the Right to Nationality, adopted at the 53rd Ordinary Session, in Banjul, The Gambia, 9–23 April 2013.

¹⁸ The Right to Nationality in Africa, Study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, pursuant to Resolution 234 of April 2013 and approved by the Commission at its 55th Ordinary Session, May 2014.

¹⁹ Resolution 277, on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, adopted at the 55th Ordinary Session, 28 April – 12 May 2014, Luanda, Angola.

²⁰ African Charter on the Rights and Welfare of the Child adopted 11 July 1990, OAU Doc CAB/LEG/24.9/49) entered into force 29 November 1999 (ACRWC).

²¹ ACRWC Preamble para 2.

²² ACRWC art 1.

²³ ACRWC art 2.

freedoms enshrined in the charter without discrimination. In all engagements involving children, undertaken by an individual or private or public authority, ‘the best interest of the child shall be the primary consideration.’²⁴

In addition, a child has a right to survival and development,²⁵ from birth, every child has rights to a name, registration directly after birth, and to obtain a nationality.²⁶ Article 6 particularly imposes an obligation on States parties to the ACRWC to ensure their Constitutions makes provision to enable every child to attain the nationality of the State in the place of birth if at the time of birth, the child is not granted nationality by any other state based on its laws. It makes provision for the right to nationality and denies instances of arbitrary denial of nationality, which is prohibited under the African Charter on the Rights and Welfare of the Child.²⁷ The rights to nationality has been interpreted to mean that the state where a child is born has the right to grant nationality.²⁸ Article 6 of the ACRWC guarantees every child the right to a name from birth, registration instantly after childbirth, the right to secure a nationality and states parties are obliged to ensure their Constitution acknowledge principles that allow for the child to attain nationality in the country of birth if at the time of birth, the child is not guaranteed a nationality by another state in line with its laws.²⁹ The rights to a name, registration and nationality is also referred to as legal identity.³⁰ The provision is intended to protect children from statelessness. Thus, if effectively implemented in national legal systems, article 6 has a potential of addressing the problem of statelessness. The provision is more progressive than article 6 of the CRC because incorporates an obligation on States parties as provided for under the Convention on the Reduction of Statelessness, for States parties to ensure their Constitutions integrate nationality issues to facilitate children to acquire the nationality of the state in which they are born, in circumstance where the child would be stateless if not accorded a nationality.

In addition, the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) adopted a General Comment on article 6 which repeats the fact that

²⁴ ACRWC art 4.

²⁵ ACRWC art 5.

²⁶ ACRWC art 6.

²⁷ *Ibid.*

²⁸ *Nubian Children Case 9*, para 42 interpreting the right to a nationality to mean a right to a nationality from birth, 50 – 51 holding that the refusal of nationality at birth due to the existence of another nationality requires the territorial state to ‘ensure’ that the other state provides nationality.

²⁹ ACRWC article 6, GC 6 of the African Committee of Experts on the Rights and Welfare of the Child General Comment on the Interpretation of Article 6.

³⁰ Lawyers for Human Rights & Save the Children South Africa, *Documentation of Children including unaccompanied and separated migrant children in South Africa: A Practical Guide* (2021) 11.

States parties do not possess unconstrained discretion in terms of creation of norms on granting of nationality.³¹ But that States parties are obliged to observe international obligations in their application of nationality issues.³² The General comments also condemns discrimination on the grounds of sex, race, ethnic group or similar measures in the interpretation, adoption and application of nationality laws.³³

The ACRWC provides for a prohibition against arbitrary deprivation of nationality.³⁴ In the *Nubian Children* Case the African Children's Committee interpreted the right to nationality to mean the 'right to nationality from birth.'³⁵ According to the African Children's Committee, the state where the child is born has a prime obligation in every case.³⁶ The African Children's Committee argued that States of birth are obliged to ensure nationality, this could include cooperation with another state to ensure that the child acquires nationality from another state. Where the other states fail to cooperate by conferring nationality on the child, the state of the child's birth is obliged to confer the nationality.³⁷ The essence of this interpretation is to ensure no person is statelessness at any time. If states thus effectively recognise and apply the laws effectively the implication is that the problem of statelessness would be eradicated. It only requires the states to do their parts in undertaking their responsibilities. Similarly to the CRC, the ACWRC also enshrines fundamental principles and rights that must be considered when making decisions relating to name or nationality such as best interests of the child, participation, non-discrimination as highlighted in chapter 2.³⁸

With regards to birth registration, similarly to the CRC, the ACRWC recognises the right to birth registration.³⁹ This implies the African child is not excepted from the enjoyment of the right to birth registration. The importance of birth registration was reiterated by the African Children's Committee in the *Nubian* case by recognising that 'there is a strong and direct link

³¹ African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/02 (2014), adopted by the Committee at its 23rd Ordinary Session, 7–16 April 2014, paras 83–101.

³² *Ibid.*

³³ *Ibid.*

³⁴ ACRWC art 6.

³⁵ ACERWC Judgment of 22 March 2011, Decision No. 002/Com/002/2009 (*Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*) para. 42.

³⁶ *Institute for Human Rights and Development in Africa and Open Society on behalf of Children of Nubian Descent in Kenya v Government of Kenya (Merits)* (Communication No Com/002/2009, 22 March 2011) 10 [46], 12-13 [57] (*'Nubian Children Case'*); ACERWC, General Comment 2 on Art 6 of the African Charter on the Rights and Welfare of the Child, AU Doc ACERWC/GC/02 (2014) 9.

³⁷ ACRWC Art 6(4).

³⁸ Chapter 2 sections 2.1.2 & 2.2.

³⁹ UNCRC art 7, ACRWC art 6.

between birth registration and nationality.⁴⁰ Thus, Manby, argues that birth registration is crucial to ascertaining legally the ‘place of birth, parental connection,’ it constitutes documented evidence ‘in terms of acquisition of parents’ nationality or the nationality of the state where the child is born.⁴¹ Hence, low rates of birth registration can negatively impact several children by putting them at risk of statelessness.⁴² It is therefore imperative for African states such as Zambia to introduce measures to ensure all births that occur on the territory are registered. In recognising the gaps in the current regional framework, the AU has recently adopted the African Protocol on Statelessness.⁴³ This protocol is intended to enhance the protection of stateless persons, with a hope to eradicate the cases of statelessness on the continent. The African Protocol on Statelessness is considered in depth below.

3.2.3 The Protocol to the African Charter on Human and Peoples’ Rights Relating to the specific aspects of the right to a Nationality and Eradicating Statelessness in Africa

The African Protocol on Statelessness was adopted by the Heads of State and government of the AU.⁴⁴ The Protocol is intended to complement the Banjul Charter in accordance with article 66. The preamble, paragraph 3, refers to article 15 of the UDHRs which is also mentioned in the Banjul Charter. Article 15 accords every person with the right to a nationality and that no person ‘shall have their nationality arbitrary deprived or denied the right to change their nationality.’⁴⁵ Similarly, the preamble refers to several international human rights conventions such as the ICCPR and the CRC.⁴⁶ Both treaties guarantee the child the right to acquire a nationality.⁴⁷

At the regional level, the Protocol refers to the ACRWC and the Maputo Protocol.⁴⁸ Both treaties prohibit discrimination and provides for the right to equality before the law. This implies that matters relating to nationality must be handled in line with the rights of non - discrimination and equality. The Protocol recognises that the ‘right to a nationality is a

⁴⁰ *Nubian Case* paragraph 42.

⁴¹ B Manby *Citizenship Law in Africa* 3rd edition (2016) 116.

⁴² *Ibid.*

⁴³ African Protocol on Statelessness, < https://au.int/sites/default/files/treaties/44126-treaty-EN_Protocol_on_Citizenship_and_Nationality.pdf> adopted on 18 February 2024 < <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-relating-specific-aspects-right>> Note that the Protocol is yet to enter into force awaiting 15 ratifications.

⁴⁴ African Protocol on Statelessness in Africa, preamble.

⁴⁵ UDHR art 15.

⁴⁶ Details of the International Legal Framework on statelessness is considered in Chapter 2 of this Dissertation.

⁴⁷ African Protocol on Statelessness preamble para. 4.

⁴⁸ *Ibid* para. 5.

fundamental requirement to ensure an individual is effectively protected and guaranteed the enjoyment of other human rights abundantly.⁴⁹

Paragraph 9 of the preamble reaffirms that states have the primary obligation for prevention and eradication of statelessness and that regarding nationality matters States are obliged to consider not only their interests but also interests of concerned individuals. The preamble of the Protocol on statelessness is comprehensive as it recognises the relevant conventions and principles established by monitoring bodies such as the African Commission and the African Committee in terms of the protection, preservation of the right to nationality as well as the prohibition against the deprivation of nationality arbitrary.⁵⁰ It reaffirms the idea that statelessness amounts to a violation of article 5 of the Banjul Charter as rendered in decisions such as the *African Commission on Human and Peoples' Rights in Modise v. Botswana*.⁵¹

The preamble also recognises the importance of birth registration as an essential element fundamental in establishing the legal status between an individual and a State.⁵² It emphasises the need for State to expediate birth registration in border communities, among nomadic populations and anywhere necessary.⁵³ The inclusion of civil registration in form of birth registration in the preamble signifies the importance of the exercise in facilitating the implementation of the right to nationality. The main object of the Protocol is to eradicate statelessness in Africa. Thus, the preamble recognises that the eradication of statelessness would entail the implementation of the right to a nationality, access to birth registration, prohibition of arbitrary withdrawal or denial of nationality.⁵⁴ Accordingly, the objectives of the Protocol are to:

Promote, protect and ensure respect for the right to a nationality in Africa; [to] Ensure that statelessness in Africa is prevented and eradicated; to determine the general principles for the prevention, the elimination of the risk of statelessness and eradication of statelessness in Africa and [to] promote the aspirations of the African people for an African citizenship.⁵⁵

⁴⁹ *Ibid* para. 8.

⁵⁰ *Ibid* para. 11.

⁵¹ See section 3.2.1 above.

⁵² African Protocol preamble para 15.

⁵³ *Ibid*.

⁵⁴ *Ibid* para 17.

⁵⁵ *Ibid* art 2.

The Protocol reaffirms the idea that though it is for States to determine who their nationals are, due regard must be made to the relevant convention addressing statelessness in international law.⁵⁶ States parties to the Protocol must agree and recognise the following general principles:

every person has a right to nationality, No one shall be arbitrarily deprived or denied recognition of his or her nationality nor denied the right to change his or her nationality; States shall take steps, individually and collectively, to eradicate statelessness and to ensure that every person has the right to the nationality of at least one state where he or she has an appropriate connection; In all actions undertaken by any person or authority concerning the nationality of a child, the best interests of the child shall be the primary consideration.⁵⁷

Article 3 of the Protocol merely recognises as general principles, the rights that are integrated in several international human rights instruments.⁵⁸ Similarly, the Protocol incorporates essential concepts such as the concept of non-discrimination as provided in article 4 of the Protocol. The assertion is that when deciding nationality, no person shall endure discrimination. Women and men shall enjoy equal rights when seeking to change or retain nationality.⁵⁹ Article 5(3) provides that in attribution of nationality, states parties shall ensure that their national laws do not result in making children born within or outside its boundaries stateless. Where that is the case, the application of the national laws must be relinquished in favour of persons who would otherwise be stateless.⁶⁰ The Protocol specifies the basis for acquisition of nationality which include the 'habitual residence, place of birth, adoption, care by *kafeel* [person], where domestic legislation makes provision for *kafala*,⁶¹ States Parties are obliged to adopt measures to ensure a child acquires nationality specifically in circumstance where the child would otherwise be stateless, renunciations of another nationality shall never be a requirement for attaining another nationality.⁶² with reference to the notion of habitual residence, article 7 provides that the national laws of the States' Parties must make provisions for what constitute habitual residence. With regards to Nomads and cross-border communities and under circumstances where it is not clear whether a person is a habitual residence, States Parties are urged to refer to factors that could constitute evidence of an existing connection such as 'place

⁵⁶ *Ibid* art 3.

⁵⁷ *Ibid*.

⁵⁸ Refer to Chapters 2 of this `Dissertation, examples include UDHR art15, ICCPR art 24, CRC art 6, Banjul Charter art 7 and the African Protocol on Statelessness art 3 among others.

⁵⁹ African Protocol on Statelessness art 4(2).

⁶⁰ *Ibid* Art 5(4).

⁶¹ According to art 1 of the Protocol, *Kafala* as 'a voluntary commitment made by a person (*kafeel*) in accordance with domestic law of the State Party undertakes responsibility for the protection, upbringing and care of a child, in the same way as a parent would do for his or her own child'

⁶² *Ibid* art 6.

the birth, marriage, place of residence and existence of family in that territory, farming in the area on a yearly basis, existence of burial sites for family affiliates and contribution to the State among other factors.⁶³

The Protocol is comprehensive and covers a wide range of persons including children. Article 10 specifically addresses the rights of the Child. The rights of the child include the rights to registration immediately after birth, nationality at birth or thereafter, right to be heard or participation in procedures adopted for purposes of acquiring nationality, realisation of these rights can only be possible if States incorporate relevant laws addressing the issues in national systems.

The exhaustiveness of the Protocol is further illustrated by inclusion of article 12 which provides for documentation of nationality. States Parties are obliged to include the right to a certificate of nationality or appropriate document in their national laws intended to provide proof of nationality.⁶⁴ Additionally, procedures of how to acquire the documents must be clearly defined in law.⁶⁵ Other obligations involve ensuring unaccompanied and separated children have access to legal documentation that confirms proof of nationality which must be issued in their name. The Protocol is silent on the place of birth or decent. The provision only refers to names of the unaccompanied and separated children. However, the provision does not foresee circumstances where other details such as place of birth could be significant. This could only imply the information might not be relevant in circumstances of unaccompanied and separated children. The provision prohibits arbitrary cancellations of proof of nationality documentation. This is imperative to ensure full realisation of the rights of children. Article 12 (5) imposes a burden of proofing nationality of a person on the state and not the person in possession of valid documents ascertaining nationality of a particular State.⁶⁶

Though nationality is about a legal connection based on factors such as place of birth, place of business, habitual residence and it is also a matter of choice. For instance, a person could decide to acquire another nationality and renounce a nationality. Under such circumstances, a State Party cannot prohibit any person from renouncing a nationality unless if it results in rendering the person stateless in accordance to national law.⁶⁷ States Parties are prohibited from the

⁶³ *Ibid* art 8.

⁶⁴ *Ibid* art 12(1), (2).

⁶⁵ *Ibid*.

⁶⁶ *Ibid* art 12(5).

⁶⁷ African Protocol on Statelessness arts 13, 15(6).

deprivation of the right to nationality unless if obtained by ‘fraud or false representation.’⁶⁸ Arbitrary denial of any ‘person or group of persons’ nationality on the basis of ‘racial, ethnic, religious or political grounds or on grounds related to exercise of rights established by the African Charter’ in accordance to article 15 (4) of the Protocol.

Article 18 of the Protocol requires States Parties to integrate provisions intended to protect statelessness persons within the legislation. National laws of States Parties must recognise and protect stateless persons. This is done by States integrating specific measures that provide for ‘criteria for the attribution of the status of stateless person, as an interim measure.’⁶⁹ Such provisions will ensure that the legal system recognises the existence of statelessness persons and thus would make it easier to adopt measures to ensure that their status is regularised. Other obligations imposed on states include provision of humanitarian assistance and protection to stateless persons in accordance with the normative standard as provided in the various international and regional human rights instruments (article 18(2)). Finally, the Protocols accords statelessness persons with entitlements including the capacity to enjoy human rights, humanitarian assistance, access to an identity and travel documents.⁷⁰

More importantly, article 17 establishes a limitation on the State Party’s ability to expel persons from their territories. Instance, State Parties cannot expel persons who have initiated an appeal against the decision to deny recognition, reaffirming the right of every person to appeal and access to courts.⁷¹ Also, States Parties are barred from expelling stateless persons who are within the territories lawfully unless otherwise.⁷² The Protocol stands out because it not only integrates human rights concepts but also refugees laws. This makes its capacity to protect persons broad.

The Protocol can be criticised for permitting States to make reservations on any provision in of the Protocol upon ratification or accession.⁷³ Apart from that, the Protocol is progressive and if ratified and implemented, it can address the problem of statelessness in Africa. African States must be urged to ratify the protocol and domesticate the provisions of the Protocol in their national legal systems as a matter of urgency. The Protocol will enter into force thirty (30) days

⁶⁸ *Ibid* art 15 (2) & (3).

⁶⁹ African Protocol on Statelessness art 18(1).

⁷⁰ *Ibid* art 18(3).

⁷¹ *Ibid* Art17 (1).

⁷² *Ibid* art17 (2).

⁷³ African Protocol on Statelessness art 25.

after attaining fifteen ratifications.⁷⁴ So far, no State has ratified the Protocol. It is thus necessary to ensure the UNHCR, NGOs that focus on statelessness and other relevant Civil society organisations conduct awareness campaigns among the AU States parties to ensure governments realise the significance of eradicating statelessness. The AU secretariat can also have a role of promoting the Protocol. Considering African's States' history of slow ratification, the lobbying of governments will go a long way at ensuring states ratify the Protocol.

3.3 Examples of cases relating to statelessness, rights to name, identity, birth registration and nationality as interpreted in Africa

In 2009, the Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Initiative (OSI) conveyed a communication before the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), on behalf of the children of Nubian descent in Kenya.⁷⁵ The communication referred to the Kenyan government's denial to accord the Kenyan nationality to Children of Nubian descent constituting a violation of their fundamental rights as provided for in the ACRWC. The contention was that the Kenyan government had allegedly violated provisions of the charter by virtue of its actions. The provisions are as follows: article 3 of the ACRWC which safeguards the right of a child against discrimination based on 'race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status,' article 6(2), 3 and (4) covers the rights of birth registration and nationality, article 11(3) which imposes an obligation on states parties to adopt appropriate measures in order to implement the realisation of children's right to education and article 14 which focuses on equal access to health care. Thus, statelessness was the main issue of contention in the communication.⁷⁶

The African Children's Committee proceeded to consider the communication in the seventeenth ordinary session, despite the absence of the respondent State, Kenya, on the basis that it was in the best interest of the child to for the matter to be considered.⁷⁷ The second basis for the Committee's decision to proceed in the absence of Kenya was based on the guidelines for consideration of Communication in the absence of a party.⁷⁸ The matter was finally concluded in 2011, constituting the first decision to be considered by the Committee. In terms

⁷⁴ *Ibid* art 26.

⁷⁵ E Fokala and L Chenwi 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee' (2013) (6) *African Journal of Legal Studies* 357,

⁷⁶ *Nubian Children* case para. 44.

⁷⁷ E Fokala and L Chenwi (note 75 above) 358.

⁷⁸ Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child, ACERWC/8/4 (2005) (chapter 2 Article 2(v)(3)).

of matters of statelessness, birth registration, rights to identity, name and nationality, the decision is significant for the following reasons: It is the first matter to be considered by the Committee, it provides an interpretation for the child's right to nationality which is enforceable and aligned to economic, social and cultural rights and the decision is the most far-reaching case on the child's right to nationality.⁷⁹

Kenya was not a state party to the 1954 stateless Convention which provides a definition of a stateless person.⁸⁰ As of 25th November 2024, Kenya is still not a state party to the 1954 Stateless Convention. Though, the fact that a state is not a party to a particular convention does not automatically mean that it would be excepted from its application. The state can be obliged to recognise certain issues depending on the nature of the matter. For instance, if the matters constitute customary international law, the state has no choice but to recognise the norms. Within the context of matters relating to statelessness, the international law Commissions has argued that the definition of statelessness as provided in the 1954 Convention constitutes customary international law.⁸¹ On the basis the African Committee, adopted the same definition, which provides that a child is considered stateless if the child is not 'considered as a national by any State under the operation of its laws.'⁸²

In the *Nubian* case, the African Children's Committee held that Kenya was in breach of article 6 of the ACRWC, implying that denying the children nationality for 18 years constituted a violation of their right to nationality, which was conflicting not only with the best interests of the child but also the spirit and purpose of the provision.⁸³ It further clarified that the state parties obligation in ensuring immediate birth registration of all children include addressing challenges hindering the people from effectively conducting birth registration and adopting relevant legislation and policies.⁸⁴ The African Children's Committee has recognised the problem of lack of implementation for birth registration in Africa and consequently issued the general comment.⁸⁵ The General Comment 6 provides guidelines on how states parties can enhance birth registration among children under the age of five.⁸⁶ The General Comment 6

⁷⁹ E Fokala and L Chenwi (note 75 above) 358.

⁸⁰ 1954 Stateless Convention.

⁸¹ E Fokala and L Chenwi (note 75 above) 359.

⁸² *Nubian Children* case para 44.

⁸³ *Ibid* para. 42.

⁸⁴ G Odongo 'Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya's record in implementing children's rights norms,' (2012) 12 *African Human Rights Law Journal* 119.

⁸⁵ General Comment on article 6 the African Charter on the Rights and Welfare of the Child: "Rights to Birth Registration, name and nationality." (GC 6 African Children's Committee)

<https://www.acerwc.africa/sites/default/files/2022-09/General-Comment_Article_6_ACRWC_English.pdf>

⁸⁶ GC 6 African Children Committee para 111.

provides a definition of birth registration and an explanation of its importance.⁸⁷ The guidance offered by the African Children's Committee, of how the Charter and provision ought to be implemented by states is clear and comprehensive. The only thing that needs to be done is for state parties to follow the Committee's comprehensive guidance. Such an approach has a potential of facilitating African states to address the problem of statelessness within their countries.

In the *Nubian Children* case, the African Children's Committee, stated that the provision should be interpreted to mean that children must have nationality from birth.⁸⁸ The decision further acknowledges that *ius soli* approach by stipulating that the state where a child is born must grant the child's nationality if the child would otherwise be stateless.⁸⁹ Similar issues were raised by ACERWC General Comment No 2 (2014).⁹⁰ In the *Nubian* case, the ACERWC held that 'immediate birth registration' was not restricted to merely the adoption of laws and policies but also eliminating any barriers to effective birth registration processes.⁹¹ 'Immediately birth registration' means 'as soon as possible, with due regard to cultural and local practice related to maternity and infant rearing' as refers to 'days or weeks after birth.'⁹² Birth registration should be linked to relevant institutions such as the hospitals to improve accessibility.⁹³

Apart from the Nubian Case that focused on children, majority of the cases on nationality in the African region have focused on politically involved individuals whose governments had attempted to violate their fundamental rights. The matters were considered by the African Commission under the Banjul Charter as illustrated below. For instance, the case of *John Modise* who spent years in detention 'in the South African Homelands of Bophuthatswana or the no-man's land between South Africa and Botswana' as the Botswanan government had denied acknowledging his nationality.⁹⁴ Modise's experiences or suffering were deemed to constitute a violation of article 5 of the Banjul Charter. Thus, the African Commission concluded that the Botswanan government had violated Modise's right to dignity, recognition of his legal status as a person contrary to article 5 of the Banjul Charter.⁹⁵

⁸⁷ *Ibid* para 43.

⁸⁸ *Nubian Case* (2011: para. 42).3.

⁸⁹ *Ibid* para. 50, ACERWC GC No 2 (2014) para 94.

⁹⁰ ACERWC General Comment No 2 (2014) para 94.

⁹¹ ACERWC 2011: para. 40, G Odongo (note 84 above) 119.

⁹² ACERWC General Comment No. 2, 2014: para. 79.

⁹³ *Ibid* para. 75.

⁹⁴ Manby (note 41 above) 33.

⁹⁵ *Communication 97/93, Modise v. Botswana* (2000), para 91.

Also, in *Amnesty International v. Zambia*, the Commission deliberated the expulsions of William Banda and John Chinula from Zambia to Malawi and concluded that accordingly.

compelling the ‘complainants to live as stateless persons under degrading conditions, the [Zambian] government ... [had]deprived them of their family and [was] depriving their families of the men’s support, and this constitutes a violation of the dignity of a human being, thereby violating Article 5’⁹⁶

The main issue presented by the Commission is the idea that where one’s right to nationality is at risk of being lost, the aggrieved individual must be accorded an opportunity to challenge the assertions. A state cannot arbitrarily strip an aggrieved person of their right to nationality, without according the person an opportunity to challenge the assertions.⁹⁷ The Commission held against the Zambian government’s controversial constitutional amendment that established a requisite, for anyone intending to contest for presidency to prove that both parents were Zambian by birth.⁹⁸ This is because the amendment was motivated by the desire of the state to thwart former president Kenneth Kaunda from recontesting for president, so, the Commission, held that the decision infringed articles 2, which prohibits discrimination, article 3 which guarantees every person equality and equal protection before the law and article 13 which provides for participation in selection of representatives, access to public services and property.⁹⁹

The Commission quite rightly contended that freedom of movement among the parts of what was referred to as the Central African Federation, which today refers to the states of Malawi, Zambia, and Zimbabwe was equivalent to insinuating that a native Zambian could only be restricted to persons born in and whose parents were born in what came to be referred to as the sovereign territory of Zambia would be arbitrary.¹⁰⁰ The application of such a law would thus be contrary to the Banjul Charter. The Commission concluded that the deportation of individuals was contrary to articles 2,7 and 12 of the Charter, and that such an action constituted a violation of human rights.¹⁰¹

⁹⁶ *Communication No. 212/98, Amnesty International v. Zambia* (2000), para 50.

⁹⁷ *Amnesty International v. Zambia*, para 33, *Communication No. 159/96, Union Interafricaine des Droits de l’Homme and Others v. Angola* (1997); *Modise v. Botswana*; *Communications Nos. 27/89, 49/91 and 99/93, Organisation Mondiale Contre la Torture and Others v. Rwanda* (1996); *Communication No. 71/92, Rencontre Africain pour la Défense des Droits de l’Homme v. Zambia* (1996).

⁹⁸ *Communication 211/98, Legal Resources Foundation v. Zambia* (2001).

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Union Interafricaine des Droits de l’Homme and Others v. Angola, paragraph 16, Communication 292/2004, Institute for Human Rights and Development in Africa v. Angola* (2008).

3.4 Conclusion

The chapter has provided examples of instances when individual grievances were brought before the African Commission and the African Children's Committee. The matters were mainly brought to the attention of the monitoring bodies through the procedures provided under the African legal framework relating to statelessness. While there seem to be a substantial number of cases handled under the commission, only a few cases have been considered by the African Committee. The existence of a limited number of cases does not necessarily imply that matters relating to statelessness are effectively handled within the national courts of the States' parties, it could imply the lack of understanding or perhaps representation for the aggrieved parties. It is therefore necessary to interrogate the situations of African States to ascertain the effectiveness of the laws in combating statelessness.

It is also imperative to ensure awareness of the existing regional laws in various African states and making it clear that individuals have the capacities to bring claims at a regional level if the local remedies are exhausted. The chapter also provides an overview of the Protocol on Statelessness in Africa. The Protocol is progressive as it reaffirms several fundamental rights and concepts as stipulated in international human rights. Some of the major issues addressed include the reaffirmation of States parties' responsibilities to address and eradicate statelessness, the integration of principles such as the right to a nationality, concepts of non-discrimination, equality among others. These concepts if effectively utilised can play an essential role towards the eradication of the problem of statelessness on the continent.

The chapter also considers examples of cases that have been considered by the monitoring bodies of the African regional system. The nature of cases considered constitute evidence that the problem of statelessness is common in Africa. What is evident though is that there are probably masses of people within the region who have been denied the right to nationality thus affecting other fundamental rights and resulting in a dim future for the affected persons. It is imperative for African states to instigate studies to interrogate the matter to ensure every person's right to nationality, identity, name and birth registration are upheld and that no person is left behind. The chapter confirms that Africa has a sound legal framework relating to statelessness. If effectively implemented the continent can eradicate statelessness.

CHAPTER FOUR: THE EFFICACY OF THE ZAMBIAN LEGAL FRAMEWORK ON STATELESSNESS, NATIONALITY, RIGHTS TO NAME, IDENTITY AND BIRTH REGISTRATION

4.1 INTRODUCTION

Zambia is a sovereign State with a constitutional form of governance.¹ It is a landlocked country based in Southern Central Africa. This chapter critically analyses the Zambian legal framework governing statelessness. It considers the efficacy of Zambia's national legal framework relating to statelessness, nationality, rights to name, identity and birth registration. This is done by conducting a review of legislation, case law and policies on statelessness, nationality, rights to name, identity and birth registration. The CRC Committee, in its most recent concluding observations, advised Zambia, to strengthen its efforts to eradicate discrimination against children in marginalised and deprived situations, including girls, children that live in rural areas, children born at home, refugee children, children without legal identity, migrant and unaccompanied children.² The legislation, judicial decisions and Expert reports on Zambia are reviewed to determine Zambia's compliance to the International and regional treaties which it has ratified. It is also imperative for the task to be conducted for the purpose of enhancing the situation of stateless persons and eradicating statelessness in Zambia.

4.2 The Zambian legal framework on statelessness, nationality, rights to name, identity and birth registration

This section evaluates the efficacy of the national legal framework in addressing statelessness and promoting universal birth registration, rights to name, identity and nationality within the Zambian context. The analysis of Zambia's legal framework is considered to ascertain the extent to which the law protects stateless persons, the rights to name, identity, birth registration and nationality. In Zambia's most recent CRC Committee Concluding Observations, with reference to the general principles of the CRC, Zambia was urged to improve its efforts:

to eliminate discrimination against children in marginalised and disadvantaged situations, including children with no legal identity, migrant and unaccompanied children. To ensure that

¹ Constitution of Zambia Chapter 1 as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, art 4(1).

² CRC/C/ZMB/CO/2-4 Concluding observations on the combined second to fourth periodic reports of Zambia, March 2016, para 26, CRC/C/ZMB/CO/5-7 Concluding observations on the combined fifth to seventh periodic reports of Zambia, June 2022, para. 18 (a).

the principle of the best interests of the child is incorporated in legislation that is relevant to and has an impact on children.³

Addressing the above issues will ensure enhanced enjoyment of the CRC rights by all the children within the territory of Zambia without discrimination. Similarly, the ACERWC (the Committee) in its concluding observation on the report of Zambia, with reference to the general principle of non-discrimination, highlighted the fact that the ‘Committee had received information that children from Muslim background faced discrimination in getting birth registration and nationality.’⁴ This implies that discrimination in matters of birth registration and implementation of the right to nationality is prevalent. Thus, it is necessary to ensure that measures intended to address the situation are adopted.

With reference to civil rights and freedoms as stipulated under articles 7 – 8 and 13 to 17 of the CRC, the State Party was urged to:

Intensify and speed up the roll-out of the Integrated National Registration and Information System and consider linking it with the Smart Care information management system at the Ministry of Health; to establish birth registration facilities country wide, and ensure availability of the essential material such as birth notification forms, funds, and other necessities required to facilitate birth registration; to revise the law to prevent and respond to statelessness; to consider ratifying the 1961 Convention on Reduction of Statelessness⁵

The idea is that birth registration and access to the right to nationality may be enhanced because of the above interventions. More recently, the ACERWC in its concluding observations acknowledged the effects adopted by Zambia towards the attainment of universal birth registration and certification for all children born on the territory.⁶ The Committee particularly acknowledged measures intended to enhance the birth registration rates which the State had resolved to adopt.⁷ Examples of the interventions adopted include the establishment of birth registration counters in 806 health services across the 10 provinces, devolution of birth registration and issuance of birth certificates exercises, the introduction of mobile birth

³ CRC/C/ZMB/CO/5-7, June 2022, paragraphs 18 (a), 19a, .

⁴ Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Initial Report of the Republic of Zambia on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child (2019), para 21.

⁵ *Ibid* para 21.

⁶ Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the first periodic report of the Republic of Zambia on the status of implementation of the African Charter on the Rights and Welfare of the Child (2024). para 19.

⁷ *Ibid* para 19.

registration among others are modes intended to enhance birth registration rates in Zambia.⁸ However, the ACERWC, referred to impediments of birth registration in rural areas where people have to walk long distances to access health services that are usually understaffed.⁹ The Committee urged Zambia to adopt birth registration systems which are accessible to everyone without discrimination, and to enhance mobile birth registration to serve the people unable to access health facilities.¹⁰ It is on this basis that the Zambian legal framework is thus evaluated within this context.

The Constitution is the *grundnorm* of the Zambian legal system. Article 1(1) of the Constitution provides that, it is the ‘supreme law of the Republic of Zambia,’ consequently, any written law or customary law and tradition conflicting with its provisions is invalid and to the extent of the discrepancy.¹¹ This implies that all law within the territory must comply with the provisions of the Constitution or else the provisions would be deemed incomparable and unconstitutional. This was well illustrated in the case of *Bernard Kanengo v Attorney General* where the Constitutional Court held that all legislation ‘flows from the Constitution and all actions conducted must be anchored in law otherwise they would be unconstitutional.’¹² An overview of the Republic Constitution within the context of statelessness, birth registration citizenship or nationality is considered in the next section.

4.2.1 The Constitution of the Republic of Zambia

The Constitution provides for the sources of Zambian law which include: the Constitution, Acts of Parliament, also referred to as legislation, statutory instruments, the Zambian customary law which is coherent with the Republican Constitution, the common law and statutes applicable to Zambia.¹³ Therefore, the Zambian Constitution does not consider international and regional Conventions that Zambia has ratified. In essence, Zambia is a dual legal system which means that international and domestic legislation are regarded as two different types of laws. Thus, for any international and regional Conventions to be enforceable in Zambia, it needs to be incorporated into the national legal system.

⁸ *Ibid* para 19.

⁹ *Ibid* para 20.

¹⁰ *Ibid* para 20.

¹¹ Constitution of Zambia art 1(1).

¹² *Bernard Kanengo v Attorney General* 2022/CCZ/0024.

¹³ Constitution of Zambia art 7.

Part Four of Constitution provides for the fundamental information relating to acquisition of citizenship or nationality in Zambia.¹⁴ Zambian citizenship is obtained by either ‘birth, descent, registration or adoption.’¹⁵ However, citizenship by birth is restricted to persons who at the time of birth, one of their parents is a Zambian citizen as stipulated in article 35(1). This automatically excludes refugees or other migrant children or unaccompanied children above the age of eight. This gap implies that there is a possibility that the majority of children are not covered by the law. This implies Zambia could have several children without legal documentation and a nationality simply because they are unable to satisfy the conditions as provided by the law.

However, the law protects foundlings or ‘children who appear not to be more than eight years, found on the territory of Zambia whose parents are unknown’ are deemed to be Zambian nationals.¹⁶ According to article 35(3), children born on registered ships or aircraft of a country are deemed to have been born in the country of registration. This extends to those that are born on unregistered ships or aircrafts of a country, such children are deemed to have been born in that state. It is not clear if Zambia adopts measures to ensure such a child is accorded a nationality to avoid incidents of statelessness in accordance with the 1961 Stateless Convention. This implies that such children lack protection as there is no guarantee that children born in unregistered ships or aircraft would automatically be accorded nationality from the States where the unregistered ships or aircraft are from. This provision further illustrates a gap in Zambia’s legal framework intended to afford protection to children generally.

Under article 36 of the Constitution, persons ‘born outside Zambia is a citizen by descent only if at the time of birth, at least one of the parents was a citizen by birth or descent.’¹⁷ In the case of *Seanyana State Advocate Mundungani Isdore C.P v Chief Immigration Officer and the Minister of Home Affairs and the Attorney -General* (1991) S.J. (H.C), the applicant (Mr Isdore Mundungani) was questioned, detained for a couple of weeks and nearly deported to Zimbabwe by the immigration authorities on the grounds that he was not a Zambian citizen. However, at Chirundu, the Zimbabwean authorities denied to accept him on the basis that he was not a Zimbabwean national. The applicant then proceeded to ‘seek for an order of prohibition, certiorari and a declaration that the order of the Minister of Home Affairs to

¹⁴ Constitution of Zambia, arts 34 -44.

¹⁵ *Ibid* art 34, *Hastie Sibanda v the Attorney General* 2023/CCZ/002, para. 29.

¹⁶ Constitution art 35(2).

¹⁷ *Ibid* Art 36.

declare him a prohibited immigrant was invalid, null and void for all legal purposes.¹⁸ Justice BK Bweupe held that the applicant was a Zambian by descent, consequently any attempts to deprive the applicant's citizenship was invalid and void for all intents and purposes and that the applicant was not liable to deportation. The High Court further quashed the deportation warrant which had been issued by the Minister of Home Affairs arguing that it was invalid both in law and fact.¹⁹ The case confirmed the fact that a Zambian national cannot be deported or declared as a prohibited immigrant.

In addition, the Constitution provides for other ways of gaining nationality such as; adoption, citizenship by registration which is available to persons who have attained the age of eighteen; naturalisation, which can be attained after a period of five or ten years of residence in Zambia.²⁰ Acquiring nationality based on birth and descent requires one of the parents of the concerned person to be a citizen of Zambia. According to the *Hastie Sibanda* Case this is in accordance with the *jus sanguinis*, which is acquisition of nationality based on parents.²¹ The principle of *jus sanguinis* can be constated with the principle of *jus solis* that is acquisition of nationality based on the territory of birth.²² The latter is the recommended one in human rights law for any state seeking to eradicate statelessness.

Article 40 permits individuals to renounce citizenship with fear of losing the Zambian nationality. However, citizenships acquired by fraudulent, false representation or concealment of facts can risk having their citizenship deprived. The Constitution is silent as to whether an aggrieved person could challenge or appeal the decision against the state within the domestic legal system. This implies that there is a risk that individual rights could be violated by such decisions. The Constitution does not refer to stateless persons neither does it safeguard the human rights of such persons.

Article 42 clearly provides that rights, privileges and benefits of citizenships as guaranteed in the Constitution are restricted to Zambian citizens and that they are eligible to be issued official documentation of identification. No reference is made to statelessness persons. This could be an indication of an assumption that such persons do not exist. The implication is that such children are not afforded any protection in Zambia. Children are among those most affected by

¹⁸ *Seanyana State Advocate Mundungani Isdore C.P v Chief Immigration Officer and the Minister of Home Affairs and the Attorney -General* (1991) S.J. (H.C), para 13.

¹⁹ *Ibid* Headnote.

²⁰ *Ibid* arts 38, 37.

²¹ *Hastie Sibanda* para. 13.

²² *Ibid*.

the apprehensions of statelessness.²³ For instance, research conducted within the context of undocumented children in Iran suggests that children without legal documentation are more likely to be excluded from rights and privileges accorded to recognised children.²⁴ This is exactly what is guaranteed in the Zambian Constitution. The fact that undocumented or statelessness children are not acknowledged implies that the chances of having their rights protected is null.

Yet, Stateless children deserve protection just like any other children in a State. As articulated by Khan, statelessness is not something deserved by the person affected, neither can the person be blamed for it, especially in terms of children.²⁵ According to Khan, children do not have a choice with regards to where they are born, actions of their parents, identity or actions of States.²⁶ Despite, the Constitution defining a child as any person below the age of eighteen.²⁷ It is not suitable enough to protect childhood statelessness because the situation is not recognised in the Constitution. However, the Constitution is only supposed to be the foundation of the Zambian legal system. The substantive issues related to acquisition of nationality, birth registration, rights to name, identity and birth registration are supposed to be addressed comprehensively by the enabling Act. Thus, the next section will consider the relevant law as provided under the Citizenship Act No 33 of 2016 (the Citizenship Act)²⁸ and the Children Code Act of 2022, among others.²⁹

4.2.2 The Citizenship Act, the Birth and Deaths Registration Act and the National Registration Act Chapter 126 of the Laws of Zambia

Like the Constitution, the Citizenship Act is silent on matters relating to statelessness. Part III of the Act focuses on citizenship by birth. It refers to birth registration, national registration and citizenship by presumption for foundlings addressed in sections 15 and 16 of the Act, respectively. Birth and national registration are restricted to persons who are Zambian citizens by birth only.³⁰ Such persons are obliged to have their births registered in accordance with the

²³ Z Abtahi, K Zamani & M Potocky 'Undocumented children in Iran A review of recent legal progress' (2022) 4(1) *The Statelessness and Citizenship Review* 140.

²⁴ *Ibid.*

²⁵ F Khan 'Exploring Childhood Statelessness in South Africa' (2020) 23 *Potchefstroom Electronic Law Journal* 5.

²⁶ *Ibid.*

²⁷ Constitution of Zambia, art 266.

²⁸ The Citizenship Act No 33 of 2016.

²⁹ The Children Code Act No 12 of 2022.

³⁰ The National Registration Act Chapter 126 of the Laws of Zambia which provides the Act deals with legal documentation of identification in accordance with article 42 of the Republican Constitution. Article 42 of the Constitution provides that a 'citizen is entitled to a document of identification issued by the State to citizens.'

Births and Deaths Registration Act (BDR Act).³¹ The Act is intended to provide uniformity in provision of birth registration. Section 5 of the BDR Act requires all births to be registered. The Act does not define what constitute ‘all births’ thus difficult to appreciate the scope of coverage. Though the Act makes references to the adopted children, ‘still born’ and ‘live born’ children, who must all be registered.³² Neither the Constitution, Citizenship Act or the BDR Act refer to origin of a person’s name, language or tribe. This implies that either the law is not inclusive enough to incorporate children of stateless persons or the law could be deemed to be restricted to persons who at least have one parent born in Zambia. Either way the law is discriminatory as it fails to consider children born from stateless parents.

Attempts to address the issue of discrimination against females was illustrated in the celebrated case of *Nawakwi v Attorney General*.³³ Though not directly related to statelessness, this is in a matter involving a single female parent who was discriminated against by virtue of her sex. The issue was whether passport office required both parents’ consent before including children on a parent’s passport.³⁴ Justice CM Musumali held that the petitioner had been discriminated against on the grounds of sex.³⁵ Consequently, the Judge held that the petitioner’s children be indorsed in the present passport without requiring her to undertake a fresh affidavit.³⁶ The court further confirmed that it was a right of every Zambia to have a passport as part of the affirmation of the freedom of movement.³⁷ Finally, it is not imperative for a mother to obtain consent from the father of the child before including the child on a passport.³⁸ Though the decision does not directed related to the notions of statelessness, birth registrations, rights to name, identity or nationality, the case exemplifies challenges that could be faced by a women in the process of seeking to undertake birth registration and to acquire a birth certificate for a child. It is thus necessary to ensure that the state makes the procedures for birth registration and issuance of certificates as accessible as possible to all so that individuals can easily undertake the process. By way of *obiter dictum*, Justice CM Musumali argued that:

the facts [of the Nawakwi case] revealed that a mother of a child is not regarded by the Government to be an equal parent to a father. The father has been made to have more say over the affairs of a child at least in so far as the endorsement of the particulars of the child and the

³¹ Births and Deaths Registration Act, 1973 Chapter 51 of the Laws of Zambia.

³² *Ibid* sections 28 & 29.

³³ *Nawakwi v Attorney General* (HP 1724 of 1990) [1991] ZMHC 6 (23 June 1991).

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ *Ibid*.

issuing to a child of a passport or a travel document are concerned. This has been done by the Government of this country through the institution of the practice of asking for a father's letter of consent when matters of passports and travel documents affecting children have had to be dealt with at Passport Offices; as well as when obtaining children's birth certificates, at least during the lifetimes of the fathers. This practice is discriminatory to mothers on no other basis than the fact that they are females.³⁹

Thus, whatever measures the states puts in place to ensure the process of birth registration and certification, it is essential that these procedures must be fair and not discriminatory against any person. Section 16 of the Citizenship Act provides for 'citizenship by presumption for foundlings.' The provision provides protection for foundlings, that is children found within the Zambian territory, who appear to be less than eight years, whose parents and nationality is unknown are assumed to be Zambian nationals. Apart from this provision, which is also found in the Constitution, no further information is provided about what happens to such children. Also, the law is restricted to protecting foundlings only, the rest of the stateless children are not acknowledged nor accorded any protection. This is a huge gap in a legal system which defines a child as any person below the age of eighteen. This implies that Zambia does not only have means to locate, identify stateless persons for the purposes of ensuring they enjoy the rights to nationality, birth registration, identity and name. Yet, children remain undocumented, unrecognised, unprotected and at risk of been denied the fundamental rights as provided under the CRC, which Zambia has ratified. In August 2022, Zambia adopted the Children Code Act No 12 of 2022, (Children's Code), the legislation is a consolidation, law reform of the Zambian laws concerning children. The Children Code further domesticates the CRC and the African Charter on the Rights and Welfare of the Child. The Act is considered within the context of childhood statelessness below.

4.2. 3 The Children's Code Act

The Children's Code defines the child in the same manner as defined in the Republic Constitution.⁴⁰ This means a child is any person below the age of 18. Section 3(1) of the Children's Code provides for the fundamental principle of the best interest of the child. Accordingly, 'a child's best interest is the primary consideration in a matter or action concerning the child, whether undertaken by a public or private body.' Most importantly are sections 7 and 8 of the Children's Code. Section 7 provides for the prohibition of discrimination against the child. Section 8 provides for the right to a name and nationality. Whilst the law is

³⁹ *Ibid* para. 16.

⁴⁰ Children Code Act 2022 section 2.

progressive, section 8(3) provides that the child shall be ‘registered after birth in accordance with the Births and Deaths Registration Act which in its current form excludes stateless persons. Unless the Births and Deaths Registration Act is amended, the right to name and nationality of stateless children in Zambia will continue to be violated. Therefore, all major statutes that consider matters relating to nationality, birth registration, rights to name and identity make no reference to stateless persons. It is clearly a presumption that such persons are nonexistent. This is despite Zambia ratifying several international and regional Conventions that guarantee the rights to legal identity, birth registration and nationality. The Conventions and how they have been applied in Zambia are considered in the next section.

4.3 Zambia’s international and regional obligations

Zambia is a State Party to several international treaties that guarantee the rights to nationality, name/identity and birth registration.⁴¹ For instance, Zambia has been a state party to the 1954 Stateless Convention since 1st November, 1974.⁴² Nevertheless, neither the Republic Constitution or legislation refer to stateless persons. The Zambian legal system neither mentions stateless persons nor protects them. Stateless persons are simply not recognised in Zambia. Consequently, the CRC Committee in its Concluding Observations urged Zambia to consider acceding to the 1961 Convention Statelessness Persons hoping that the state could introduce measures intended to safeguard stateless persons within its national legal framework.⁴³

Similarly, Zambia is a State party to the ICCPR, though the convention is partially implemented under the Zambian legal system.⁴⁴ For instance, article 24 of the ICCPR, which guarantees every child the rights to nationality and birth registration has never been incorporated.⁴⁵ Studies suggest that statelessness is caused by several reasons among them is the failure to record a birth, movement from the country of birth or the denunciation of one right to citizenship ‘where the parents have a different nationality from the place of birth.’⁴⁶ The UNHCR has advised states to embrace birth registration and statelessness determination

⁴¹ Refer to treaties considered in Chapter 2, section 2.2. Note that Zambia is a state party to all treaties addressed in the section except the ICPRM.

⁴² Convention Relating to the Status of Stateless Persons < <https://www.unhcr.org/sites/default/files/legacy-pdf/3bbb0abc7.pdf> >

⁴³ CRC/C/ZMB/CO/2-4 para 26, CRC/C/ZMB/CO/5-7 para. 18 (a).

⁴⁴ Zambia ratified the ICCPR on 10 April 1984 < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=194&Lang=en >

⁴⁵ ICCPR arts 24, 24(3).

⁴⁶ AK Yousafzai, J Lombardi, M Erum & T Hyder ‘Statelessness and young children’ (2022) 4(1) *Statelessness and Citizenship Review* 154.

processes, revise national law and observe the 1961 Convention on the Reduction of Statelessness.⁴⁷

Zambia has also ratified key international treaties intended to protect stateless persons against any form of discrimination, the rights to nationality, legal identity, access to legal documentation and birth registration among other essential rights.⁴⁸ The UN Human Rights Committee has provided guidance in terms of what is required of states to implement the right to nationality. Accordingly:

States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination regarding the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both parents.⁴⁹

It is imperative for Zambia to recognise and undertake its obligations in accordance to the Convention that the State has ratified. Zambia must be held accountable by means of shaming for its failure to take active measures to protect stateless persons. Though Zambia can be commended for incorporating the CRC which provides for general principles that are essential to the child from birth and through out life.⁵⁰ The CRC provides for the general principles of the CRC such as best interests of the child (section 3), right to survival and developments (section 5), right to expression (section 6), prohibition against discrimination (section 7), right to name and nationality (section 8).⁵¹ Article 8 of the CRC guarantees every child the right to name and nationality states, it provides that: ‘A child has a right from birth to name and nationality, where the child is deprived of the identity, the State shall provide for appropriate assistance with a view to establish that identity.’⁵² However, the statute is silent on stateless persons. Most relevant to this research is the principles of non-discrimination, the best interests

⁴⁷ W T Worster ‘Customary International Law Requiring States to Grant Nationality to Stateless Children Born in their Territory’ (2022) 4 (1) *Statelessness and Citizenship Review* 114.

⁴⁸ CEDAW (ratified on 21st June 1985) articles 9 & 16, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Treaty.aspx?CountryID=194&Lang=en ; CERD (ratified 4th Feb 1972), ICESCR (ratified 10 April, 1984), CRC (6th December 1991), CRPD (1st February, 2010) https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=194&Lang=en

⁴⁹ CCPR General Comment No. 17: Rights of the child (Art.24), 7 April 1989, para 8.

⁵⁰ Children’s Code Act 12 of 2022 <

<https://www.parliament.gov.zm/sites/default/files/documents/acts/ACT%20No.%2012%20OF%202022%2CThe%20Children%27s%20Code%20FINAL.pdf> (Children’s Code)

⁵¹ *Ibid* sections 3, 5,6,7 & 8.

⁵² CRC Art 8.

of the child, the right to life, survival and development and the right to be heard.⁵³ Under article 9 and 16 of CEDAW, Zambia is obliged to recognise and implement the prohibition of discrimination with regards to nationality laws.⁵⁴

So far Zambia has demonstrated the CRC and the ACRWC through the adoption of the Children's Code Act of 2022. At the regional level Zambia is a state party to key regional human rights treaties such as the Banjul Charter,⁵⁵ the ACRWC,⁵⁶ and the Maputo Protocol.⁵⁷ Article 1 of the ACRWC requires States Parties to adopt 'legislation and other measures' to implement the ACRWC rights. States Parties are obliged to respect, protect and undertake their obligations towards individuals.⁵⁸ States are obliged to respect individuals' rights.⁵⁹ On this basis, Zambia is obliged to ensure all births are registered and certificates are issued without discrimination. In addition, stateless persons must be recognised as individuals capable of possessing rights, duties, and particularly, the right to acquire a nationality. Failure to recognise and grant stateless children these rights is detrimental and puts them at risk of abuse and exploitation.⁶⁰

In addition, Zambia is obliged to implement the UNSDGs Target 16.9 which requires the state to ensure all births are registered. Universal birth registration is intended to ensure that all children acquire a 'legal identity and especially birth registration for all.'⁶¹ So far the research has demonstrated that Zambia is a state party to several treaties that recognise the rights to nationality, name, identity, and birth registration. However, the state has not been effective at integrating the rights in the national legal framework in order to make them accessible to all persons. On this basis, Zambia has failed lamentably to implement the treaties that the State has acceded to. It is thus in violation of the provisions that guarantee the rights to nationality, birth registration, legal identity and name.

⁵³ Committee on the Rights of the Child General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child UN Doc CRC/GC/2003/5 (2003). para 6.

⁵⁴ CEDAW arts 9 & 16,

⁵⁵ Ratified 16th December 1964 <<https://achpr.au.int/en/states>> 16th December 1964.

⁵⁶ Ratified 02 December 2008 < <https://www.acerwc.africa/en/member-states/ratifications>>

⁵⁷ Ratified 02 May 2006 < https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_WOMEN_IN_AFRICA.pdf>

⁵⁸ The African Commission on Human and Peoples' Rights also include the duty to promote. See *SERAC v Nigeria* (ACHPR) 2155/96 of 27 October 2001.

⁵⁹ *SERAC v Nigeria* (ACHPR) 2155/96 of 27 October 2001 para 45.

⁶⁰ F Khan (note 25 above) 4.

⁶¹ 'Sustainable Development Goal 16', *United Nations Department of Economic and Social Affairs Sustainable Development Knowledge Platform* <<https://sustainabledevelopment.un.org/sdg16>>.

4.4 Conclusion

Zambia must ratify the 1961 Convention on the Reduction of Stateless persons. Thereafter, the state must ensure the following: that its laws integrate measures intended to protect stateless persons, to enhance their situation and to help identify statelessness persons from various communities in Zambia. The current legal framework does not protect stateless persons. It does not provide for the right to nationality, neither does it seek to address the problem of statelessness. The chapter highlights gaps in the Zambia's legal system that currently fails to recognise the existence of stateless persons. The chapter has emphasised the fact that the existing laws on birth registration is intended for Zambians by birth, descent, registration and those adopted. No other category is provided. As articulated in Chapter 1, approximately only 16 percent of the population has had their birth registered.⁶² In order to ensure universal birth registration and avoid statelessness, it is imperative for the Births registration and citizenship laws to be reformed. The reformation of the laws must include integration of specific provisions in the Constitution and the legislation to allow for the legal system to recognise the existence of stateless persons within the territory, procedures for the state's identification of such persons and according them the necessary protection. This implies accessibility of universal birth registration, certifications, and access to the rights to name/ identity and nationality.

⁶² See chapter 1 Section 1.3.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

This chapter concludes the study. It discusses key issues raised in the research and it also provides recommendations on how Zambia can eradicate statelessness. The chapter begins with a summary or an overview of the key issues raised in the research, followed by the recommendations and finally the conclusion. The next section considers the summary of the research.

5.2 Summary and findings of the research

Chapter one is the introduction. It provides a foundation for the study. The chapter introduces the concept of statelessness and the challenges it establishes. The chapter also clarifies the research aim, objectives, and questions. The main objective of the research was to conduct a review of the Zambian legal framework relating to statelessness and to ascertain how best Zambia can respond to the problem of statelessness.

Chapter two considers the international legal framework on statelessness. It provides an overview of how States have responded to the problem of statelessness generally. The main issues highlighted by the chapter is the fact that States have not always perceived statelessness to be an urgent problem requiring urgent attention. Therefore, it has been left unattended subsequently many people today are stateless due to failure of states to integrate measures to address statelessness. Hence, the plight of statelessness children remains neglected. Chapter two illustrates the importance of nationality. The essence of such a connection between the state and an individual is protection, followed by access to the rights guaranteed under the CRC and other international and regional Conventions. A child can only effectively enjoy these rights if they are accorded access to the rights to nationality. The right to nationality has a direct link to other child's rights as demonstrated in the latest CRC Committee decision in the *Mkah* case.

Chapter three focuses on the African Regional system for protection of statelessness and the rights to nationality, name and birth registration. The chapter provides examples of individual grievances brought before the African Commission and the African Committee of Experts. The chapter indicates that few cases have been considered by the continental monitoring bodies. It thus concludes that it is necessary for states parties to be made aware of the existing regional laws and making it clear that individuals have the capacities to bring claims at a regional level subject to exhaustion of local remedies. The chapter provides an overview on the Protocol on

Statelessness in Africa. Some of the major issues addressed in the Protocol include the reaffirmation of States parties' responsibilities to address and eradicate statelessness. Other issues considered include the integration of principles such as the right to a nationality, concepts of non-discrimination and equality among others. These issues are essential towards the eradication of the problem of statelessness on the continent. It is imperative for African states to instigate studies to interrogate the matter to ensure every person's right to nationality, identity, name and birth registration are upheld and that no person is left behind. The chapter confirms that the African regional system has a sound legal framework relating to statelessness. If effectively implemented the continent can eradicate statelessness.

Chapter four is a case study on Zambia. It interrogates the Zambian legal framework in order to ascertain the extent to which it protects and prevents statelessness. The chapter highlights the gaps in the Zambian legal framework, underscoring the restrictions in both case law and legislation. The current legal framework does not protect stateless persons. It does not provide for the right to nationality, neither does it seek to address the problem of statelessness. The main contention is that the Zambian legal system falls short of recognising the existence of stateless persons, neither does it protect them. The existing laws on birth registration are merely intended for Zambians by birth, descent, registration and those adopted. No other category is provided. Thus, the prevalence of discrimination against stateless persons in Zambia is evident.

The chapter concludes by recognising the need for Zambia to ensure its laws integrate measures intended to protect stateless persons, to help identify stateless persons from various communities in Zambia and to integrate laws and policies intended to enhance the situation for stateless persons. Legal reforms must include the incorporation of specific provisions under Zambian law to facilitate the identification and protection of stateless persons. Stateless persons can only be effectively protected after the incorporation of specific provisions in the laws such as to recognise their existence, to protect them and eradicate statelessness by making it possible for such persons to acquire the Zambian nationality in circumstances where they would be stateless.

The CRC Committee in its previous concluding Observations to Zambia recommended the following,¹ that Zambia must:

- (a) Strengthen its efforts to develop and implement free birth registration

¹ CRC/C/ZMB/CO/2-4 Para 32.

procedures and issuance of birth certificates with a special focus on children in rural areas and marginalised groups of children, such as refugee children.

(b) Strengthen and expand mobile birth registration to reach universal coverage, particularly for registration of children in rural areas, refugee children and those who have never been registered.

(c) Take measures to decentralise the birth registration system and provide adequate human, technical and financial resources so that birth certificates can be processed and issued at the district and provincial levels.

(d) Increase public awareness about the importance of birth registration and the process by which children are registered.

Based on the issues raised the following recommendation are made.

5.3 Recommendations

Zambia needs to be sensitised on the significance of eradicating statelessness from a child's rights perspective. Education on how a lack of access to the right to nationality can negatively impact the child is necessary to ensure the state party takes the matter seriously and adopt measures to address the problem. The issue of statelessness can easily be resolved with the necessary political will. The sensitisation may be conducted by international institutions such as the UNHCR, academics as well as civil society organisations.

As addressed above, the CRC Committee has previously urged Zambia, to reinforce its efforts to eradicate discrimination against children in marginalised and deprived situations, including girls, children that live in rural areas, children born at home, refugee children, children without legal identity, migrant and unaccompanied children.² With regards to birth registration and nationality in accordance with CRC articles 7, 8, 13-17 on civil rights and freedoms, Zambia need to enhance birth registration, by making it more accessible and available to everyone without discrimination. Universal birth registration can be attained not only by extending the birth certification to the ten provincial headquarters, but it is imperative to ensure the exercise is undertaken. Registration of births in hospitals, the development of the new birth registration under the INRIS must be closely monitored.

² CRC/C/ZMB/CO/2-4, para 26, CRC/C/ZMB/CO/5-7 para. 18 (a).

The relevant stake holders such as the State and NGOs, academics and relying on the UNHCR Global Plan of action, it is necessary for the Zambian Government to adopt the Global action plan at the national level so that it is relevant to Zambia. The plan must be detailed enough to document all that Zambia needs to do to address statelessness. On top of the list must be review of all legislation to ensure it accounts for stateless persons and their rights to nationality, birth registration, legal identity, access to relevant legal documentation. The Birth and Death Registration Act must be amended by removing discriminatory provisions that inhibits stateless persons from having their births officially recorded. Additionally, it is imperative for the child's right to name and nationality, to be incorporated in the Republic Constitution's Bill of Rights section.

Zambia must also ratify the 1961 Convention on the Reduction of Statelessness.

Since the law is reviewed and in accordance with Zambia's international and regional Conventions, Zambia must adopt measures to domesticate the law to the national legal system. Conducting educational, awareness campaigns, community roads shows, door to door campaigns within the communities to enlighten the population on the importance of birth registration and how the act is directly connected to other key issues that are necessary to facilitate a persons' ability to access fundamental rights and freedoms. Zambia must fully domesticate and implement the ICCPR including article 24.

5.4 Conclusion

In conclusion, the completion of this research constitutes the first step towards Zambia mainstreaming the notion of statelessness into its laws. Every person is entitled to fundamental rights and freedoms by virtue of being human, it is imperative that every person is accorded an opportunity to enjoy the rights.

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