CLIMATE CHANGE AND STATELESSNESS IN SOUTH AFRICA: CURRENT LAWS AND FUTURE DEVELOPMENT

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ABSTRACT

Climate change is a global issue affecting the lives of billions of people. A relatively recent and under-researched issue is the relationship between climate change and statelessness. To be stateless means that a person is not recognised as a national of any state under the operation of its law. The exact number of stateless persons worldwide is unknown given that many stateless people are 'invisible', yet the United Nations has reported that millions of people worldwide are stateless. Climate change and its impacts are exacerbating this issue through, among other things, the destruction of land and forced displacement of populations.

This dissertation considers South Africa's obligations under international law concerning the prevention of climate change-induced statelessness and the protection of persons rendered stateless by climate change. Using the legal frameworks of nationality, statelessness, refugee law, and climate change-induced displacement, this dissertation assesses what South Africa's obligations are and whether these are being met. The assessment is conducted within the context of South Africa as a regional power and one of the highest emitters of greenhouse gases globally. The dissertation's findings are that, either on paper, in practice, or both, South Africa is failing to meet some of its international obligations concerning climate change and statelessness.

South Africa's legal regime requires development to prevent climate change-induced statelessness and protect persons rendered stateless by climate change. This development must be appropriate given South Africa's status as a developing country. Brazil, another developing country and leader in its region, has taken significant steps to fight statelessness and climate change-induced displacement in the South American region. South Africa can learn from Brazil's example and its laws to develop its own legal framework to meet its international obligations better and address the issues of climate change and statelessness.

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LIST OF ABBREVIATIONS

"ACERWC" African Committee of Experts on the Rights and Welfare of the Child

"ACHPR" African Charter on Human and People's Rights

"ACJPS" African Centre for Justice and Peace Studies

"ACRWC" African Charter on the Rights and Welfare of the Child

"AU" African Union

"BDRA" Births and Deaths Registration Act 51 of 1992

"CEDAW" Convention on the Elimination of All Forms of Discrimination against Women

"DHA" Department of Home Affairs

"EDP" Environmentally Displaced Person

"GDP" Gross Domestic Product

"GHGs" Greenhouse Gases

"GNI" Gross National Income

"HRC" Human Rights Committee

"ICCPR" International Covenant on Civil and Political Rights

"ICJ" International Court of Justice

"IDP" Internally Displaced person

"IPCC" Intergovernmental Panel on Climate Change

"LLIS" Low Lying Island State

"MIDSA" Migration Dialogue for Southern Africa

"NCCAS" National Climate Change Adaptation Strategy

"NEMA" National Environmental Management Act 107 of 1998

"OAU" Organisation of African Unity

"PDD" Platform on Disaster Displacement

"PLACE" People's Legal Aid Centre

"POC" Population of Concern

"RAB" Refugee Appeal Board

"RSDO" Refugee Status Determination Officer

"SADC" Southern African Development Community

"SCA" Supreme Court of Appeal

“SDGs” Sustainable Development Goals

“SDP” Status Determination Procedure

“UDHR” Universal Declaration of Human Rights

“UN” United Nations

“UNFCCC” United Nations Framework Convention on Climate Change

“UNHCR” United Nations High Commissioner for Refugees

CHAPTER ONE: THE FACTUAL CONTEXT FOR CLIMATE CHANGE-INDUCED STATELESSNESS

1. INTRODUCTION

Former President of the United States, Barack Obama, once described climate change as an "urgent and growing threat" that is the "one issue that will define the contours of this century, more dramatically than any other".[2] The urgency of the threat of climate change is evidenced by its impacts. Droughts, floods, desertification, rising sea levels, and tropical storms are all increasing in frequency and intensity. The 2022 report from the International Panel on Climate Change (IPCC) states that the time to limit global warming is limited and that action must be taken now.[3]

The impacts of climate change are felt particularly hard by vulnerable communities.[4] One of the most vulnerable groups is stateless persons.[5] A stateless person is a person "who is not considered as a national by any State under the operation of its law".[6] In 2016, the United Nations High Commissioner for Refugees (UNHCR) office estimated that there were between ten and fifteen million stateless persons worldwide.[7] Although there is no exact data on the number of stateless persons in Southern Africa, as of 31 December 2021, there were a recorded 9 042 319 persons of concern in the Southern African region, including refugees, internally displaced

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[2] Remarks by the President at United Nations Climate Change Summit (23 September 2014) available at *https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/remarks-president-un-climate-change-summit*, accessed on 24 May 2022.

[3] United Nations Climate Statement 'The Window for Climate Action Has Not Yet Closed' 4 April 2022, available at *https://unfccc.int/news/the-window-for-climate-action-has-not-yet-closed*, accessed on 5 April 2022.

[4] Technical Meeting of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts for the United Nations Framework Convention on Climate Change (UNFCCC) held in Casablanca Morocco from 27 – 29 July 2016'Action Area 6: Migration, Displacement and Human Mobility, Pillar 1 – Enhancing Knowledge and Understanding' available at *https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/excom_iom_technical_meeting_aa6_pillar_2_coordination_and_coherence.pdf*, accessed on 20 June 2022.

[5] UNHCR 'Statelessness and Climate Change Factsheet' 29 October 2021, available at *https://www.refworld.org/docid/617c01da4.html*, accessed on 7 February 2022 (Climate Change factsheet); UNHCR 'Strategic Directions 2022 – 2026' available at *Reporting.unhcr.org/strategic-directions-2022-2026*, accessed on 3 March 2022 (Strategic Directions).

[6] UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: *https://www.refworld.org/docid/3ae6b3840.html,* accessed on 13 September 2022, article 1 (1954 Statelessness Convention).

[7] Allison J Petrozziello 'Statelessness as a product of slippery statecraft: a global governance view of current causes, actors and debates' (2019) 1 *Statelessness & Citizenship Review* 136 at 137.

persons (IDPs), and stateless persons.[8] In recent decades, climate change has been recognised as a significant cause of statelessness. In 2018, 18.8 million people were displaced by slow-onset disasters.[9] In 2019, 95% of displacements were triggered by weather events. The UNHCR has recognised that displaced and stateless persons are at the forefront of the climate crisis.[10]

This dissertation assesses possibilities for law and policy development in South Africa to address the issue of statelessness caused by the impacts of climate change. The law and policy look at both the goals of prevention and reducing climate change-induced statelessness and the protection of those already rendered stateless. The argument for development will be made in several stages. First, this dissertation will look at South Africa's current laws on statelessness as a result of climate change, how they purport to prevent or reduce statelessness, and how they purport to protect stateless persons. This will include a review of South Africa's obligations under international law and whether these obligations are being met. Second, this dissertation will analyse the sufficiency and efficacy of existing laws and policies in South Africa relating to both prevention and protection. This assessment will examine how laws and policies are applied in practice and the impacts on South Africa's stateless population and those at risk of statelessness. Finally, the dissertation will assess potential developments in South African law and policy by performing a comparative analysis between South Africa and Brazil, a state similar to South Africa developmentally but with significantly more progressive statelessness and climate change laws. Brazil has been chosen as the comparator due to its similarity to South Africa in terms of development goals, emission levels, and economic status. The argument for law and policy development will specifically address South Africa's responsibilities as Africa's largest polluter, emitting 40% of the total cumulative greenhouse gas emissions for the continent.[11]

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[8] UNHCR Reporting on the South Africa Multi-Country Office for 2015, available at *Reporting.unhcr.org/southafricamco*, accessed on 24 May 2022; UNHCR Regional Update 'Southern Africa Operational Update' 1 December 2021, available at *https://reliefweb.int/report/democratic-republic-congo/unhcr-regional-update-southern-africa-operational-update-1-december*, accessed on 24 May 2022.

[9] Mark Darryl A Caniban & Francis Ron C de Guzman 'Reducing statelessness and according safe haven to climate change refugees' (2020) 39 *Philippine Law Journal* 1006 at 1007.

[10] UNHCR Strategic Directions op cit note 5.

[11] Kathryn Hochstetler 'Climate rights and obligations for emerging states: the cases of Brazil and South Africa' (2012) 79 *Social Research* 957 at 970.

A growing body of academic work acknowledges the importance of addressing climate change-induced statelessness. While international, regional, and national instruments aim to either reduce statelessness or climate change impacts, laws and policies dealing with both are absent. And while moves are being made in this direction, progress is slow. This dissertation aims to close the gap by addressing law and policy developments and making recommendations specific to the South African context. This will contribute to the growing body of research that aims to protect one of society's most vulnerable groups: stateless persons.

2. PROBLEM STATEMENT AND RESEARCH QUESTIONS

South Africa hosts one of the largest of what the UNHCR dubs "populations of concern" (POCs) in Southern Africa.[12] This includes refugees, asylum seekers, and stateless persons, although the actual number of stateless persons in South Africa is unknown. Most of these POCs are from other Southern African states. States in Southern Africa are particularly vulnerable to climate change due to their geographic location and development status.[13] Given the current global trajectory of climate change, it is likely that the portion of South Africa's stateless population that originates from its Southern African neighbours and other states, will increase. This dissertation assesses whether South Africa's current legal and policy regime is equipped to address the problem of climate change-induced statelessness and how this regime can be developed to address any shortcomings. The following research questions will aid this inquiry.

Considering South Africa's current laws on statelessness:

(a) Is South Africa meeting its obligations under international law to reduce and prevent climate-induced statelessness?

(b) To what extent do South Africa's laws and policies adequately prevent statelessness and protect stateless persons in the context of climate change?

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[12] UNHCR 'South Africa' available at *https://www.unhcr.org/south-africa.html*, accessed on 9 September 2022.

[13] Robert Scholes & Francois Engelbrecht for the Centre for Environmental Rights 'Climate impacts in southern Africa during the 21st Century' September 2021, available at *https://cer.org.za/wp-content/uploads/2021/09/Climate-impacts-in-South-Africa_Final_September_2021.FINAL_.pdf*, accessed on 9 September 2022.

(c) How can South Africa's laws and policies be developed to prevent climate-induced statelessness and protect stateless persons?

2.1. Is South Africa Meeting its Legal Obligations under International Law to Reduce and Prevent Climate Change-Induced Statelessness?

This obligation is not only to persons who may be rendered stateless by climate change but also to the international community. By its nature, statelessness is a problem that crosses national boundaries.[14] Therefore, South Africa's obligations to reduce climate change-induced statelessness are intended for the benefit of affected and potentially affected persons and the global community as a whole.

South Africa's international obligations may originate in customary international law or specific treaties. Customary international law is law in South Africa and is binding unless inconsistent with the Constitution or other South African legislation.[15] Where obligations arise in terms of a treaty, for South Africa to be bound by that treaty, it must have been signed and ratified. According to section 231 of the Constitution, the executive is responsible for negotiating and signing international agreements. The agreements are only ratified once the National Assembly and National Council of Provinces approve.[16] Once the agreement is ratified, South Africa is bound by it in international relations with other parties to the agreement.[17] A further step must be taken before the treaty has a legal effect within South Africa. The legislature must domesticate the treaty by passing legislation to provide for the treaty's implementation and enforcement within South Africa.[18] Only then can international agreements be a source of rights and obligations within South Africa.[19] The Constitution also requires South African legislation to be given a reasonable interpretation consistent with international law over an alternative, inconsistent interpretation.[20]

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[14] Molly Cochran 'Activism and International Thought: The Women's International League of Peace and Freedom and the Problem of Statelessness in the Interwar Period' (2023) 3 *Global Studies* Quarterly 1-12 at 3; Laura Van Waas ''Are we there yet?' The emergence of statelessness on the international human rights agenda' (2014) 32 *Netherlands Quarterly of Human Rights* 342 – 346.
[15] The Constitution of the Republic of South Africa 1996 section 232 (The Constitution).
[16] Ibid sections 231(1) and (2)
[17] Hennie Strydom 'International law-Making as an Attribute of State Sovereignty' in Hennie Strydom (ed) et al. *International Law* Chapter 3 at 96.
[18] Ibid.
[19] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) 374 para 92.
[20] The Constitution supra note 15 section 233.

South Africa has not ratified the 1954 Convention on the Status of Stateless Persons or the 1961 Convention on the Reduction of Statelessness (the Statelessness Conventions).[21] While South Africa is not a party to either Statelessness Convention, it is bound by customary international law and various international and regional legal instruments it has ratified. This dissertation investigates whether and to what extent South Africa has domesticated its international legal obligations. There is a body of existing literature that describes South Africa's obligations under international law and their domestication. This dissertation goes beyond this as it looks at these obligations and whether they are being met. This dissertation also looks specifically at obligations related to climate-induced statelessness and not only general statelessness obligations. The position taken in this dissertation is that formally, i.e., on paper, South Africa is meeting most of its obligations under the international legal framework regarding statelessness, but there is still room for improvement. This dissertation further posits that when the second aspect of this problem, climate change, is considered, South Africa fails to meet its international obligations. This analysis indicates the first steps to be taken in law and policy reform, as South Africa is duty-bound to fulfil obligations it has already agreed to.

2.2. To what extent do South Africa's laws and policies adequately prevent statelessness and protect stateless persons affected by climate change?

The first aspect of this problem statement and the dissertation examines whether South Africa formally meets its international law obligations. Once this is established, the dissertation turns to whether these obligations are being met practically and whether South Africa's current law and policy, as written and practised, effectively addresses the problem of climate change-induced statelessness. This entails an assessment of South African law on refugees, statelessness and stateless persons, and South African environmental law. South Africa's laws on statelessness and climate change are both currently under consideration, which is evidence of their need for reform.[22] It is vital

[21] 1954 Statelessness Convention supra note 5; and the UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: *https://www.refworld.org/docid/3ae6b39620.html*, accessed on 13 September 2022 (1961 Statelessness Convention).

[22] There is currently a Climate Change Bill before Parliament, and a review is being conducted of South Africa's nationality, immigration, and refugee law with a view to drafting a white paper on statelessness. The latest version of the Climate Change Bill (B9-2022) is available at *https://www.parliament.gov.za/bill/2300773*, accessed on 14 September 2022 (Climate Change Bill). See also Business Live 'Statelessness in spotlight as home affairs to review three acts' available at

that when these laws are enacted in their final form, they are holistic and effective. This dissertation intends to show that South Africa's law on statelessness is inadequate. It fails to prevent statelessness and fails to address existing cases of statelessness. The government could take multiple, relatively obvious actions to improve this legal framework. This dissertation intends to show further that holistic law and policy are absent when addressing these issues simultaneously, and policies that incorporate both environmental and statelessness protections will be proposed.

This dissertation takes a further position that not only is South Africa's law and policy inadequate, but so is its implementation. There is no in-depth research on the number of stateless persons in South Africa or the overall experience of these persons when dealing with government processes and officials. There are examples of practical implementation of South Africa's legal framework, which can be extracted from case law and anecdotal accounts of individual persons. This evidence suggests additional developments or measures are needed to ensure adequate implementation of the proposed legal framework.

Statelessness is one of the worst circumstances a human being can exist in. Possessing a nationality is essential for many reasons. It is the basis from which other rights are accessed, such as the rights to housing and education. While certain rights, such as the right to dignity, are available to all humans, access to mechanisms for enforcing that right is limited to those with legal status. Nationality is a human right and an essential part of one's culture and identity. In *Chisuse v Director General*, *DHA,* the Constitutional Court stated that citizenship 'goes to the core of a person's identity, their sense of belonging in a community' and can impact their enjoyment of other rights.[23]

For persons who have been chased from their homes by a disaster such as flooding and who find themselves without rights or an identity, immediate action must be taken. The research undertaken for this dissertation contributes to a growing field of study that aims to ensure that this action is not only taken but effectively taken.

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https://www.businesslive.co.za/bd/national/2022-01-26-statelessness-in-spotlight-as-home-affairs-to-review-three-acts/, accessed on 14 September 2022.

[23] *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) para 28 (*Chisuse*).

2.3. How can South Africa's laws and policies be developed to prevent climate change-induced statelessness and protect stateless persons?

Answering questions 2.1 and 2.2 indicates which areas of South Africa's legal framework need development but not how this development should occur. This dissertation looks to answer this question by comparing South Africa's legal framework with Brazil's. Using another state's framework as an example can guide how South Africa's laws could and should be developed. The position of this dissertation is that there are aspects of Brazil's legal framework that are ill-suited to the South African context but that there are many more which are not only suitable but would benefit South Africa as a state in addition to its stateless population.

Despite long acknowledging the importance of statelessness as a global and national problem, South African law and policymakers have taken very few steps to address this problem. This study contributes to existing and future research that can inform policy decisions and provide a basis for decisive action.

3. LITERATURE REVIEW

The literature reviewed for this dissertation examines the recognition of climate change-induced statelessness as a global issue and how current international and domestic legal regimes are addressing this issue. There is general agreement in the existing literature that there is a protection gap when it comes to persons displaced as a result of climate change.[24] There is also general agreement that there is a protection gap regarding stateless persons in South Africa and the Southern African region.[25] Therefore, members of both groups are particularly vulnerable and often find themselves without access to basic human rights protections.

3.1. How does climate change lead to displacement and statelessness?

Persons can be displaced in several ways due to the impacts of climate change. The first is through territory loss due to rising water levels. Due to global sea level

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[24] Matthew Scott 'Climate Refugees and the 1951 Convention' in Satvinder Singh Juss (ed) *Research Handbook on International Refugee Law* Chapter 22. Reed Koenig 'Climate Change's First Casualties: Migration and Disappearing States' (2015) 29 *Georgetown Immigration Law Journal* 501.

[25] SADC Parliamentary Forum: Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC Region, adopted at the SADC Parliamentary Forum 40th Plenary Assembly Session 1 – 15 November 2016, Harare, Zimbabwe, SADCPF40 – Res 001/16, Published 15 November 2016, available at *http://citizenshiprightsafrica.org/wp-content/uploads/2017/01/Resolution-Statelessness_SADCPF-40th-Plenary-Assembly_2016.pdf*, accessed on 13 September 2022.

increases, it is predicted that certain low-lying island states (LLISs) will soon become inundated with water. While this problem is approached with Pacific island states in mind, such as Tuvalu or the Maldives, states closer to South Africa may also be affected, such as Mauritius, Seychelles, and Madagascar.[26] Nationals of LLISs will be forced to abandon the territory as it is inundated with water.

There is some disagreement in academic literature over what happens to a state and its nationals when this occurs. Should a state lose its territory, it will no longer satisfy the Montevideo Criteria relating to the existence of states.[27] According to the Montevideo Criteria, for a state to exist, it must possess a permanent population, a defined territory and an independent government with the capacity to enter into relations with other states.[28] McAdams argues that, contrary to the Montevideo criteria, the state may continue to exist despite losing its territory. She argues that while satisfaction of the Montevideo Criteria is necessary for a state to come into existence, losing one of the criteria does not necessarily mean that the state ceases to exist.[29] The appeal of this argument is clear. The international community would likely hesitate to stop recognising an entire nation of people. Such an approach would mean that the state continues to exist, and its nationals would not be rendered stateless. The UNHCR expert panel on the concept of a stateless person under international law leans towards the stricter approach. The expert panel stated that where a state does not exist under international law, these persons will be considered stateless *ipso facto*.[30] From a practical standpoint, even if the state continued to exist, the access of its nationals to

[26] Lere Amusan & Oluwole Olutola 'Addressing climate change in Southern Africa' (2016) 72 *Indian Quarterly* 395.
[27] Antonio Joseph DelGrande 'Statelessness in the context of climate change: the applicability of the Montevideo criteria to "sinking states"' (2021) 53 *NYUJILP* 152.
[28] UN General Assembly, Draft Declaration on Rights and Duties of States, 6 December 1949, A/RES/375, available at *https://www.refworld.org/docid/3b00f1ec54.html*, accessed on 13 September 2022.
[29] Jane McAdam 'Building international approaches to climate change, disasters, and displacement' (2016) 33 *Windsor Yearbook of Access to Justice* 1.
[30] Michel Rouleau-Dick 'Sea level rise and climate statelessness: from 'too little, too late' to context-based relevance' (2021) 3 *Statelessness & Citizenship Review* 287.

effective nationality would be doubtful. These persons would, therefore, at the very least be rendered *de facto*[31] stateless, if not *de jure*[32] stateless.[33]

While the sinking state problem has in the past been seen as the quintessential example of statelessness due to the impacts of climate change, there is growing recognition that statelessness is more likely to result from displacement combined with additional factors such as lack of documentation, loss of documentation, unequal nationality laws or effluxion of time.[34] There are multiple ways in which displacement can occur as a result of the impacts of climate change. Sudden onset disasters, including floods, tropical storms, drought, fires, etc., can cause people to flee their homes. While this displacement is often internal, it can be across borders, particularly where combined with conflict or where the government of the state in question is unable or unwilling to assist displaced persons.[35] Slow-onset disasters such as desertification or rising sea levels can make land uninhabitable. It can impact the livelihoods of people relying on the land for agriculture, a large part of the Southern African economy.[36] Persons leave these areas in pursuit of habitable land and a better livelihood. It is also possible that the impacts of climate change, such as damage to livelihoods and competition over scarce resources, can lead to conflict. In many areas of Africa, there appears to be a link between climate change or weather events and increases in armed conflict and violence.[37] For many persons fleeing conflict, while the official reason for their displacement is conflict or violence, the underlying cause may be related to climate change. Finally, there are times when a government may

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[31] 1954 Statelessness Convention supra note 6 article 1. A *de facto* stateless person is a person "who is not considered as a national by any State under the operation of its law".

[32] Hugh Massey 'UNHCR and De Facto Statelessness (Background Paper No LPPR/2010/01) Division of Internal Protection and UNHCR' April 2010 at 61, available at *https://www.unhcr.org/4bc2ddeb9.pdf*, accessed on 20 June 2022. This UNHCR background paper defines de facto stateless persons as "persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country".

[33] At the United Nations Conference on the Elimination or Reduction of Future Statelessness, it was recommended "that persons who are stateless de facto should as far as possible be treated as stateless de jure, to enable them to acquire an effective nationality". United Nations Conference on the Elimination or Reduction of Future Statelessness, Resolution I, United Nations, Treaty Series, vol. 989, at 279.

[34] UNHCR Climate Change Factsheet op cit note 5 at 1,

[35] IOM 'World Migration Report 2022' 1 December 2021 at 234, available at *https://publications.iom.int/books/world-migration-report-2022*, accessed on 17 March 2022.

[36] Technical Meeting of the Executive Committee op cit note 4. See also Wario R. Adano & Fatuma Daudi 'Links between climate change, conflict and governance in Africa' (2012) *Institute for Security Studies* 234 at 2.

[37] Leah A Ndimurwimo & Leonard C Opara 'Access to justice for internally displaced persons: the global legal order' (2019) 6 *Journal of Law Society and Development* 1 at 8. See also Adano & Daudi op cit note 36 at 2.

designate certain areas as high-risk zones, unfit for human habitation, in which case persons in these zones would be displaced.[38] While displacement in any of these scenarios does not automatically render a person stateless, it can do so when combined with some of the abovementioned issues, unequal nationality laws, loss of documents, and the effluxion of time.

These coexisting risk factors are particularly pertinent in cases of cross-border displacement due to climate change. Often, such displacement is for a protracted period, which increases the risk of statelessness.[39] Events linked to climate change-induced displacement, such as flooding and tropical cyclones, also carry a risk for loss or destruction of documentation, which increases the risk of statelessness.[40]

3.2. Existing protection under refugee law frameworks

There is a certain degree of overlap in the treatment of refugees and stateless persons. In fact, according to Thomas Aleinikoff, former deputy representative for the UNHCR, all refugees are *de facto* stateless persons.[41] In certain circumstances, persons displaced across borders and rendered stateless by the impacts of climate change may qualify as refugees. They may benefit from protection under international and national refugee law frameworks, but this is not always true. Many persons displaced by climate change, so-called 'climate refugees', do not qualify as refugees under international or national laws. Protection under refugee law in its current form is, therefore, limited and uncertain. This is discussed more fully in chapter four.

3.3. Current opinions on South Africa's statelessness laws

All opinions in the literature concur that South Africa and other Southern African states need to accede to the 1954 and 1961 Statelessness Conventions.[42] The UNHCR

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[38] Walter Kälin 'Conceptualising Climate-Induced Displacement' in Jane McAdam (ed) *Climate Change and Displacement* (2012) at 85.
[39] UNHCR Climate Change Factsheet, op cit note 5; Ajwang Warria 'Stateless Transnational Migrant Children in South Africa: Implications and Opportunities for Social Work Intervention' (2020) 6 AHMR African Human Mobility Review 6 at 9; UNHCR Strategic Directions op cit note 5.
[40] UNHCR Climate Change Factsheet op cit note 5; Bronwen Manby for the World Bank 'Identification in the Context of Forced Displacement' 2016 at 12, available at *https://documents1.worldbank.org/curated/en/375811469772770030/pdf/Identification-in-the-Context-of-Forced-Displacement-Identification-for-Development-ID4D.pdf*, accessed on 24 May 2023.
[41] Thomas Aleinikoff & Stephen Poellot 'The responsibility to solve: The international community and protracted refugee situations' (2014) 56 *Virginia Journal of International Law* 207. See also Fatima Khan 'Does the right to dignity extend equally to refugees in South Africa?' (2020) 20 *AHRLJ* 261-284.
[42] 1954 Statelessness Convention supra note 6; 1961 Statelessness Convention supra note 21.

has stressed the importance of acceding to these conventions.[43] South African government representatives have stated that although South Africa is not a party to the Statelessness Conventions, the essential tenets thereof are already contained in South African law.[44] This is partly true. South Africa already provides for gender-neutral nationality laws[45], laws preventing statelessness in children[46], and prohibitions on deprivation of nationality, where doing so would result in statelessness[47], all contained in the Statelessness Conventions. What South Africa does not have is laws and policies focused on the rights available to stateless persons who do not qualify as refugees or that aim to resolve existing scenarios of statelessness. South Africa does not have a status determination procedure for stateless persons, which the Statelessness Conventions require. People deemed stateless in South Africa are effectively *de facto* stateless because no formal finding of statelessness has been made unless a court of law has made a ruling.

In some cases, South Africa's laws fail to prevent or reduce climate change-induced statelessness. For instance, as will be discussed later in chapters two and three, some laws aimed at reducing statelessness depend on other laws. In some ways, the Births and Deaths Registration Act (BDRA) is the first hurdle at which South Africa's laws aimed at preventing statelessness fall.[48] How the BDRA and its regulations are drafted, create barriers to acquiring nationality and reducing statelessness.

Another issue with South Africa's law on statelessness identified in the literature is that, even where the laws are drafted to prevent statelessness, there is a disconnect between the law itself and its implementation.[49] As contained in the Citizenship Act,

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[43] UN High Commissioner for Refugees (UNHCR) '*#IBelong* Campaign' available at *https://www.unhcr.org/ibelong/,* accessed on 13 September 2022.
[44] UNHCR 'Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons' 2011 at 113, available *https://www.unhcr.org/4ff55a319.pdf*, accessed on 13 February 2023;
[45] The South African Citizenship Act 88 of 1995 (as amended) sections 2 to 4 deal with the acquisition of nationality by birth, descent, and naturalisation respectively, and do not differentiate between persons based on their gender.
[46] Ibid section 2(4).
[47] *The Democratic Alliance v The Minister of Home Affairs* 2021 JDR 1853 (GP); The Constitution supra note 15 section 20.
[48] Births and Deaths Registration Act 51 of 1992 (BDRA).
[49] UNHCR 'Birth Registration and Statelessness in the Member States of the Southern Africa Development Community', 23 December 2022 at 16 and 32, available at *https://reliefweb.int/report/angola/birth-registration-and-statelessness-member-states-southern-africa-development-community*, accessed on 10 January 2023 (Birth Registration in SADC); Aimée-Noël Mbiyozo for the Institute for Security Studies 'Statelessness in Southern Africa – Time to end it, not promote it' November 2019, available at *https://issafrica.s3.amazonaws.com/site/uploads/sar32.pdf*, accessed on 13 September 2022.

South Africa's nationality law provides that every child born in South Africa may acquire South African nationality if they would otherwise be stateless.[50] Unfortunately, this law is not effectively or consistently implemented. Public officials do not correctly or effectively determine a child's nationality at birth.[51] One of the areas in which this discrepancy is most apparent is when children are born to refugee parents. For instance, refugee mothers may come from countries where mothers cannot pass nationality on to their children. The children born to these refugee mothers in South Africa are stateless at birth. In practice, they are assigned their mother's or parents' nationality. Assignment of another state's nationality by South African officials in this manner is meaningless since only a state can determine its nationals[52]. These children, therefore, lose out on the benefit of South African law specifically aimed at preventing statelessness.

Yet another factor identified as widening the protection gap for stateless persons in South Africa is political will and public attitudes toward POCs such as refugees and stateless persons. South Africa has made pledges to accede to the Statelessness Conventions since 2011. Some say this indicates a political will to eradicate statelessness and protect stateless persons. More than a decade later, no progress has been made. The UNHCR has previously touted South Africa's refugee law as one of the most progressive legal regimes in the world.[53] Yet, applications for refugee status are overwhelmingly rejected, and approximately 95% of asylum seekers are perceived as economic migrants taking advantage of the asylum system. South African policy towards refugees and black African migrants seems to be moving more and more towards exclusion.[54] The Department of Home Affairs (DHA) has proposed that South Africa withdraw from international refugee conventions and reaccede with reservations, lessening the rights and protections available to refugees in South Africa.[55] Regarding statelessness, government officials are quoted as questioning whether the issue of statelessness even exists. In 2019, the Home Affairs director of

[50] The Citizenship Act 88 of 1995 (as amended) section 2(2).
[51] Fatima Khan 'Exploring childhood statelessness in South Africa' (2020) 23 *PELJ* at 16 and 17.
[52] Ibid.
[53] Fatima Khan & Megan Lee 'Policy shifts in the asylum process in South Africa resulting in hidden refugees and asylum seekers' (2018) 4 *African Human Mobility Review* 1205 at 1206.
[54] Ibid.
[55] Human Rights Watch 'South Africa Mulls Major Immigration Overhaul' 20 November, available at *https://www.hrw.org/news/2023/11/20/south-africa-mulls-major-immigration-overhaul*, accessed on 22 November 2023.

travel documents and citizenship disputed statelessness itself, claiming, "I seriously dispute that any person can be born stateless".[56] The absence of political will and negative public attitudes towards stateless persons and POCs, in general, are exacerbating the existing protection gaps.

4. METHODOLOGY

Research for this dissertation has been conducted on a desk-top study basis. Any information related to individual cases of statelessness or displacement has been obtained from publicly available sources.

4.1. Analysing South Africa's Compliance with its International Obligations

This dissertation looks at the existing legal framework on climate-induced statelessness at an international and regional level applicable to South Africa. The analysis considers the issue of climate change-induced statelessness by looking at four legal frameworks: nationality, statelessness, refugee law, and disaster-induced displacement. The frameworks on nationality and statelessness are relevant because they concern the right to nationality and, conversely, the absence of nationality. These frameworks are, therefore, relevant to South Africa's obligations to protect the right to nationality by preventing or reducing climate change-induced statelessness, as well as South Africa's obligations to protect persons rendered stateless by climate change. The refugee law framework is likewise relevant to South Africa's obligations to prevent climate change-induced statelessness and protect persons rendered stateless by climate change. Persons rendered stateless or at risk of statelessness by climate change are often forced to cross international borders.[57] Refugee law can provide such persons with a recognised protection status and pathways to citizenship through naturalisation. It can, therefore, protect these persons and reduce the number of stateless persons. The framework on disaster-induced displacement is relevant to South Africa's legal obligations to protect stateless persons who have been forced to cross international borders due to climate change.

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[56] Mbiyozo op cit note 49.

[57] UNFCCC 'Africa's humanitarian action in migration policy: adjusting to environment and climate change - Summary and proposed policy actions for the first 1,000 days' at 1, available at *https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/africa-focused_environmental_pillar_research_summary_final.pdf,* accessed on 29 March 2023.

The analysis of these frameworks sets out which instruments South Africa has ratified and domesticated and to what extent this domestication is consistent with the requirements of the international legal instrument. This analysis also considers instruments to which South Africa has not yet acceded. South Africa's existing laws are compared to these instruments to determine what additional protections and preventative measures are provided for in these instruments, if any. Consideration is given to whether accession would aid in developing South African law and, if so, how.

Once South Africa's legal framework has been analysed for its compliance with international obligations and its adequacy in protecting stateless persons and preventing statelessness, it will be clear whether and where development is required. The dissertation then turns to assess how this development should occur. This is done by utilising a comparative analysis of South Africa's legal framework with Brazil's.

Documents relevant to Brazil's legal framework were obtained through internet sources. Although Brazil is predominantly Portuguese-speaking, most sources, including legislation, had English versions available online. Information regarding Brazil's legal framework was also obtained by reviewing academic sources such as journal articles and global policy documents published in English. On the rare occasion that there was no English version of a specific law available online, Google Translate was used to obtain the English translation of the document, and this translation was cross-checked with academic sources to ensure that the translation and interpretation of the law were correct.

Based on the findings of this comparative analysis, the dissertation will make recommendations for any necessary law and policy development in South Africa.

5. LIMITATIONS OF THE STUDY

South Africa does not currently have data on the number of stateless persons living in South Africa, nor on the number of persons in South Africa displaced as a result of climate change. No empirical research on the number of such persons has been conducted for this dissertation. Such an undertaking would be laudable but better undertaken in pursuing a PhD or LLD. There is, in addition, limited academic literature on the issue of climate-induced statelessness, specifically in South Africa. This dissertation aims to address this gap.

6. STRUCTURE OF THE DISSERTATION

6.1. Chapter 2: The Legal Framework on the Right to a Nationality

This chapter outlines the current international and national legal frameworks regarding the right to a nationality. The chapter assesses whether South Africa is meeting its international obligations under this framework, how it may fall short, and how this affects stateless persons displaced due to climate change.

6.2. Chapter 3: The Legal Framework on Statelessness

This chapter sets out current international and national legal frameworks regarding statelessness. The chapter assesses whether South Africa is meeting its international obligations under this framework, how it may fall short, and how this affects stateless persons displaced due to climate change.

6.3. Chapter 4: The Legal Framework on Refugees and Asylum Seekers

This chapter outlines the current international and national legal frameworks regarding refugees and asylum seekers. It considers whether these frameworks currently prevent climate change-induced statelessness and whether they offer protection for persons rendered stateless by climate change. The chapter assesses whether South Africa is meeting its international obligations under this legal framework, whether it is falling short, how this affects stateless persons displaced due to climate change specifically, and whether there is potential for the national legal refugee law framework to prevent climate-induced statelessness and protect stateless persons.

6.4. Chapter 5: The Legal Framework on Disaster-Induced Displacement

This chapter outlines the current international and national legal frameworks regarding disaster-induced displacement. The chapter assesses whether South Africa is meeting its international obligations under this framework, whether it is falling short, and how this affects stateless persons displaced due to climate change specifically. The chapter also considers the potential of this framework on a national and international level to prevent climate-induced statelessness and the limitations thereof.

6.5. Chapter 6: A Case Study of Brazil

This chapter outlines the history of Brazil's legal development and current laws on statelessness and climate change. The chapter assesses the current laws aimed at preventing climate change-induced statelessness and those aimed at protecting

stateless persons and persons displaced by climate change. The chapter then analyses the differences between South Africa and Brazil's laws on statelessness and climate change. It discusses areas where Brazil is further developed than South Africa and how South Africa could catch up.

6.6. Chapter 7: Conclusion

This chapter summarises the arguments of the preceding chapters and makes final recommendations for South Africa's legal development going forward. The chapter will also include recommendations for further study.

CHAPTER TWO: CLIMATE CHANGE AND THE LEGAL FRAMEWORK ON THE RIGHT TO A NATIONALITY

1. INTRODUCTION

The issue of statelessness as a result of climate change transverses several legal frameworks. The primary two are those dealing with the right of persons to a nationality generally and with statelessness specifically. Other legal frameworks do not deal explicitly with this issue but are nevertheless relevant. These are the frameworks dealing with refugees and disaster-induced displacement. Each framework will be discussed on the international and regional levels to form a holistic view of the current legal framework concerned with climate change-induced statelessness. The discussion will also specify which aspects of the various legal frameworks, such as treaties or customary international law, South Africa is bound by, as well as those which are powerfully persuasive. The discussion will then turn to a review of the South African frameworks to determine whether the national framework is consistent with South Africa's international and regional obligations and where the national framework may be falling short.

This chapter will address the first of these four frameworks: the right to a nationality. This framework is concerned with the prevention and reduction of climate change-induced statelessness. By ensuring nationality from birth, South Africa can prevent statelessness. South Africa can reduce statelessness by providing legal mechanisms by which stateless persons can obtain South African nationality. This chapter will assess how South Africa is currently achieving these goals and whether there is room for improvement.

2. INTERNATIONAL LEGAL FRAMEWORK

2.1. International Legal Instruments

There are multiple international instruments dealing with the right of individuals to a nationality and the protection of that right. Some, like the 1948 Universal Declaration of Human Rights (UDHR), declare the right of all persons generally to a nationality. Article 15 of the UDHR states that:

> Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.[58]

This right is not to any specific nationality but to *a* nationality. Other instruments protect the right to nationality in relation to particular groups of persons. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires that women be granted equal rights to men when acquiring, changing, or retaining their nationality.[59] The International Convention on the Elimination of All Forms of Racial Discrimination prohibits nationality laws that discriminate based on race or ethnicity.[60] The International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child both protect the right of children to acquire a nationality.[61] The Convention on the Rights of Persons with Disabilities prohibits nationality laws that discriminate based on a person's disabilities.[62]

The number of instruments that contain protections of the right to a nationality and prohibitions on infringements of that right speaks to its importance. South Africa has ratified all of these instruments.[63] Therefore, South Africa must comply with the articles contained therein and enact domestic legislation giving effect to them.

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[58] 1948 Universal Declaration of Human Rights, article 15.
[59] UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Article 9(1), available at *https://www.refworld.org/docid/3ae6b3970.html,* accessed 24 January 2023 (CEDAW). Ratified by South Africa on 15 December 1995.
[60] UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Article 5(d)(iii), available at *https://www.refworld.org/docid/3ae6b3940.html,* accessed 24 January 2023. Ratified by South Africa on 10 December 1998.
[61] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 7, available at *https://www.refworld.org/docid/3ae6b3aa0.html*, accessed 24 January 2023 (ICCPR). Ratified by South Africa on 10 December 1998.
[62] UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at *https://www.refworld.org/docid/45f973632.html*, accessed 24 January 2023. Ratified by South Africa on 30 November 2007.
[63] Ratified in 1995, 1998, 1998 and 2007 respectively. UN OHCHR 'Status of Ratification Interactive Dashboard – Ratification of 18 International Human Rights Treaties' available at *https://indicators.ohchr.org/,* accessed on 10 May 2023.

The existence of these instruments and their wide ratification is evidence of a near-universal acceptance of the need for persons to have a nationality or a right to a nationality and for that right to be protected.

2.2. Customary International Law

The right to nationality has become a norm of customary international law. Customary international law also recognises that each state has the right to determine who its citizens are and what the requirements are for acquiring nationality.[64] So, while states have the power to determine their nationals and procedures for conferring nationality, these must align with international law on the right to a nationality. States must consider the customary law norm of the right to nationality when creating laws and policies regarding nationality determination.[65]

2.3. Case Law

In the case of *Liechtenstein v Guatemala (the Nottebohm case),*[66] brought in 1953 before the International Court of Justice (ICJ), the ICJ defined nationality as follows.

> according to the practice of states, arbitral and judicial decision and the opinions of writers, nationality is a legal bond having its basis a social fact of attachment, a genuine connection of existence, interest, and sentiments, together with the existence of reciprocal rights and duties.[67]

The *Nottebohm* case relates to nationality in the context of diplomatic protection.[68] The genuine connection test in that context is contentious, and the case does not have customary international law status, meaning it is not binding on South Africa. While this case is not binding on South Africa, this definition shows the importance of nationality as a connection between individuals and states. Providing

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[64] Aimée-Noël Mbiyozo for The Institute for Security Studies (ISS) 'Statelessness: an old problem with new threats' 13 November 2019, available at *https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats*, accessed on 11 May 2023. Nottebohm Case (Liechtenstein v. Guatemala); Second Phase, International Court of Justice (ICJ), 6 April 1955 at 20, available at *https://www.refworld.org/cases,ICJ,3ae6b7248.html*, accessed on 11 May 2023 (*Nottebohm*).
[65] Carol A Batchelor 'Transforming international legal principles into national law: the right to a nationality and the avoidance of statelessness' (2006) 25 *Refugee Survey Quarterly* 10.
[66] *Nottebohm* supra note 64.
[67] *Nottebohm* supra note 64.
[68] The UN published Draft Articles on Diplomatic Protection which do not require a genuine connection between a person and a state in order for diplomatic protection to be provided. These draft articles are not yet in force. UN Draft Article on Diplomatic Protection, 2006, available at *https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf*, accessed on 15 September 2023.

routes to nationality for persons rendered stateless or at risk of statelessness due to the impacts of climate change is a crucial strategy to prevent further statelessness and protect stateless persons. This definition of nationality, which emphasises connection and attachment, should therefore be considered in South Africa's citizenship laws dealing with the acquisition, attribution, loss and renunciation of nationality.

2.4. International Policy

The international policies in various documents and speeches by UN officials provide additional insight into why the right to nationality is so essential. According to the UN General Assembly Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, E Tendayi Achiume, nationality is a precondition for the full enjoyment of human rights for people everywhere. It plays a vital role in determining access to fundamental human rights. [69] Although all humans have human rights, nationality impacts the ability to exercise and enjoy those rights.

South Africa's laws aimed at preventing and reducing statelessness must align with the critical status of the right to a nationality found in international conventions, policy, and customary law. The laws should consider the genuine connection between the persons they are designed to benefit and the South African state.

3. REGIONAL LEGAL FRAMEWORK

3.1. Regional Legal Instruments

Several legal instruments applicable to the African continent mirror the rights and protections of the international instruments discussed above. The African Charter on Human and Peoples' Rights (ACHPR) does not contain an explicit right to nationality, but it is implicit in other rights. The monitoring organ of the ACHPR, the African Commission on Human and Peoples' Rights, adopted a resolution in which it affirmed that the right to nationality is implied in article 5 of the ACHPR.[70] This was confirmed in the case of *Open Society Justice Initiative v Côte d'Ivoire*.[71] Article 5 provides that

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[69] UN General Assembly Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, A/HRC/38/52, 25 April 2018, at 4, available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/117/79/PDF/G1811779.pdf?OpenElement*, accessed on 19 January 2023.

[70] African Commission on Human and Peoples' Rights, 234: Resolution on the Right to Nationality, 23 April 2013, available at *https://www.refworld.org/docid/51adbcd24.html*, accessed on 24 January 2023.

[71] 27 May 2016, Communication 318/06.

> [e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.[72]

The 2003 Protocol to the ACHPR on women's rights confirmed that women must be treated equally to men regarding marriage and nationality rights.[73] The African Charter on the Rights and Welfare of the Child (ACRWC) establishes the right of every child born in Africa to have their birth registered and to acquire a nationality.[74] Africa, therefore, has a legal framework similar to the international legal framework, which protects the rights of all people to nationality and specifically protects the rights of vulnerable persons such as women and children. South Africa has ratified all of these instruments and is bound thereby.

3.2. Regional Case Law

In a regional decision by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the ACERWC aligned itself with the reasoning of the ICJ in the *Nottebohm* case and confirmed its view that nationality is defined as a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments.[75] In determining whether someone is a national of a particular state, the decision of the African Court on Human and Peoples' Rights in *Anudo v Tanzania* reinforced the international principle that a person's status as a citizen is not determined by written law alone but also by the application of law in practice.[76]

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[72] ACHPR supra note 72, article 5.
[73] Protocol To The African Charter On Human And Peoples' Rights On The Rights Of Women In Africa, 2003, available at *https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/ProtocolontheRightsofWomen.pdf*, accessed on 21 September 2023.
[74] Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 6 available at *https://www.refworld.org/docid/3ae6b38c18.html,* accessed on 24 January 2023 (ACRWC).
[75] *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v the Government of the Republic of Sudan* (ACERWC) DECISION NQ: 002/2018, para 33, available at *https://ihrda.uwazi.io/api/files/1569322460390df7dk1nt8dh.pdf*, accessed on 19 January 2023 *(ACJPS & PLACE v Sudan)*.
[76] *Anudo v United Republic of Tanzania* (African Court on Human and Peoples' Rights), 22 March 2018, available at *https://www.african-court.org/en/images/Cases/Judgment/-012%20-%202015%20-%20Anudo%20Vs.%20Tanzania%20-%20Judgment%2022%20March%202018%20-%20Optimized.pdf*, accessed on 19 January 2023 (*Anudo*).

4. THE SOUTH AFRICAN NATIONAL LEGAL FRAMEWORK

4.1. Legislation

4.1.1. The Constitution

The supreme source of law in South Africa is the Constitution.[77] The Constitution does not always use the terminology of a right to a nationality. Instead, it uses the term citizenship. Citizenship is protected in the founding provisions and two sections of the Bill of Rights. Section 3, in the founding provisions, provides for a common South African citizenship in which all citizens are equally entitled to the rights of citizenship and equally subject to the duties of citizenship.[78] Section 20 in the Bill of Rights protects this right by providing that no citizen may be deprived of citizenship.[79] This protects the rights of South African citizens to have their nationality protected by ensuring they are not deprived of it. The section applies only to South African citizens. Another way in which the Constitution protects the right to a nationality is by providing for the right of every child to a nationality from birth.[80] This right aims to ensure that no child born on South African territory is born without a nationality. It applies to all children born in the territory, regardless of the nationality or status of the child's parents. It is important to note that the section does not provide for a right to a *South African* nationality but to *a* nationality.

4.1.2. The Citizenship Act[81]

The Citizenship Act is the primary legislation on the right to South African nationality and citizenship.[82] Chapter 2 of the Citizenship Act provides for the acquisition of South African citizenship. It codifies South Africa's approach to acquiring citizenship, which is primarily based on *jus sanguinis*, citizenship according to blood relation.[83] A child born to one or two South African parents, whether inside or outside the country, is considered a South African citizen by birth. There are limited circumstances in which the *jus soli* principle applies, and citizenship by birth is granted to children born in the territory whose parents are not South African citizens. Children born to

[77] The Constitution supra note 15.
[78] The Constitution supra note 15 sections 3(1) and (2).
[79] The Constitution supra note 15 section 20.
[80] The Constitution supra note 15 section 28(1)(a).
[81] Citizenship Act supra note 50.
[82] Citizenship Act supra note 50.
[83] Citizenship Act supra note 50 section 2(1).

permanent residents of South Africa qualify to be South African citizens by birth if they have lived in South Africa from their date of birth until the age of majority and their birth was registered in terms of the BDRA.[84] The Citizenship Act specifically provides for the scenario in which a child may be born without a nationality. In such a case, the Act provides that the child born in South Africa shall be a South African citizen by birth if they do not have nationality or the right to a nationality of any other country and their birth was registered in terms of the BDRA.[85]

It is clear that to rely on the provisions of the Citizenship Act, particularly for children born to non-South African parents, the requirements of the BDRA must be complied with. This means that notice of the birth of the child in question must be given in the prescribed manner within 30 days of the birth.[86] The regulations to the BDRA provide for notice of birth to be given by South African citizens,[87] permanent residents or refugees,[88] and parents other than permanent residents or refugees who are not South African citizens.[89] If notice is not given within 30 days for the birth to be registered, the notice must comply with the requirements for late birth registration.[90] Regulations 4 and 5 provide for the late birth registration for children born to South African citizens and permanent residents or refugees.[91] There is no equivalent regulation addressing late notice of birth for children born to non-South African citizens who are neither permanent residents nor refugees. The result is that foreigners who are not permanent residents or refugees cannot give late notice of birth.

4.2. Case Law

In *Chisuse and Others v Director General DHA*,[92] the Constitutional Court was required to interpret the provisions of the Citizenship Act in light of the Constitution.[93] The court defined citizenship broadly as membership in a political community, where those who form part of the community enjoy rights but also assume duties associated

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[84] Citizenship Act supra note 50 section 2(3); BDRA supra note 48.
[85] Citizenship Act supra note 50 section 2(2).
[86] BDRA supra note 48 section 9(1).
[87] Regulations on the Registration of Births and Deaths in GN 128 *GG* 37373 of 26 February 2014, regulation 3 (BDRA Regulations).
[88] Ibid regulation 7.
[89] Ibid regulation 8.
[90] BDRA supra note 48 section 9(3A).
[91] BDRA Regulations supra note 87 regulation 4.
[92] *Chisuse* supra note 23.
[93] *Chisuse* supra note 23 para 23.

with that membership.[94] The court recognised citizenship as the means through which the rights in the Constitution can be accessed.[95] In South Africa, citizenship and equality of citizenship are critical due to the history of deprivation of citizenship suffered by many in South Africa. The court recognised that citizenship is more than simply a legal status.

> It goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person.

In interpreting the Citizenship Act in line with the Constitution, the Constitutional Court stated that the spirit and purport of the Citizenship Act are to widen pathways to South African citizenship rather than to restrict them.[96]

In *Centre for Child Law v Director General DHA*,[97] the Eastern Cape High Court was required to assess the constitutionality of section 10 of the BDRA. The constitutionality of the section was questioned as it did not allow unmarried fathers to give notice of a newborn child under their surname if the mother was absent. The mother, in this case, was a national from the Democratic Republic of Congo who was in South Africa on a visitor's visa, which expired before the child was born. The child's father was a South African citizen. The DHA refused to register the child's birth as the mother did not have a valid visa or permit and, therefore, could not comply with the requirements of the Regulations on the Registration of Births and Deaths.[98] The full court of the Eastern Cape High Court declared section 10 of the BDRA unconstitutional because it barred unmarried fathers from giving notice of the birth of their children under their surnames in the absence of a child's mother. The declaration of invalidity was suspended for twenty-four months to allow Parliament to cure the defect. In the interim, the full court read words into section 10 to remedy the defect during the suspension period.

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[94] *Chisuse* supra note 23 para 25.
[95] *Chisuse* supra note 23 para 24.
[96] *Chisuse* supra note 23 para 76.
[97] *Centre for Child Law v Director General, Department of Home Affairs and Others* 2020 (6) SA 199 (ECG) (*CCL v DG DHA* (ECG)).
[98] BDRA Regulations supra note 87.

The matter then went before the Constitutional Court to confirm the declaration of invalidity.[99] The submissions before the court were that the section unlawfully discriminated against unmarried fathers and children born out of wedlock. The result of this was that children born out of wedlock were unable to realise their constitutional rights. The Centre for Child Law, the applicant in the Constitutional Court, emphasised that the best interest of the child principle is the starting point in all matters concerning children's rights and argued that children without birth certificates are at a greater risk of exclusion of access to their nationality.[100] The Director-General of the DHA, the respondent, did not oppose the application for confirmation and agreed mainly with the Centre for Child Law's submissions. The Court found that the differentiation between married and unmarried fathers was invalid and amounted to unfair discrimination on the grounds of marital status, sex, and gender. The Court found further that section 10 impaired the dignity of unmarried fathers and their children. The section was found to be inconsistent with the best interests of the child as well as a child's right to nationality from birth.[101] The High Court's declaration that the section was unconstitutional was confirmed. The Constitutional Court ordered that section 10 be severed in its entirety.[102]

In the *Centre for Child Law v Director General DHA* litigation, the additional question of the constitutionality of certain regulations to the BDRA was in issue before the court *a quo* in *Menzile Naki and another v Director General: Department of Home Affairs*.[103] This issue was decided by the court a quo, by a single judge sitting in the Eastern Cape High Court, and was not dealt with by the full bench of the Eastern Cape High Court or the Constitutional Court. The court *a quo* considered the constitutionality of regulations 3(3) and 3(5), 4(3) and 4(5), and 5(3) and 5(5).[104] Sub-regulation (3) to regulations 3, 4, and 5 deals with the form of the notice and the documents required to be produced by persons giving notice of the birth of a child born to South African citizens. It was declared unconstitutional in so far as it required

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[99] *Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31 (*CCL v DG DHA* (ZACC)).
[100] Ibid para 21.
[101] Ibid para 79.
[102] *CCL v DG DHA* (ZACC) supra note 99 para 89.
[103] *Menzile Naki and another v Director General: Department of Home Affairs and Another* (4996/2016) [2018] ZAECGHC 90 (*Naki*).
[104] BDRA Regulations supra note 87.

> (f) a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen;
>
> and
>
> (i) where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian

The court a quo read in the words "where it is available" and "and available" into these respective sections[105]. The result is that these documents are not an absolute requirement when giving notice of birth. Sub-regulation (5) to regulations 3, 4, and 5 states that a notice of birth not complying with the requirements of sub-regulations (3) and (4) shall not be accepted. Sub-regulation (5) to regulations 3,4, and 5 was declared unconstitutional and invalid.[106] The result is that even where a notice of birth does not comply with all the requirements in the regulations, it may nevertheless be accepted by the officials concerned. This only applies to children born to at least one parent who is a South African citizen.[107]

In the Centre for Child Law litigation regarding section 10 of the BDRA, the High Court[108] and Constitutional Court[109] recognised that birth registration is an essential feature of children's right to nationality, as, without it, children cannot fully realise this right. Ensuring that the right to nationality is protected is vital to prevent statelessness. The Gauteng High Court also recognised this in the *Democratic Alliance v Minister of Home Affairs* judgment, where it held that section 20 of the Constitution, which prohibits the deprivation of citizenship, is a right against statelessness.[110] In other words, rights that protect nationality also prevent statelessness.

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[105] *Naki* supra note 103 para 39.
[106] *Naki* supra note 103 para 39.
[107] A finding as to the constitutionality of regulations does not need to be confirmed by the Constitutional Court. Therefore, the finding of the court a quo on this issue stands, despite not being confirmed by the Constitutional Court. Section 172 of the Constitution states that an order of invalidity by a High Court is of no force unless confirmed by the Constitutional Court. However, this relates only to Acts of Parliament, provincial Acts or conduct of the President. Regulations do not constitute Acts of Parliament.
[108] *CCL v DG DHA* (ECG) supra note 97.
[109] *CCL v DG DHA* (ZACC) supra note 99.
[110] *The Democratic Alliance v The Minister of Home Affairs* supra note 47.

5. LAW IN PRACTICE

The Citizenship Act and BDRA function together. Certain sections of the Citizenship Act require birth registration in order to determine citizenship.[111] Even where citizenship is not dependant on birth registration, birth registration is proof of where a child was born and to who. The right to nationality is, therefore, protected through birth registration. South African law provides for and requires universal birth registration. Following the decision of the Constitutional Court in *Centre for Child Law v Director-general DHA*, it would *appear* that all discrimination has been removed from South Africa's law on birth registration. In reality, significant problems remain. On paper, South Africa's birth registration system protects the right to a nationality. In practice, these laws and this system are not experienced equally by all who attempt to use them. Even where the laws are not discriminatory, how they are applied may be.[112] As stated by the African Court on Human and Peoples' Rights in *Anudo v Tanzania*, a person's status as a citizen is not determined by written law alone but by applying the law in practice.[113] Therefore, it is necessary to assess the application and implementation of South Africa's laws on birth registration.

At approximately 89%, South Africa has a relatively high, not universal, rate of birth registration for children under the age of five,[114] but reported statistics may not be entirely accurate as they may not include vulnerable groups such as refugees, asylum seekers, undocumented migrants, and stateless persons.[115] For birth registration to be truly universal, it must include children born in South Africa to foreigners, refugees, asylum seekers and undocumented migrants.[116] Even among South African citizens, birth registration is not universal.[117] Vulnerable groups tend to be left behind in the birth registration process, and lack of birth registration is most

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[111] Citizenship Act, Sections 2(2), 2(3) and 4(3).
[112] Mbiyozo op cit note 49 at 7.
[113] *Anudo* supra note 76.
[114] UNICEF 'The State of the World's Children' 2021 at 234, available at *https://www.unicef.org/media/114636/file/SOWC-2021-full-report-English.pdf,* accessed on 6 February 2023.
[115] Birth Registration in SADC op cit note 49 at 11.
[116] African Committee of Experts on the Rights and Welfare of the Child (ACERWC) General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality", 16 April 2014 at 23, ACERWC/GC/02 (2014), available at: *https://www.refworld.org/docid/54db21734.html*, accessed on 17 November 2023.
[117] UNICEF op cit note 114 at 234.

prevalent among these persons.[118] For those children born to refugees or asylum seekers who do have their births registered, this does not always ensure that their right to nationality is protected. The officials responsible for registering these children's births record their nationality as that of their parents.[119] This is done without knowing the nationality laws of the parent's country of origin or whether the child has a right to that nationality. Therefore, according to official records, a child may have a nationality, but in reality, they do not.

The Constitutional Court gave judgment in *Centre for Child Law v Director-General DHA* in 2021. Yet, in 2023, unmarried fathers are still facing obstacles to giving notice of the birth of their children. For instance, the DHA is requiring fathers to provide DNA tests as proof of paternity.[120] These tests are both expensive and time-consuming. Obtaining them, where financially possible, will still put the father in a position where he will need to register the child's birth late, thereby incurring further fees and expenses.

In Musina, in two similar cases, children were born to a South African father and an undocumented, non-South African mother.[121] In both cases, the parents attempted to register the children's birth within the requisite 30-day period but were unable to do so due to the mothers being undocumented. The mothers were instructed to obtain documentation, and the fathers were instructed to get DNA tests to prove paternity. In both cases, despite several attempts, the children remain unregistered, depriving them of full access to the rights to which they are entitled, including their right to a nationality. So, while the Director-General of the DHA, before the Constitutional Court, submitted that there should be no differentiation between married and unmarried fathers when it came to registering the births of their children,

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[118] Birth Registration in SADC op cit note 49 at 11; UNHCR & Lawyers for Human Rights 'Statelessness and Nationality in South Africa - Presentation to the Department of Home Affairs Portfolio Committee' 9 March 2021 at 17, available at *https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf*, accessed on 7 February 2023.

[119] Khan op cit note 51 at 16.

[120] Norman Cloete for IOL 'Birth registration: How SA's legislation harms foreign national children' 26 November 2022, available at *https://www.iol.co.za/saturday-star/news/birth-registration-how-sas-legislation-harms-foreign-national-children-ba51d9e5-27d8-4202-bdae-d57bdfc33ca1*, accessed on 11 January 2023.

[121] Daily Maverick 'Musina Home Affairs accused of violating children's rights over refusal to issue birth certificates' 2 February 2023, available at *https://www.dailymaverick.co.za/article/2023-02-02-musina-home-affairs-accused-of-violating-childrens-rights-over-refusal-to-issue-birth-certificates/*, accessed on 6 February 2023.

officials in the DHA remain stuck in outdated and discriminatory patterns of birth registration.

6. CRITICAL ANALYSIS AND CONCLUSION

Ensuring nationality from birth is a crucial method of preventing statelessness. While birth registration does not equate to acquiring a nationality, it can be critical to a person's ability to acquire one.[122] Obstacles to birth registration are particularly relevant for persons displaced by climate change. Such persons do not qualify for a recognised protection status in South Africa. Depending on the country of origin of displaced persons, they may qualify for a visitor/tourist visa.[123] If their displacement is prolonged or permanent, as is often the case in climate change-induced displacement, they will be forced to overstay this visa. Even if the displacement is temporary, if displaced persons lose their documentation during the disaster or climate event that caused them to flee, they may not be granted re-entry into their country of origin. They will be forced to remain in South Africa. Lost or destroyed documentation will also prevent displaced persons from being able to register the births of their children while in South Africa. Again, loss or destruction of documentation during weather events is foreseen as an issue in climate-related displacement and statelessness.[124] In each of these scenarios, displaced persons will be undocumented and at risk of statelessness. Should they give birth in South Africa, laws protecting children born to undocumented migrants are vital to ensuring the prevention of statelessness in children born to those displaced by climate change.

6.1. Preventing climate change-induced statelessness through birth registration

Birth registration and documentation are essential for people to fully realise their right to nationality. It is, therefore, vital that obstacles to achieving birth registration and documentation are removed. Even where nationality is not in dispute, there are restrictions to obtaining documentation in South Africa.[125] Persons often face difficulty getting documentation due to incompetence, resource constraints, or wilful discrimination.[126] When it comes to undocumented parents and unmarried fathers, despite the Constitutional Court's judgment in *Centre for Child Law v Director-*

[122] ACERWC "The Right to a Name" op cit note 116 at 27.
[123] The Immigration Act 13 of 2002 at section 11 (Immigration Act).
[124] UNHCR Climate Change Factsheet op cit note 5.
[125] Mbiyozo op cit note 49 at 4.
[126] Mbiyozo op cit note 49 at 7.

General DHA,[127] the examples discussed above show that, in practice, discrimination persists. Unmarried parents remain unable to register the births of their children where the mother is undocumented even though the father is a South African citizen. This is so, even though a child's right to have their birth registered is not dependent on the legal status of their parents, and not having their birth registered goes against the best interests of the child principle. South African legislation does not provide for a process of ensuring that children born to undocumented parents can be registered.[128]

The decision of the court in *Naki v Director-General DHA* regarding regulations 3, 4, and 5 to the BDRA may be helpful where a child is born to at least one South African parent but does not assist those born to undocumented parents.[129] Doing so would require amendments to regulation 8, which deals with notice of birth for children born to parents who are non-South African citizens. Currently, the regulation requires that the persons giving notice of the birth be documented.[130] Alternatively, the regulations would need to be updated to include a new regulation providing for a situation where both parents are undocumented or the sole parent is undocumented in cases where only one parent is known or is giving notice. Of course, this would need to come with appropriate safeguards. As acknowledged by the majority of the Constitutional Court in *Centre for Child Law v Director-General DHA*, there may be potential for human trafficking if proper safeguards are not provided.[131]

A UNHCR report on birth registration in Southern Africa states that South Africa has implemented various safeguards to ensure birth registration.[132] Still, there are additional safeguards that South Africa has not implemented that could encourage wider birth registration, especially among vulnerable groups such as undocumented migrants and persons displaced by climate change. One suggestion by the ACERWC is the creation of mobile registration services that can provide access to birth registration for persons living in rural and remote communities who do not have the resources to travel to register the births of their children.[133]

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[127] *CCL v DG DHA* (ZACC) supra note 99.
[128] Birth registration in SADC op cit note 49 at 24.
[129] *Naki* supra note 103.
[130] BDRA Regulations supra note 87 regulation 8.
[131] *CCL v DG DHA* (ZACC) supra note 99 para 82.
[132] Birth Registration in SADC op cit note 49.
[133] ACERWC "The Right to a Name " op cit note 116 at 32.

Another area with room for improvement is the process of late birth registration. South Africa allows late birth registration, which is positive, more than 30 days after birth. It is possible to provide further safeguards by removing obstacles to late birth registration, such as the payment of fees. Another, more urgent, change required to this area of the law is to allow late registration of children born to non-South African citizens who are not refugees or permanent residents. The Regulations to the BDRA should be updated to ensure that children born to this group of individuals are not unfairly deprived of their right to have their birth registered. The UNHCR further suggests that South Africa implement an internal appeals process whereby aggrieved persons can challenge the denial of late birth registration.[134]

South Africa's current approach to birth registration of children born to undocumented parents fails to meet South Africa's obligations to prevent and reduce climate change-induced statelessness. There is both a lack of gender equality and a disregard for the best interests of the child principle.

6.2. Reducing statelessness in adults displaced by climate change

South Africa's legal framework on nationality lacks recognition of the right of adults to a nationality. The Constitution explicitly recognises the right of every child to a nationality. Regarding adults, it recognises that all South African citizens have equal citizenship and prohibits the deprivation of this citizenship.[135] It does not recognise the right of all persons to a nationality. Article 15 of the UDHR provides for every person's right to a nationality. The UDHR is not legally binding but is highly persuasive. Certain aspects of the UDHR and Article 15, such as the prohibition on arbitrary deprivation of nationality, have becomes customary international law and are therefore binding on South Africa.[136] Article 5 of the ACHPR, which includes the right to human dignity and legal status, implies the right to nationality.[137] Unlike the UDHR, the ACHPR is binding on South Africa. The right to a nationality contained in these international instruments does not have explicit recognition in South Africa's legal framework. Such a right should properly be recognised in the Constitution and given effect in the Citizenship Act. This type of recognition would benefit persons displaced

[134] Birth Registration in SADC op cit note 49 at 39.
[135] The Constitution supra note 15 section 3 and 20.
[136] Mirna Adjami 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 *Refugee Survey Quarterly*.
[137] African Commission on Human and Peoples' Rights op cit note 70.

into the South African territory by the impacts of climate change by providing the potential to obtain South African nationality, thereby reducing climate change-induced statelessness in the country and region.

The absence of a recognition of the rights of all persons to a nationality and the persistent discrimination present in the registration of certain births, especially those involving children born to undocumented foreigners, are contrary to the words of the Constitutional Court in the *Chisuse* judgment; the spirit of the Citizenship Act is to widen pathways to South African citizenship, and not to narrow them.[138]

South Africa is bound by international obligations to respect the right to a nationality. This obligation is crucial in the prevention and reduction of climate change-induced statelessness. Ensuring the right to nationality is fulfilled in the context of climate-induced displacement will necessarily reduce the number of stateless persons. In its current written form, South Africa's legal system does not adequately protect the right to nationality of adults displaced by climate change. In its implementation, the legal system does not adequately ensure the right to nationality of children born in South Africa to displaced parents.

[138] *Chisuse* supra note 23 para 76.

CHAPTER THREE: CLIMATE CHANGE AND THE LEGAL FRAMEWORK ON STATELESSNESS

1. INTRODUCTION

The previous chapter discussed the first legal framework relevant to the issue of climate-induced statelessness, which deals with the right to nationality. Nationality and statelessness are two sides of the same coin, and this chapter will look at the legal framework that comes into play when the right to a nationality is not fulfilled, i.e., when a person is stateless. The international, regional, and national frameworks will be discussed in so far as they address, or aim to address, both the protection of stateless persons and the prevention of future cases of statelessness. This framework is relevant to South Africa's obligations to reduce climate change-induced statelessness and protect those rendered stateless by climate change.

2. INTERNATIONAL LEGAL FRAMEWORK

2.1. International Legal Instruments

The two primary legal instruments aimed at addressing statelessness internationally are the 1954 Convention relating to the Status of Stateless Persons (the 1954 Convention)[139] and the 1961 Convention on the Reduction of Statelessness (the 1961 Convention).[140] The 1954 Convention defines what a stateless person is: a person who is not considered a national by any state under the operation of its law,[141] and it sets out the rights to which stateless persons are entitled. These rights include the right to gainful employment,[142] housing,[143] education,[144] and freedom of movement.[145] The state hosting stateless persons must provide them with identity papers, travel documents, and administrative assistance.[146] Article 32 of the 1954 Convention provides that states must, as far as possible, try to facilitate the naturalisation of stateless persons and that this process should be as expeditious as possible. The goal of the 1954 Convention is to ensure that stateless persons enjoy the broadest possible

[139] 1954 Statelessness Convention supra note 6.
[140] 1961 Statelessness Convention supra note 21.
[141] 1954 Statelessness Convention supra note 6 article 1.
[142] 1954 Statelessness Convention supra note 6 Chapter III, articles 17 to 19.
[143] 1954 Statelessness Convention supra note 6 article 21.
[144] 1954 Statelessness Convention supra note 6 article 22.
[145] 1954 Statelessness Convention supra note 6 article 26.
[146] 1954 Statelessness Convention supra note 6 articles 25, 27 and 28.

exercise of fundamental rights and freedoms enjoyed by all human beings and, through article 32, to reduce statelessness and improve the status of stateless persons.

The 1961 Convention takes this last goal further, aiming to reduce and eventually eradicate statelessness. The 1961 Convention aims to reduce statelessness by obliging state parties to provide nationality to children born or found in the state territory who would otherwise be stateless.[147] Articles 5 to 7 concern loss of nationality and provide that loss of nationality is only possible where it would not result in a person being stateless. Article 8 dictates under which circumstances deprivation of nationality is allowed. Article 9 sets out various bases on which deprivation of nationality, such as race or ethnicity, is never allowed. The two Conventions, therefore, aim to protect the rights of existing stateless persons, ensuring they are treated with dignity deserving of all human beings, promote the prevention of further statelessness, and reduce statelessness through the naturalisation of stateless persons. In 2011, South Africa pledged to accede to both Statelessness Conventions.[148] Unfortunately, it has yet to do so and is not a state party to either of these Conventions. Acceding to both Conventions would enhance South Africa's obligations to prevent and reduce climate change-induced statelessness and protect persons rendered stateless by climate change.

2.2. Customary International Law

Some aspects of the Statelessness Conventions have become so widespread that they are now considered customary international law, such as the definition of a stateless person in article 1 of the 1954 Convention. Article 1 states that a stateless person is a person who is not considered a national of any State under the operation of its law. All states, including South Africa, regardless of whether they are state parties, must determine a person's status by applying this definition. William T Worster has convincingly argued that the obligation on states imposed by the 1961 Convention to grant nationality to children born on the state's territory who would otherwise be stateless has also become customary international law.[149] Worster supports his position on the basis that several international treaties impose this obligation, there is

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[147] 1961 Statelessness Convention supra note 21 articles 1 and 2.
[148] UNHCR Pledges op cit note 44 at 36; UNHCR & LHR 'Statelessness and Nationality in South Africa' op cit note 118 at 17.
[149] William Thomas Worster 'Customary International Law Requiring States to Grant Nationality to Stateless Children born in their Territory' (2022) 4 *Statelessness & Citizenship Review* 113 – 139.

a multitude of domestic legislation imposing this duty on the relevant states, and state practice tends to follow this rule. Where state practice does not follow this rule, it is often considered wrongful. He argues that, based on the available evidence, it can be presumed that such a rule exists under customary international law, and there is insufficient evidence to rebut such a presumption.[150] Given the extent to which state practice follows this rule and the near-universal acceptance of the standards of the best interests of the child, it is likely that this obligation has become a rule of customary international law. Recognising such a rule would also ensure the broadest possible protection for children and promote the reduction of statelessness. If this is the case, South Africa is obliged, in terms of customary international law, to grant South African nationality to all children born on the territory who would otherwise be stateless.

2.3. International Policy

Central policies in the international fight against statelessness include the UNHCR's *#IBelong* campaign and Global Action Plan to End Statelessness, which started in 2014 and aims to eradicate statelessness by 2024.[151] The campaign has various goals, including promoting the ratification of the 1954 and 1961 Statelessness Conventions, adoption by states of domestic legislation aimed at reducing statelessness, advocating for the removal of current domestic legislation which can lead to statelessness, and obtaining documentation for stateless persons.[152] Policy on statelessness mirrors that on the right to a nationality. For example, international policy and law dictate that men and women should have equal nationality rights. International law and policy on statelessness envisage total gender equality in nationality laws to avoid statelessness arising due to legislation discriminating based on gender.[153] The UNHCR also provides various notes on good practices that states can follow to achieve the goals of the *#IBelong* campaign, such as good practices on birth registration and ensuring that

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[150] Ibid at 119.
[151] *#IBelong* Campaign op cit note 43; UNHCR 'Global Action Plan to End Statelessness: 2014-2024' available at *https://www.unhcr.org/ibelong/global-action-plan-2014-2024/,* accessed on 27 January 2023.
[152] *#IBelong* Campaign op cit note 43; UNHCR 'Global Action Plan' op cit note 151.
[153] *#IBelong* Campaign op cit note 43. See also UN High Commissioner for Refugees (UNHCR), Background Note on Gender Equality, Nationality Laws and Statelessness 2021, 5 March 2021, available at *https://www.refworld.org/docid/604257d34.html*, accessed on 25 January 2023.

no child is born stateless, as well as on establishing status determination procedures (SDPs).[154]

An area in which international policy is helpful is in the distinction between *de jure* and *de facto* stateless persons. The definition contained in article 1 of the 1954 Convention is the definition of a *de jure* stateless person. As such, the rights and obligations imposed by the 1954 and 1961 Conventions, strictly speaking, relate only to *de jure* stateless persons. A UNHCR background paper defines *de facto* stateless persons as

> persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.[155]

A *de facto* stateless person may have a nationality, but that nationality is ineffective and does not provide the rights and protections associated with being a national of a state.[156] The UNHCR encourages states to treat *de facto* stateless persons as if they were *de jure* stateless to allow them to acquire an effective nationality.[157] This recommendation is not binding on South Africa, but adhering to it would ensure the greatest reduction of climate change-induced statelessness. Nationals of countries affected by a climate disaster may flee to South Africa because they find themselves unable to avail themselves of the protection of their state. They would, therefore, be *de facto* stateless. Effective reduction of climate change-induced statelessness, therefore, requires such persons to be treated as *de jure* stateless to have the option of acquiring South African nationality.

3. REGIONAL LEGAL FRAMEWORK

3.1. Regional Legal Instruments

The regional legal instruments discussed in chapter two, which provide for the right to a nationality, also contain provisions to address statelessness. Article 6(3) of the

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[154] Available at *https://www.refworld.org/statelessness.html,* accessed on 20 January 2023.
[155] Massey op cit note 32 at 61.
[156] Carol A Batchelor 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 178. See also Khan op cit note 51 at 6.
[157] UNHCR 'Handbook on Protection of Stateless persons' at 5, available at *https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf*, accessed on 27 January 2023.

ACRWC, for instance, provides for the right of every child to a nationality.[158] This is followed by article 6(4) which requires states to grant nationality to a child born in the state's territory if the child would otherwise be stateless.[159] In a General Comment to article 6 of the ACRWC, the ACERWC stated that it is not sufficient to merely have legislation providing for children born stateless to acquire the nationality of the state in which they were born. The law must be implemented appropriately, and the circumstances of children born in State parties must be carefully examined to determine whether the child has a nationality or a right to a nationality.[160]

3.2. Regional Case Law

In the case of *Anudo v Tanzania*,[161] the African Court on Human and Peoples' Rights recognised that the determination of nationality is within the power of sovereign states but that that power had to be exercised in accordance with international standards to avoid the risk of statelessness.[162] The court found that the Tanzanian authorities had failed to take necessary steps to prevent the applicant, in this case, from being left in a situation of statelessness. As a result, he had been rendered a stateless person according to the 1954 Statelessness Convention.[163] The Court unanimously found that Tanzania had arbitrarily deprived the applicant of his nationality in violation of Article 15(2) of the UDHR and had violated his right not to be expelled arbitrarily. The Court ordered Tanzania to take all necessary steps to restore the applicant's rights by allowing him to return to the national territory and ensuring his protection.[164] Although Tanzania is not a party to the 1954 Statelessness Convention, the court used the definition of stateless person in the Convention to determine the applicant's statelessness. This is evidence of the customary international law status of the definition, which must be used when determining the status of stateless persons. The case is also important for confirming that a state's sovereign power to determine its nationals must be exercised consistently with international standards to avoid the risk of statelessness. South Africa ratified the Protocol that established the court and which

[158] ACRWC supra note 74 article 6(3).
[159] ACRWC supra note 74 article 6(4).
[160] ACERWC "The Right to a Name" op cit note 116 at 44.
[161] *Anudo* supra note 76.
[162] *Anudo* supra note 76 paras 77 and 78.
[163] *Anudo* supra note 76 para 103.
[164] *Anudo* supra note 76 para 132.

states the court's decisions are legally binding.[165] South Africa is, therefore, obliged to ensure that its nationality laws are consistent with international standards and do not create a risk of statelessness.

In *ACJPS & ACERWC v Sudan*,[166] the African Committee of Experts on the Rights and Welfare of the Child (the Committee) had to clarify when a country must accept that a person is not a national of a particular state and is therefore stateless. The Committee referenced the UNHCR's guidelines on statelessness, which state that

> the country must accept that a person is stateless if the authorities of that State refuse to recognize that person as a national. A state can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national.[167]

The Committee found that a country cannot solely interpret and apply another country's nationality laws when determining the nationality of someone on the former state's territory.[168] The Committee also commented on the burden of proof in cases involving children, recognising that there should be a shared burden between the claimant or their parents and the concerned government to obtain evidence and establish the facts. In cases with insufficient evidence to support the claimant having another nationality, the country concerned should grant the child nationality automatically without prolonging the child's statelessness.[169]

Decisions of the Committee are not binding, but they have significant authority.[170] This decision provides further guidance on how South Africa should

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[165] Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998, available at *https://www.refworld.org/docid/3f4b19c14.html*, accessed on 18 May 2023; Open Society Justice Initiative 'African Court on Human and People's Rights' available at *https://www.justiceinitiative.org/publications/african-court-human-and-peoples-rights#:~:text=The%20African%20Court%20on%20Human,compliance%20with%20the%20African%20Charter*, accessed on 18 May 2023.

[166] *ACJPS & PLACE v Sudan* supra note 75 para 33.

[167] UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, 21 December 2012, HCR/GS/12/04, para 19, available at *https://www.refworld.org/docid/50d460c72.html*, accessed on 25 January 2023.

[168] *ACJPS & PLACE v Sudan* supra note 75 para 83.

[169] *ACJPS & PLACE v Sudan* supra note 75 para 83.

[170] 'African Committee of Experts on the Rights and Welfare of the Child and fair and effective criminal justice for children' available at *https://cdn.penalreform.org/wp-content/uploads/2012/08/justice-for-children-briefing-1-v7.pdf*, accessed on 18 May 2023.

determine the status of stateless persons. The starting point is the definition in the 1954 Statelessness Convention. According to the Committee, it is not sufficient for a state to merely interpret the nationality laws of another state. There is a shared burden of proof, especially with children, when determining nationality. The decision is significant for encouraging states to grant nationality where there is insufficient evidence of another nationality, a relatively low threshold. South African authorities should, therefore, grant South African nationality to children where there is insufficient evidence that the child has the nationality of another state.

Another case that highlights the importance of preventing statelessness in childhood is the case of the *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* (the Nubian Children case). [171] This is another decision by the African Committee of Experts on the Rights and Welfare of the Child. The Nubians have lived in Kenya for over 100 years but, despite this, were always regarded as 'aliens' with uncertain citizenship status. This significantly impacted Nubian children who were not registered as Kenyan at birth. Children, in general, in Kenya do not have their nationality recognised at birth. They make an application upon reaching 18 for an identity card. This is a simple process for most children, and their citizenship is expected to be recognised. Nubian children are the exception and must undergo a lengthy and complicated vetting process. Some receive identity cards after a protracted delay. Others never receive cards at all. Nubians were noted as being the only non-border people in Kenya who were treated this way. The complainants in this matter argued that Kenya had violated its obligations under article 6 of the African Children's Charter regarding the right of children to a nationality and the avoidance of statelessness.[172] It was further argued that Kenya had violated article 3 of the African Children's Charter on the prohibition of discrimination, as it was discriminating against Nubian children by treating them differently from other Kenyan children based on their ethnic and religious origins.[173] The Committee agreed, finding

[171] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011, available at: *https://www.refworld.org/cases,ACERWC,4f5f04492.html*, accessed on 25 January 2023. (*Nubian Children*)
[172] ACRWC supra note 74 article 6.
[173] ACRWC supra note 74 article 3.

Kenya had violated its obligations under articles 3 and 6, as Kenya's system unlawfully discriminated against Nubian children, leaving them stateless or at risk of statelessness without any legitimate hope of gaining recognition of their citizenship.[174] The Committee observed that statelessness is the antithesis of the best interests of the child.[175] The Committee, therefore, recommended that Kenya reform its legislation and administrative processes and implement a non-discriminatory birth registration system.[176]

3.3. Regional Policy

Across the African continent and within the states belonging to the Southern African Development Community (SADC), there is very low ratification of the 1954 and 1961 UN Statelessness Conventions. There is an acknowledgement by the Pan-African Parliament of the fact that hundreds of thousands of Africans are stateless or at risk of statelessness.[177] The Pan-African Parliament has welcomed the development of a policy framework to address statelessness, a protocol on eradicating statelessness, and the accession to both UN Statelessness Conventions. It has also passed a resolution encouraging states to find immediate solutions for stateless persons and those at risk of statelessness by addressing the root causes of statelessness. It encourages regional economic communities to research causes of statelessness within their regions and develop regional strategies to address these causes.[178]

The SADC region has previously taken a similar stance. Conclusion and Recommendations emanating from a 2016 Migration Dialogue for Southern Africa (MIDSA) contain agreements by state parties to take various steps, including adopting a regional action plan on statelessness. It was further agreed at MIDSA that state parties would ratify and domesticate the UN 1954 and 1961 Statelessness Conventions.[179] The SADC Parliamentary Forum likewise passed a resolution in 2016

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[174] *Nubian Children* supra note 171 paras 5, 43 and 69.
[175] *Nubian Children* supra note 171 para 46.
[176] *Nubian Children* supra note 171 para 69.
[177] Pan-African Parliament Resolution on the Eradication of Statelessness in Africa, 17 May 2019, available at *https://citizenshiprightsafrica.org/pap-resolution-on-the-eradication-of-statelessness-in-africa/,* accessed on 24 January 2023. The Pan-African Parliament is the legislative body of the African Union.
[178] Ibid.
[179] SADC Migration Dialogue for Southern Africa (MIDSA) – Conclusions & Recommendations 2016, Held in Gaborone, Botswana, 16 to 18 August 2016, available at *https://citizenshiprightsafrica.org/midsa-conclusions-and-recommendations-2016/,* accessed on 24 January 2023.

calling on governments in the SADC region to take steps to end and avoid statelessness, such as acceding to the UN Statelessness Conventions, resolving existing cases of statelessness, and reforming legislation to prevent statelessness.[180]

Regional policy, therefore, encourages but does not oblige South Africa to take steps to ratify the Statelessness Conventions and prevent and reduce cases of statelessness in the region.

4. SOUTH AFRICA'S NATIONAL LEGAL FRAMEWORK

4.1. Legislation

4.1.1. The Constitution[181]

The legislation that protects the right to a nationality also protects the right against statelessness. As quoted and approved by the Gauteng High Court in the *Democratic Alliance v Minister of Home Affairs* judgment, section 20 of the Constitution, which prohibits the deprivation of citizenship,[182] is a right against statelessness.[183] Therefore, the Constitution's protection provided to South African citizens is important in protecting their rights against statelessness. The rights contained in the Constitution should also protect persons who are already stateless. Certain rights in the Constitution apply only to South African citizens, such as political rights and the right to freedom of trade, occupation, and profession.[184] Other rights are not limited to South African citizens and apply to all persons within South Africa, including stateless persons. Such rights include the rights to dignity and life.[185] Therefore, according to the Constitution, stateless persons who reside in South Africa should have access to and protection of their fundamental human rights. The issue is that stateless persons often cannot enforce these rights as they have limited access to justice. This reinforces the view of Carol A Batchelor, who has described the right to nationality as the right to have rights.[186]

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[180] SADC Parliamentary Forum op cit note 25.
[181] The Constitution supra note 15.
[182] Ibid.
[183] *The Democratic Alliance v The Minister of Home Affairs* supra note 47 para 26.
[184] The Constitution supra note 15 sections 19 and 22.
[185] The Constitution supra note 15 sections 10 and 11.
[186] Batchelor op cit note 156 at 159.

4.1.2. The Citizenship Act[187]

Several provisions in the Citizenship Act prevent statelessness, explicitly or implicitly, or have the potential to be used to reduce and prevent statelessness. Section 2(2) states that any person born in South Africa who is not a South African citizen by operation of *jus sanguinis*, i.e. being born to one or two South African parents,[188] shall nevertheless be a South African citizen by birth if they do not have the nationality or the right to nationality of any other country.[189] For this section to apply, the provisions of the BDRA must be complied with.[190] This section explicitly and directly protects persons born in South Africa against statelessness by providing them with South African citizenship.

Section 4(3) provides for citizenship by naturalisation. It applies to persons born in South Africa, to non-South African citizens who do not have permanent residence status, and states that such persons can apply for citizenship by naturalisation upon reaching majority if they have lived in South Africa from birth to date of attaining majority, and if their birth was registered in terms of the BDRA.[191] Again, the provisions of the BDRA must be complied with. Like section 2(2), this will allow persons born in South Africa who would not be South African citizens by birth to acquire South African nationality. Unlike section 2(2), this is only possible once the person in question reaches the age of majority. Section 4(3), therefore, has the potential to reduce statelessness by providing stateless persons with South African citizenship but still leaves such persons without nationality until the age of majority. No regulations have been published relating to the operation of either of these sections.

A draft set of regulations relating to section 4(3) was published for comment on 24 July 2020, but these have yet to come into effect.[192] In their current form, draft regulation 3A dictates the form in which an application for naturalisation must be made in terms of section 4(3) and what documents must accompany such an application. Draft regulation 3A accounts for persons born in South Africa to refugees or asylum seekers and children born to foreigners not admitted for permanent

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[187] Citizenship Act supra note 50.
[188] Citizenship Act supra note 50 section 2(1).
[189] Citizenship Act supra note 50 section 2(2)(a).
[190] Citizenship Act supra note 50 section 2(2(b); BDRA supra note 48.
[191] Citizenship Act supra note 50 section 4(3).
[192] Publication of the Draft Regulations on the Citizenship Act, 1995 for Comments in GN 815 *GG* 43551 of 24 July 2020.

residence.[193] Sub-regulation (2)(c) to draft regulation 3A states explicitly that section 4(3) only applies to persons who have no citizenship, residency, or connection in any manner whatsoever with any other country.[194] It is, therefore, solely intended to assist stateless persons to acquire South African nationality. There are potential issues with the draft regulations in their current form. Firstly, no regulation or sub-regulation states that officials *must* grant citizenship by naturalisation where all requirements have been satisfied. Second, sub-regulation (3) to draft regulation 3A states that, for draft regulation 3A, registration of birth in terms of the BDRA means that the child was registered within 30 days of the date of birth.[195] No provision is made for a scenario where the procedure for the late notice of the birth was followed. This means that for persons wanting to make use of Section 4(3), their birth must have been registered within 30 days of birth. As discussed in chapter two, in sections 4.1.2 and 5, this is not always possible, especially where the child's parents are undocumented.

As the legislation currently stands, section 2(2) provides greater protection but has the additional hurdle of proving that the child in question does not have another nationality or a right to another nationality. Both of these sections, therefore, have the potential to prevent and reduce climate change-induced statelessness but are not without obstacles.

4.1.3. The Immigration Act[196]

The Immigration Act regulates the admission of foreigners to South Africa, their residence in South Africa and related matters. This legislation may affect the rights of persons who come to South Africa while fleeing climate change and its impacts. In the preamble, the Immigration Act states that immigration control and enforcement must be performed with the highest level of respect for human rights, that xenophobia must be prevented, and that the international obligations of the Republic must be complied with.[197] Therefore, respect and fair treatment of foreigners entering South Africa are paramount.

Regarding admissions, section 9(3)(a) states that no person shall enter South Africa unless they have a valid passport and visa as set out in the Immigration

[193] Draft Regulations on the Citizenship Act op cit note 192, regulation 3A(b).
[194] Draft Regulations on the Citizenship Act op cit note 192, regulation 3A(2)(c).
[195] Draft Regulations on the Citizenship Act op cit note 192, regulation 3A(3).
[196] Immigration Act supra note 123.
[197] Immigration Act supra note 123, preamble paras (l) to (o).

Act.[198] Regulation 9 of the Regulations to the Immigration Act reinforces that anyone applying for any visa must produce a valid passport.[199] This is not possible for stateless persons or persons at risk of statelessness who have lost or damaged their documentation during a weather event. The exception to the requirement for a valid passport, and the only option available to these persons, is the asylum transit visa.[200] According to regulation 22, a person claiming to be an asylum seeker in terms of section 23 must have biometrics taken, photographs and fingerprints, and complete a form containing their details.[201] The relevant form, Form 17, only requires a passport and identity number *where applicable*.[202] It can, therefore, be completed by someone undocumented. Form 17 only requires persons to provide their previous nationality(ies) *where applicable*. It can, therefore, be filled out by any person who is not and has never been a national of any country.

An asylum transit visa lasts only five days, allowing its holder time to travel to a Refugee Reception Office to apply for asylum.[203] If the asylum transit visa expires before the holder applies for asylum, the holder shall become an illegal foreigner.[204] An illegal foreigner is in South Africa in contravention of the Immigration Act.[205] Illegal foreigners may be arrested without a warrant and deported.[206] Such persons may even be required to pay a certain amount to cover expenses related to their arrest, detention, and deportation and will be liable to imprisonment for up to 12 months or a fine of R 20 000 if they fail to do so.[207] No person in South Africa may assist an illegal foreigner *unless* it is to provide humanitarian assistance.[208] Humanitarian assistance is not defined in the Immigration Act. How South African law and officials treat persons deemed to be illegal foreigners is important because, for many persons displaced across borders into South Africa by climate change and its impacts, they will be unable to obtain visas due to lack of documentation and may not be able to obtain refugee

[198] Immigration Act supra note 123 section 9(4)(b).
[199] Immigration Regulations in GN 413 *GG* 37679 of 22 May 2014 (as amended), regulation 9(1)(a) (Immigration Regulations).
[200] Immigration Act supra note 123 section 23.
[201] Immigration Regulations supra note 199, regulation 22.
[202] Immigration Regulations supra note 199, Form 17 (DHA-1732).
[203] Immigration Act supra note 123 section 23(1).
[204] Immigration Act supra note 123 section 23(2).
[205] Immigration Act supra note 123 section 1.
[206] Immigration Act supra note 123 section 34(1).
[207] Immigration Act supra note 123 section 34(3) and (4)
[208] Immigration Act supra note 123 section 42(1)(a).

status due to not meeting the formal requirements in terms of the Refugees Act.[209] They may, therefore, be considered illegal foreigners by default. How these persons are treated is directly relevant to how our current law deals with climate change-induced statelessness and whether it is sufficient.

Asylum transit visas, refugee status, and the treatment of illegal foreigners are all relevant to how stateless persons will be treated in South Africa on a case-by-case basis in the context of climate change. It may be preferable to address the problem with a wholesale approach that will apply to all persons displaced across borders into South Africa by climate change and its impacts. Section 31(2)(b) of the Immigration Act has the potential to form the basis of such an approach.[210] It provides an alternative means of acquiring admission to and residency in South Africa. It allows the Minister of Home Affairs to grant a foreigner *or category of foreigners* the rights of residency for a specified or unspecified period when special circumstances exist that justify this decision.[211] This section was relied on in 2009 to provide permits to Zimbabwean nationals fleeing political and economic turmoil.[212]

This exemption may, therefore, be used to grant admission and residency to the following category of foreigners: persons displaced across borders and rendered stateless or at risk of statelessness due to the impacts of climate change. If such an approach is taken, the permits must not restrict the right of the holders to apply for permanent residency after a certain period, as was the case with the Zimbabwean permits.[213] Obtaining permanent residency and naturalisation must be open to persons displaced by climate change. While this does provide for the eventual reduction of statelessness due to climate change, this is not an ideal option as permit holders will remain without a nationality, or at least an effective nationality, until they have been in South Africa long enough to apply for citizenship by naturalisation.

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[209] The Refugees Act 130 of 1998 (Refugees Act).
[210] Immigration Act supra note 123 section 31(2)(b).
[211] Immigration Act supra note 123 section 31(2)(b).
[212] The Department of Home Affairs Meeting Report 'Zimbabwe Exemption Permit; Implementation of Ministerial Permit Review Report; suspension of senior officials; Shepard Bushiri matter, with Ministry' available at *https://pmg.org.za/committee-meeting/35529/,* accessed on 13 February 2023.
[213] Ibid.

4.2. Case Law

In *Chapelgate Properties v Unlawful Occupiers*,[214] the Gauteng High Court confirmed the rights available to refugees, asylum seekers, and illegal foreigners regarding the right to housing. The court did not discuss stateless persons specifically. Still, it can be inferred that the rights afforded to illegal foreigners, at the very least, would also be afforded to stateless persons. The court stated that illegal foreigners, to whom the Refugees Act does not apply, have a diminished status while in South Africa.[215] The court quotes section 42 of the Immigration Act, which prohibits the assistance of illegal foreigners or foreigners unless the assistance is related to the provision of necessary humanitarian assistance.[216] Although many of the occupants in this matter were illegal foreigners, the court nevertheless confirmed that they were at least entitled to humanitarian assistance and respect for their dignity.[217]

In *Chisuse v Director-General, Department of Home Affairs*, the Constitutional Court perhaps went slightly further than the court in *Chapelgate*. The court explicitly states that the rights in the Bill of Rights are afforded to everyone unless expressly stated otherwise.[218] While the court did not make this statement specifically about persons who might be illegal foreigners, such an interpretation is consistent with a human rights-based approach to immigration matters. The preamble to the Constitution states that one of its goals is to establish a society based on fundamental human rights.[219] Fundamental human rights are available to all, including those deemed to be illegal foreigners.

Several courts and judgments have addressed the fact that no regulations have been promulgated for section 2(2) of the Citizenship Act. In 2014, Matojane J, writing for the Pretoria High Court, ordered the Minister of Home Affairs to 'make regulations in relation to section 2(2) of the Citizenship Act pursuant to section 23, within a time period that the court deems reasonable'.[220] In 2016, on appeal from the Pretoria High Court, the Supreme Court of Appeal (SCA) confirmed the High Court's order and

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[214] *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and another* [2016] 3 All SA 508 (GJ) (*Chapelgate*).
[215] Ibid para 38.
[216] Ibid para 39.
[217] Ibid para 75.
[218] *Chisuse* supra note 23.
[219] The Constitution supra note 15, preamble.
[220] *DGLR v Minister of Home Affairs* (Gauteng Division, Pretoria) Unreported Case No: 38429/18 para 4(d).

ordered the DHA to comply with the High Court's order within 18 months of the date of the SCA order, 6 September 2016. The Minister withdrew his appeal before the order was handed down and agreed to the court's order.[221] Instead of complying with this order, the DHA attempted to have the original High Court order rescinded but was unsuccessful.[222]

In a 2023 judgment handed down by the Pretoria High Court, the court found that '[t]he Minister's failure to promulgate regulations to give effect to section 2(2) of the Citizenship Act as required by section 23 of the Citizenship Act as well as his failure to comply with the order of the Supreme Court of Appeal as well as various other orders to this effect amounts to contempt of court'.[223] The court did not find it necessary to order the Minister to promulgate regulations to section 2(2). It did endorse previous orders instructing the minister to do so and ordered him to expedite compliance with the SCA's order to promulgate the necessary regulations.[224] No regulations were promulgated or draft regulations published at the time of writing.

This case concerned Mr Khoza, a stateless man born in South Africa to undocumented foreigners who were in the country illegally. Mr Khoza never knew his father, and his mother died when he was six years old. His birth was never registered.[225] At age 16, Mr Khoza applied for late birth registration and a South African identity document. An official from the DHA conducted an investigation and found that Mr Khoza's parents were most likely nationals of Eswatini, who were in South Africa illegally when Mr Khoza was born. The official report recognised that Mr Khoza was born in South Africa and had no ties to Eswatini, which was confirmed when the state of Eswatini denied him access.[226] Mr Khoza was sent back and forth between various agencies in an attempt to have his birth registered and acquire identity documents before bringing the matter to court. The court found that, based on the DHA's findings, Mr Khoza was born in South Africa, and, therefore, ordered that his birth should have been and must be registered. Once his birth is registered, the court

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[221] *Minister of Home Affairs and Others v DGLR and Another* (Case Number 1051/2015 SCA) (6 September 2016).
[222] *Khoza v Minister of Home Affairs and Another* (6700/2022) [2023] ZAGPPHC 93 para 72.3 (*Khoza)*.
[223] Ibid para 73.
[224] Ibid para 76.
[225] Ibid paras 4-11.
[226] Ibid paras 11-13.

stated, all requirements of sections 2(2) and 4(3) of the Citizenship Act will be met.[227] The court, therefore, ordered that he be granted South African citizenship. In addition to holding the Minister of Home Affairs in contempt, the Pretoria High Court made a punitive costs award against the DHA. The court described the DHA as inflexible and oppositional. It stated that it is not the DHA's mandate to pose as a barrier to recognition of citizenship, especially not when its disputes are frivolous and contrived.[228]

Several courts and judgments have also dealt with questions relating to section 4(3) of the Citizenship Act, its poor application in practice, and its lack of regulations. In 2018, the SCA tackled this section in the case of *Minister of Home Affairs v Ali*.[229] In this case, the DHA refused to grant an application for citizenship in terms of section 4(3), even though the applicant satisfied all of the requirements of the section. The respondents before the SCA were the applicants in terms of section 4(3). All had been born in South Africa to non-South African parents without permanent residency status. All had their births registered in terms of the BDRA, had lived in South Africa until reaching the age of majority, and knew no other home. Their citizenship applications were denied, partly because the Minister of Home Affairs had failed to promulgate the regulations to section 4(3) with the necessary forms to apply for citizenship. The SCA ordered the Minister of Home Affairs to promulgate regulations regarding applications for citizenship by naturalisation under section 4(3) within one year from the date of the order. In the interim, the SCA ordered that applications under section 4(3) be accepted in the affidavit form. Judgment was handed down on 30 November 2018. On 30 November 2019, regulations were not promulgated, nor were draft regulations published for comment.

By the time judgment was given by the SCA in the matter of *Minister of Home Affairs v Jose* on 25 November 2020,[230] regulations relating to section 4(3) still had not been published, although draft regulations had been published for public comment. In this matter, the applicants for citizenship by naturalisation under section 4(3) had made their applications in affidavit form and were denied. Like in *Minister of Home*

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[227] Ibid paras 59 and 68.
[228] Ibid paras 79-85.
[229] *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169 (30 November 2018).
[230] *The Minister of Home Affairs and Others v Jose and Another* (169/2020) [2020] ZASCA (25 November 2020).

Affairs v Ali, the applicants for citizenship in this case satisfied all of the requirements of section 4(3). The High Court ordered the Minister of Home Affairs to grant the applicants' application for citizenship. On appeal, the Minister questioned whether it was competent for the court to order the Minister to grant the citizenship application rather than to remit the decision back to him for consideration. The facts of the case made it clear that all of the requirements of section 4(3) were met and that remitting the decision back to the DHA would serve no purpose. The court quoted the Constitutional Court in *Chisuse,* which stated that

> citizenship does not depend on a discretionary decision; rather, it constitutes a question of law.[231]

The SCA emphasised the importance of citizenship, saying that it is not an area in which technical points should be taken, especially where they have no legal merit. The appeal was dismissed with the result that the order of the High Court to grant the applications for citizenship in terms of section 4(3) had to be followed. This judgment is significant because officials do not have discretion when making application decisions under section 4(3). Once all of the requirements of section 4(3) are met, citizenship must be granted.

4.3. National Policy

South Africa currently has the legislative capacity to reduce and prevent statelessness through the use of sections 2(2) and 4(3) of the Citizenship Act or section 31(2)(b) of the Immigration Act. A significant obstacle to the effective use and implementation of these sections is a public sentiment against foreigners, much of which is evident in South Africa's soft policy and the attitudes of government officials. At a regional level, discussions and agreements between SADC parties indicate the political will to address statelessness.[232] This is not the case at a national level in South Africa. The Minister of Home Affairs has stated that the Citizenship Act must be reviewed and that this review must be underpinned by a clear definition of statelessness, which the Minister considers to be the absence of a link between a person and the country of origin of their forebears.[233] Yet other government officials, such as the director of travel documents and citizenship at the DHA, have disputed statelessness and whether

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[231] *Chisuse* supra note 23 para 88.
[232] SADC Migration Dialogue op cit note 179; SADC Parliamentary Forum op cit note 25.
[233] Business Live 'Statelessness in spotlight' op cit note 22.

any person can be born stateless.[234] The South African government seems hesitant to make good on pledges to accede to the Statelessness Conventions. The UNHCR has approached the DHA using various initiatives to promote accession to these Conventions, but no progress has been made.[235]

5. LAW IN PRACTICE

South African law, as practised, fails to protect persons rendered stateless due to climate change. As stated above, stateless persons displaced by climate change run the risk of being classified as illegal foreigners in South Africa under the Immigration Act and are subject to deportation. South Africa has a past of large-scale deportation relying on the Immigration Act.[236] This trend was at its worst in 2008 when over 300 000 persons were deported. More recently, in 2017, approximately 15 000 deportations were recorded.[237] Unless forcibly displaced persons qualify for asylum or can argue against deportation on some other basis, they may be deported back to their country of origin, where they are at continued risk of the impacts of climate change, without having their statelessness addressed. Their statelessness will make the deportations even more complex since the countries supposedly receiving them may not recognise them as citizens. These persons are, therefore, left in a particularly vulnerable situation.

For persons born stateless in South Africa to parents who were displaced by climate change, the outlook is equally bleak. Despite laws existing to resolve the statelessness of such persons, the implementation of those laws is left wanting. The anti-foreigner, potentially xenophobic stance contained in South Africa's policies regarding immigrants and stateless persons permeates the attitudes of officials responsible for ensuring that various aspects of the relevant legislation are implemented. For instance, when it comes to birth registration and the health sector, some healthcare officials may refuse to provide documents necessary for birth

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[234] Mbiyozo op cit note 49 at 14.
[235] UNHCR Reporting 'South Africa Multi-Country Office' 2017, available at *Reporting.unhcr.org/southafricamco*, accessed on 13 February 2023.
[236] Fatima Khan & Nandi Rayner for the UNCHR 'A historical overview of forcibly displaced persons in Southern Africa (2011-2020): Realising the Expectations of the Global Compact on Refugees' 31 July 2020 at 10, available at *https://www.unhcr.org/people-forced-to-flee-book/wp-content/uploads/sites/137/2021/10/Fatima-Khan-and-Nandi-Rayner-_A-historical-overview-of-forcibly-displaced-persons-in-Southern-Africa.pdf*, accessed on 19 September 2022.
[237] Ibid at 10.

registration when foreigners have not been able to pay their medical bills.[238] In April 2023, the Gauteng High Court in Johannesburg ordered that all pregnant and lactating mothers and children under six be provided free healthcare at public health institutions regardless of nationality or status.[239] Despite this, non-South African women are reportedly being turned away and told to give birth in their own countries or being forced to pay hospital fees they cannot afford.[240] Without birth registration, neither section 2(2) nor section 4(3) of the Citizenship Act can be utilised to acquire South African citizenship for stateless children and other stateless persons.

The proper implementation of section 2(2) is also compromised by home affairs officials, who may be reluctant to facilitate birth registration due to anti-foreigner sentiment and the belief that a birth certificate serves as proof of citizenship.[241] As shown in the cases of *Ali* and *Jose*,[242] even where the requirements under the BDRA and section 4(3) of the Citizenship Act have been met, officials may nevertheless, without any basis, refuse to grant citizenship. Good laws are, therefore, poorly implemented in practice.

For many children born to undocumented foreigners in South Africa, their experience mirrors that of the Nubian children. They are unable to have their birth registered due to the status of the parent(s). They are, therefore, unable to obtain South African citizenship. These children are born in South Africa and have lived their whole lives there, yet they do not have the rights due to them. This problem is compounded when these children reach adulthood and start having their own children, creating generational statelessness. Like Nubian children, children born to foreigners in South Africa face discrimination and xenophobia despite being entitled to South African citizenship. South African law and practice, which results in statelessness or increased risk of statelessness, may violate South Africa's obligations under articles 3 and 6 of the African Children's Charter.

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[238] Birth Registration in SADC op cit note 49 at 40.
[239] *Section27 & Others v MEC of Gauteng Department of Health & Others* (22/19304) Gauteng High Court, Johannesburg.
[240] GroundUp 'Pregnant immigrants say they have been turned away from Joburg clinics' 9 May 2023, available at *https://www.groundup.org.za/article/pregnant-immigrant-women-turned-away-from-joburg-clinics/,* accessed on 21 September 2023.
[241] Birth Registration in SADC op cit note 49 at 35.
[242] *Minister of Home Affairs v Ali* supra note 229; *Jose* supra note 230.

6. CRITICAL ANALYSIS AND CONCLUSION

Since South Africa is not bound by international law instruments governing statelessness, it cannot be said that it is failing to meet its obligations thereunder as it has no obligations. South Africa may, however, have imposed some obligations on itself through its participation in and approval of regional statelessness dialogues and resolutions. Statelessness is also a human rights issue, and South Africa is bound by international law and its own Constitution to respect and promote human rights. South Africa is further bound by the ACRWC, which aims to prevent statelessness in childhood.[243] South Africa is, therefore, obliged to enact legislation and policy that aim to prevent and reduce childhood statelessness and, at the very least, is obliged to respect the human rights of all stateless persons.

South Africa's written law fairly successfully meets its international law obligations. Stateless persons are protected by several rights in the Bill of Rights and are, at the very least, entitled to humanitarian assistance, even when considered illegal foreigners. Section 4(3) provides for persons who have reached the age of majority and who have no other nationality to acquire South African nationality as long as they were born in South Africa and spent the duration of their lives until the age of majority in South Africa. While this provision has the potential to address issues of climate change-induced statelessness, the ACERWC has recommended that, for children born on the territory of state parties, the right to acquire citizenship should be available after a period of residency that does not require the child to reach the age of majority.[244] This would avoid prolonged periods of statelessness for children born in South Africa without a nationality.

Another notable absence from South Africa's legal framework is a legislative provision providing for documentation and the acquisition of South African nationality for persons with no other nationality who were *not* born in South Africa, such as those displaced into South Africa by climate change. Section 31(2)(b) of the Immigration Act may provide some relief here in that it can at least provide residency status in special circumstances, but as discussed, this still leaves stateless persons without nationality for a prolonged period and does not necessarily provide a route to naturalisation. Those born in South Africa are covered by section 4(3) of the

[243] ACRWC supra note 74.
[244] ACERWC "The Right to a Name" op cit note 116 at 40.

Citizenship Act, but as shown in the discussion of case law above, this section is rarely implemented properly. The draft regulations are a positive step in ensuring that the section is appropriately implemented in the future, but the draft regulations lack one crucial feature. Nowhere in the draft regulations does it say that once all the requirements of the section are met, citizenship *must* be granted. This may seem self-evident, but if this were explicitly included in the regulations, it would remove all elements of discretion in decision-making. This is consistent with the *Jose* and *Chisuse* decisions, which stated that citizenship is not a question of discretion but of law. This would avoid applications being rejected due to anti-foreigner or xenophobic sentiment. Including civil registrars and administrative DHA officials in conversations about reducing and preventing statelessness is also essential.[245]

Regarding the prevention of statelessness in childhood, section 28(a) of the Constitution and section 2(2) of the Citizenship Act are consistent with South Africa's international obligations. Together, they confirm that all children have the right to nationality from birth and provide South African citizenship by birth for all children born in South Africa who would otherwise be stateless. The problem with these laws, particularly section 2(2) of the Citizenship Act, is that there is no guidance on how the law should be implemented. As stated above, at birth, children, especially those born to refugees and other foreigners, are regarded as having the same nationality as their parents. No assessment is done at the time of birth to determine whether these children have a right to their parents' nationality or whether they could be stateless. As a result, these children may be left stateless, meaning South Africa is failing to comply with its obligations under the ACRWC and potentially under customary international law. This problem should be addressed through proper training and the promulgation of regulations to section 2(2).

The laws that South Africa does have aimed at reducing statelessness are challenging to access for persons displaced and rendered stateless due to climate change because such persons are more likely to be undocumented and considered illegal foreigners. Children born to such persons on the territory are unlikely to have their births registered. South Africa must remove these obstacles to prevent and reduce climate change-induced statelessness.

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[245] Birth Registration in SADC op cit note 49 at 44.

As written, South Africa's laws on childhood statelessness fail to meet their international obligations in one other important respect - no law governs the nationality of foundlings. South Africa can improve its written laws by amending the current legislation to include a provision addressing statelessness in foundlings and abandoned children and by promulgating regulations to section 2(2) of the Citizenship Act.[246] These are crucial steps for the legislature as it is easier to resolve statelessness in childhood than adulthood.[247] This, again, is particularly relevant for persons displaced across borders by the impacts of climate change, as children may be separated from their parents or may lose their parents during the disaster or weather event that forces them to flee.[248]

Although it is not currently obliged to do so, South Africa should enact legislation that defines and identifies stateless persons through a statelessness determination procedure to address the issue of statelessness. Without such a mechanism, data, or insight into the extent of the statelessness problem in South Africa, South Africa will be unable to adequately respond to the problem of climate change-induced statelessness. [249]

As a proponent of human rights, South Africa should endeavour to meet all international human rights standards, including those related to statelessness. The first step in this would be to accede to the 1954 and 1961 Statelessness Conventions. By its pledges and in regional parliamentary resolutions, South Africa has shown the political will to do so. South Africa must deliver on its pledges. It must then amend its current legal framework to comply with its new international obligations. Some of the amendments or additions suggested above would go part of the way to complying with these new obligations.

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[246] Liesl H Muller 'The Law is Not Enough: Realising the Child's Right to a Nationality in South Africa' (2022) *Statelessness & Citizenship Review* 4 at 273.
[247] Lawyers for Human Rights and Pretoria University Law Press 'Promoting Citizenship and Preventing Statelessness in SA: A Practitioner's Guide' 2014, available at *http://citizenshiprightsafrica.org/wp-content/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf*, accessed on 14 February 2023.
[248] UNICEF 'Family separation during crisis' available at *https://www.unicef.org/protection/family-separation-during-crisis,* accessed on 1 June 2023.
[249] UNHCR & LHR 'Statelessness and Nationality in South Africa' op cit note 118 at 17; South African Nationality Network (SANN) 'Southern African Civil Society Appeal to SADC States: End Statelessness in Southern Africa' available at *pixykornerdevelopment.co.za/lhr/wp-content/uploads/2022/12/Civil-Society-Appeal-to-SADC-States-on-ending-Statelessness-22.10.21.pdf*, accessed on 16 February 2023.

Enhancing protection for stateless persons in South Africa is particularly important for persons displaced by climate change. Due to the nature of climate change and disaster-induced displacement and the associated lack of documentation, displaced persons may be unable to prove their nationality, rendering them stateless or at risk of statelessness. Children born to such persons are at a heightened risk of statelessness since their births are unlikely to be registered due to their parents' lack of documentation. The following chapter shows that the current national refugee law framework does not protect persons displaced by climate change. Therefore, the legal framework on statelessness may be the only source of protection available.

CHAPTER FOUR: THE LEGAL FRAMEWORK ON REFUGEES AND ASYLUM SEEKERS

1. INTRODUCTION

The previous chapters discuss the legal frameworks on nationality and statelessness. The obligations imposed by these frameworks are aimed primarily at the reduction and prevention of climate change-induced statelessness. The focus of this chapter shifts to the protection of persons displaced and rendered stateless by climate change. As stated in chapter one, certain instances may exist in which persons rendered stateless by the impacts of climate change are entitled to protection under the refugee law framework. This chapter will consider South Africa's obligations under this framework. These obligations will be considered under three sections. Firstly, the chapter will consider the scenarios in which refugee law protects people rendered stateless by the impacts of climate change. This section will focus only on those categories of persons that satisfy the definition of refugee and, therefore, benefit from protection under the current operation of the framework. The second section will consider when persons *may be* protected under refugee law. This section will consider interpretations of refugee law which allow for the protection of persons who would not otherwise find protection under the first section. The third section will consider potential protections available to persons who *do not* qualify for refugee status under either section one or two. This section will look at protection obligations under the principle of *non-refoulement*. This chapter will discuss South Africa's obligations under these three categories and whether these obligations are being met. Finally, the chapter will consider the appropriateness of the refugee law framework for protecting persons rendered stateless by climate change.

2. THE CAPACITY OF REFUGEE LAW TO REDUCE STATELESSNESS

The relevance of the refugee law framework is mainly to South Africa's obligations regarding protecting persons rendered stateless by climate change. In addition to its protective potential, it has a limited capacity to reduce existing cases of statelessness. Article 34 of the UN Refugee Convention is concerned with naturalisation and obliges states, as far as possible, to facilitate the assimilation and naturalisation of refugees. It further obliges states to make every effort to expedite naturalisation proceedings and

to reduce the costs of such proceedings as far as possible.[250] So, while acquiring refugee status does not resolve the problem of statelessness, it does provide a route to citizenship by naturalisation.

3. PERSONS CURRENTLY PROTECTED BY REFUGEE LAW

Certain environmentally displaced persons (EDPs) will qualify as refugees. According to the 1951 UN Convention Relating to the Status of Refugees (1951 Convention)[251] and the 1967 Protocol Relating to the Status of Refugees (1967 Protocol),[252] a refugee under international law is a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[253]

Once a person satisfies this definition, they qualify for refugee status. This status affords refugees certain rights, such as rights regarding gainful employment,[254] access to housing,[255] and access to public education,[256] and the host state is obliged to provide such a person with identity and travel documents.[257]

The African Union (AU) (Previously the Organisation of African Unity or OAU) has a more expansive definition of refugee. It includes the definition contained in the UN Refugee Convention but also provides that the following persons will qualify as refugees;

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[250] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at *https://www.refworld.org/docid/3be01b964.html,* accessed on 27 January 2023 (1951 Refugee Convention) article 34.
[251] 1951 Refugee Convention supra note 250.
[252] UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at *https://www.refworld.org/docid/3ae6b3ae4.html,* accessed on 27 January 2023.
[253] 1951 Refugee Convention supra note 250 article 1.
[254] 1951 Refugee Convention supra note 250 articles 17-19.
[255] 1951 Refugee Convention supra note 250 article 21.
[256] 1951 Refugee Convention supra note 250 article 22.
[257] 1951 Refugee Convention supra note 250 articles 27 and 28.

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence to seek refuge in another place outside his country of origin or nationality.[258]

The AU Refugee Convention also recognises that a humanitarian approach toward solving the problems of refugees is required.[259] South Africa is a party to both the UN and the AU Refugee Conventions, and these definitions have been domesticated into South African law in section 3 of the Refugees Act.[260]

There is a consensus that EDPs are not protected under the international refugee law framework, and the UNHCR has explicitly rejected the term 'climate refugee'. This is because the definition of refugee in the UN Refugee Convention requires an element of persecution. Persecution entails human agency and intent. Weather or climate events lack the element of human agency, and the relevant state government is often willing to assist those affected. Secondly, the persecution must be based on an established ground, such as race or religion. Disasters or weather events are non-discriminatory. They impact all persons in their path equally. Those affected are, therefore, not affected due to their belonging to a particular race, religion, nationality, etc.[261]

For stateless persons displaced by the impacts of climate change, there must be co-existing circumstances that, when considered, qualify such persons as refugees. For instance, the effects of climate change can often act as a catalyst for violence or conflict.[262] Alternatively, there may be instances where the State's government refuses aid to specific groups within the country's population based on their race, ethnicity, etc. In such circumstances, it could be said that there is a well-founded fear of persecution based on an established ground (race, ethnicity, etc.) and that such persons are, therefore, unable or unwilling to avail themselves of the protection of their country

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[258] African Union (previously the Organization of African Unity (OAU)), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45, available at *https://www.refworld.org/docid/3ae6b36018.html*, accessed on 13 September 2022, at article 1 (1969 AU Refugee Convention).
[259] George N Barrie 'International Human Rights Conventions' October 2012 at 1B46 - Asylum, LAWSA, LexisNexis.
[260] Refugees Act supra note 209.
[261] Scott op cit note 24; Koenig op cit note 24.
[262] UNHCR Strategic Directions op cit note 5; Khan & Rayner op cit note 236 at 9.

of origin. The climate-induced conflict would also constitute an event seriously disturbing the public order under the AU Refugee Convention.

In these circumstances, the direct cause of displacement is not climate change. Rather, the impacts of climate change contributed to circumstances that caused affected persons to flee. Where the effects of climate change are the sole cause of displacement across borders, the protection of stateless persons under refugee law becomes less certain.

4. PERSONS POTENTIALLY PROTECTED BY REFUGEE LAW

Persons rendered stateless due to the impacts of climate change *may* qualify as refugees by, first, being stateless and second, being displaced by climate change or weather events. In each of these circumstances, whether a person qualifies as a refugee will depend on the interpretation of the definition of refugee in the UN and AU Refugee Conventions.

4.1. Unable to return – considered a Refugee by virtue of being stateless

Alexander and Simon argue that all stateless persons displaced across borders should qualify as refugees under the UN Convention's current refugee definition.[263] If this were the case, all persons rendered stateless due to climate change and its impacts would qualify as refugees, regardless of how their displacement or statelessness occurred. Their interpretation is based on reading the second part of the refugee definition found in the UN Refugee Convention, following the semi-colon. The second part of the definition of refugee reads as follows:

> …; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.

This section of the definition provides for refugee status for persons who do not have a nationality, i.e., stateless persons, and who are outside their country of habitual residence and are unable or, owing to a well-founded fear of persecution on an established ground, are unwilling to return to it. Alexander and Simon argue that following the semi-colon and the use of the word 'or', a new refugee category is

[263] Heather Alexander & Jonathan Simon '"Unable to return" in the 1951 Refugee Convention: stateless refugees and climate change' (2014) 26 *Florida Journal of International Law* (2014) 531.

created unburdened by the requirements of a well-founded fear of persecution on an established ground. They argue that the grammatical construction of the sentence differentiates between stateless persons who are *unable* to return and stateless persons who are *unwilling* to return to their country of origin. For persons unwilling to return, there is a qualification that their unwillingness must be based on a well-founded fear of persecution on an established ground. If stateless persons are unable to return, then no such qualification exists in the definition. [264] The argument goes that if such persons are unable to return, regardless of whether they face fear and persecution, they will qualify as a refugee under the UN Refugee Convention. The inability to return must be fundamental rather than a mere difficulty.[265] So, on a plain and grammatically correct reading of the definition, persons without a nationality who are unable to return to their country of origin qualify for refugee status without having to prove anything else. They argue that this must have been the intention of the drafters of the Convention rather than a drafting error, as nowhere else in the Convention is such an error made.[266]

If this interpretation were accepted, those impacted by climate-induced statelessness would be protected. While they will remain stateless, a refugee status provides, in addition to rights and protections, an avenue to obtain citizenship through naturalisation.

This argument is tempting to accept, not only for its linguistic logic but for the beneficial status and protection it would afford stateless persons. This interpretation of the definition of a refugee has yet to be tested by an international decision-making body. Unfortunately, it is unlikely to be accepted. Firstly, the low ratification rate of the Statelessness Conventions shows states' unwillingness to afford stateless persons the same rights as refugees. Such an interpretation also potentially undermines some of the primary purposes underlying the Statelessness Conventions, especially the 1954 Statelessness Convention, which aims to provide stateless persons with the broadest possible rights and protection. This would not be necessary if refugee law were applicable as this would protect stateless persons in countries other than their country of origin, and national laws would protect stateless persons in their country of origin.

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[264] Alexander & Simon op cit note 263 at 539.
[265] Alexander & Simon op cit note 263.
[266] Alexander & Simon op cit note 263 at 570.

Concerning stateless persons specifically displaced by climate change, it is even more unlikely that this interpretation will be accepted, as scholars have stated that the spirit and intent of the UN Refugee Convention do not include climate refugees.[267] While there have been calls by academics and government officials to amend the current definitions of a refugee to include climate refugees or to draft a new instrument dealing specifically with climate refugees, political will among states is low.[268] Given states' reluctance to officially amend the definition of refugee to include climate refugees or to create an instrument specifically for climate refugees, it is unlikely that states will unilaterally accept this more expansive interpretation. Currently, there is no case law on this issue.

4.2. Events seriously disturbing public order – considered a Refugee by virtue of being displaced by climate change

Displaced persons rendered stateless by the impacts of climate change may also find protection under the extended refugee definition in the AU Refugee Convention. This definition includes persons 'who, owing to … events seriously disturbing public order' are compelled to leave their habitual residence to seek refuge outside their country of origin. Such 'events' do not need to affect the whole country. It is sufficient for part of the country to be affected.[269] The definition of refugee, as contained in the AU Refugee Convention, can potentially protect climate refugees on the African continent. While refugees used to flee conflict and persecution, it is recognised that they now often flee climate or environmental issues such as famine and natural disasters. It has been suggested that this is why the AU Refugee Convention contains the extended definition of refugee, as a response to new forms of displacement, and to take a more humanitarian approach.[270] In a more humanitarian approach, the origin of the harm is not as important as the existence of the harm. This approach should allow more persons to be granted refugee status under the AU Convention's extended definition.

Persons fleeing sudden-onset disasters may qualify as refugees under this definition. A disaster such as a flood or fire may qualify as an event seriously disturbing the public order. There is some real-life evidence to support this approach.

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[267] Scott op cit note 24.
[268] Caniban & de Guzman op cit note 9 at 1027; Scott op cit note 24 at 351.
[269] 1969 AU Refugee Convention supra note 258 article 1(2).
[270] Barrie op cit note 259.

During the 2009 – 2012 drought in Somalia, persons fleeing Somalia were granted refugee status in Kenya as there were found to be *events seriously disturbing the public order* in Somalia, as required by the extended definition of a refugee.[271] This would appear to indicate that climate refugees are covered by the AU Refugee Convention's extended definition, particularly because the Kenyan government released a statement at the time saying that the Somalis fleeing to Kenya were coming in search of food rather than fleeing violence.[272] Subsequently, government representatives on the African continent have pointed out that there was also conflict affecting Somalia at the time of the drought, which is why refugee status was granted in Kenya.[273] If this is considered, it becomes less likely that environmental factors alone, in the absence of conflict, satisfy the requirement of an event seriously disturbing the public order. It is, therefore, less certain that this kind of protection will extend to instances where violence or conflict is absent.

While Kenya granted asylum to Somalians, it did so based on humanitarian grounds, which does not directly support the conclusion that the AU Convention recognises climate refugees. Ethiopia, on the other hand, granted asylum to climate refugees fleeing the same Somalian droughts and did so based on the AU Refugee Convention.[274] Representatives from Ethiopia have previously stated that the broader definition of refugees in the AU Refugee Convention includes persons compelled to leave their habitual residence to seek refuge in another country due to natural disasters.[275] The interpretation of this section is, therefore, inconsistent and uncertain. Ethiopia's interpretation would advance the greatest protection for persons affected by disasters, but the uncertainty over the definition's interpretation leaves such persons at risk.

The decisions by Kenyan and Ethiopian officials do not indicate universal acceptance. They could even be the exception rather than the norm, as there is

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[271] Scott op cit note 24.
[272] The Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change Volume II, at 9, available at *https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf,* accessed on 3 November 2022 (Nansen Initiative II).
[273] Ibid at 88.
[274] Jane McAdam 'From the Nansen initiative to the platform on disaster displacement: shaping international approaches to climate change, disasters and displacement' (2016) 39 *University of New South Wales Law Journal* 1537.
[275] Ibid.

disagreement amongst scholars over whether disasters constitute events seriously disturbing the public order.[276] It is also significant that there was violence and conflict in Somalia which impacted the decision to grant Somalians refugee status in Kenya.

Another consideration when determining whether the expanded definition includes 'climate refugees' is how similar provisions have been treated elsewhere. A refugee definition similar to that found in the AU Refugee Convention could be found in the Cartagena Declaration.[277] This provision was amended to exclude climate refugees from its ambit.[278] This does not mean that the AU Refugee Convention definition will follow the route of an amendment, but it may indicate how the definition will be interpreted.

Even if it were widely accepted that events seriously disturbing the public order include rapid-onset disasters, this definition would still leave those impacted by slow-onset disasters without protection. Member states of the AU have called upon the AU Commission and UNHCR to provide interpretive guidance on the definition of refugee contained in the AU Convention as it relates to new forms of displacement, such as climate change and natural disasters.[279]

5. PERSONS PROTECTED BY THE PRINCIPLE OF *NON-REFOULEMENT*

Article 33 of the UN Refugee Convention contains the principle of *non-refoulement,* which prevents states from returning refugees to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion.[280] The introduction to the UN Refugee Convention states that

> [t]he principle of *non-refoulement* is so fundamental that no reservations or derogations may be made to it.[281]

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[276] Grant Dawson & Rachel Laut 'Human mobility and climate change' (2017) 8 *International Humanitarian Legal Studies* 113.
[277] Declaración de Cartagena sobre Refugiados, adopted during the Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios, held in Cartagena, 19-22 November 1984 (Cartagena Declaration).
[278] Michael Tiboris 'Water Insecurity and Climate Change as Emerging Human Migration Pressures' (2020) 16 *Loyola University Chicago International Law Review* 100.
[279] Ninette Kelley for the UNHCR *People Forced to Flee History, Change and Challenge* Oxford University Press (2022) 106.
[280] 1951 Refugee Convention supra note 250 article 33(1).
[281] 1951 Refugee Convention supra note 250, introduction.

Article 1(3) of the AU Refugee Convention contains the principle of *non-refoulement*. This principle is linked to the grounds for granting refugee status contained in articles 1(1) and (2) of the AU Convention. Therefore, the principle of *non-refoulement* in the AU Refugee Convention is more expansive than that contained in the 1951 UN Convention. The principle as it is contained in international customary law, specifically humanitarian and human rights law, remains the most expansive version of this principle. South Africa is bound by all three of these sources of law: the UN Refugee Convention, the AU Refugee Convention, and customary international law.

This principle has been domesticated in section 2 of South Africa's Refugees Act. The essence of this principle is that a person cannot be refused entry or be forced to return to a state where they would face harm. Adherence to this principle does not give a person refugee status. It merely requires a receiving state not to exclude the person or to forcibly return them to a situation of harm. This, therefore, does not offer much protection to those displaced and rendered stateless by the effects of climate change but is a minimum level of protection.

5.1. Customary International Law

The principle of *non-refoulement* is an element of customary international law that forms part of international refugee, human rights, and humanitarian law. The customary law principle goes beyond what is contained in the UN and AU Refugee Conventions. The customary law principle prohibits states from removing individuals from their jurisdiction when there are substantial grounds for believing that the person in question would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment, or other serious human rights violations. The principle applies regardless of a person's status, citizenship, or nationality and has no exceptions.[282]

[282] Office of the United Nations High Commissioner for Human Rights (OHCHR) 'The principle of non-refoulement under international human rights law' available at *https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf*, accessed on 24 January 2023.

5.2. Foreign and International Case Law: Ioane Teitiota v New Zealand[283]

The principle of *non-refoulement* has been given tepid approval in international jurisprudence as a mechanism whereby those displaced across borders due to climate change may be protected and granted access to a host country. A string of litigation between Ioane Teitiota and the state of New Zealand (the Kiribati litigation) concerned issues including whether Mr Teitiota was entitled to refugee status or protected person status due to the impacts of climate change and sea level rise on the environment in Kiribati.[284] Mr Teitiota, his wife, and their children arrived in New Zealand lawfully in 2007. After their permits expired, the family remained in New Zealand unlawfully. After being apprehended, Mr Teitiota applied for refugee or protected person status. The facts regarding Kiribati, which were accepted by the various courts and tribunals in New Zealand, are that Kiribati faces problems of overpopulation and limited infrastructure, exacerbated by the effects of sudden onset disasters such as storms and slow onset processes such as sea level rise. These circumstances were particularly difficult for Mr Teitiota, who was unemployed before moving to New Zealand and relied on subsistence agriculture and fishing. Mr Teitiota stated that he did not wish to return due to the difficulties described above and the environmental pressures on the available land.

To determine whether Mr Teitiota qualified for refugee status, it had to be decided whether he satisfied the definition of refugee in the UN Refugee Convention. It was submitted on behalf of Mr Teitiota that the requirement of persecution under the Convention did not require human agency and that the word "refugee" could encompass persons having to flee, irrespective of the cause. It was submitted that Mr Teitiota qualified as a refugee as he fled climate change because of the severe harm it would do to him and his family, coupled with the Kiribati government's inability or unwillingness to deal with the effects of climate change. It was found that there was no evidence that Mr Teitiota faced a real chance of suffering serious physical harm or that the environmental conditions he was likely to face would have jeopardised his life

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[283] *Ioane Teitiota v. New Zealand* (advance unedited version), CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020 para 1.1, available at *https://www.refworld.org/cases,HRC,5e26f7134.html*, accessed on 27 January 2023 (*Kiribati* (HRC)).
[284] *AF (Kiribati)* [2013] NZIPT 800413 (25 June 2013) (*Kiribati* (NZIPT)); *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 (*Kiribati* (NZHC)); *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZCA 173 (*Kiribati* (NZCA)); *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 (*Kiribati* (NZSC)).

or dignity. Mr Teitiota admitted that the entire population of Kiribati generally faced the effects of environmental degradation, and there was no suggestion that the government of Kiribati had failed to take adequate steps to protect Mr Teitiota from harm. It was found that Mr Teitiota did not face persecution or serious harm on return to Kiribati on any of the grounds established in the UN Refugee Convention. He, therefore, did not fall within the definition of refugee and could not be granted refugee status. The string of litigation in New Zealand began in the New Zealand Immigration and Protection Tribunal,[285] and went through the High Court of New Zealand and the New Zealand Court of Appeal,[286] before finally landing in the Supreme Court of New Zealand.[287] At each stage, Mr Teitiota's applications were unsuccessful. Mr Teitiota was deported to Kiribati in September 2015.[288]

In February 2016, Mr Teitiota brought a case against the government of New Zealand to the UN Human Rights Committee (HRC). The basis of this case was that, by deporting him to Kiribati, New Zealand had violated his right to life under the ICCPR.[289] Unfortunately for Mr Teitiota, the HRC found that the deportation was not unlawful because there was no immediate danger to Mr Teitiota's life in Kiribati.[290] Nevertheless, the decision was a breakthrough in the international legal framework for so-called 'climate refugees' or those displaced by climate change. The HRC recognised that climate change represents a serious threat to life and that decision-makers need to consider this when examining challenges to deportation.[291] The HRC left open the possibility of future claims being successful if the evidence can show that the effects of climate change in the receiving state (to which persons will be deported) may expose individuals to violation of their human rights. The HRC further stated that

> [w]ithout robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their

[285] *Kiribati* (NZIPT) supra note 284.
[286] *Kiribati* (NZHC) supra note 284; *Kiribati* (NZCA) supra note 284.
[287] *Kiribati* (NZSC) supra note 284.
[288] *Kiribati* (HRC) supra note 283 para 1.1. See also Amnesty International 'UN landmark case for people displaced by climate change' available at *https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/,* accessed on 24 January 2023.
[289] ICCPR supra note 61 article 6.
[290] *Kiribati* (HRC) supra note 283 paras 9.14 and 10.
[291] *Kiribati* (HRC) supra note 283 paras 9.3-9.5.

> rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending states.[292]

The majority of the HRC found that returning persons to a country where they face harm due to the impacts of climate change could violate their rights and be unlawful, but it did so in very limited circumstances. Only where the person in question faces an imminent risk of death on return would their rights be violated. While the majority of the HRC found that the facts of Mr Teitiota's case did not render his deportation unlawful, two members dissented from this finding and supported Mr Teitiota's claim. Duncan Laki Muhumuza of Uganda stated that the

> conditions of life laid out by the author – resulting from climate change in the Republic of Kiribati, are significantly grave, and pose a real, personal, and reasonably foreseeable risk of a threat to his life under Article 6(1) of the [ICCPR]. Moreover, the Committee needs to handle critical and significantly irreversible issues of climate change, with the approach that seeks to uphold the sanctity of human life.[293]

The second dissenting opinion related solely to the issue of safe drinking water. Committee member Vasilka Sancin of Slovenia found that the New Zealand government had not adequately considered this in their decision.[294] South Africa was not a party to this decision, and unfortunately, even where States are party to HRC decisions, the compliance rates are low.[295] This HRC decision is not binding on South Africa. Still, the Constitutional Court has previously used decisions of the HRC when interpreting rights in South African law,[296] and South African courts consider such a decision as having authoritative status under international law.[297] Section 233 of the Constitution also states that South African legislation should be interpreted to be consistent with international law.[298] As such, the principle of *non-refoulement* contained in the Refugee Act should be interpreted consistently with international law. The recognition by the majority of the HRC that climate change could trigger the

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[292] *Kiribati* (HRC) supra note 283 para 9.11.
[293] *Kiribati* (HRC) supra note 283, Annex 1 para 1.
[294] *Kiribati* (HRC) supra note 283, Annex II.
[295] Rosanne van Alebeek & André Nollkaemper 'The legal status of decisions by human rights treaty bodies in national law' in Helen Keller & Geir Ulfstein (eds) *UN Human Rights Treaty Bodies Law and Legitimacy* (2012) 356 – 413.
[296] See *S v Makwanyane and Another* 1995 (6) BCLR 665.
[297] *Residents of Bon Vista mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W).
[298] The Constitution supra note 15 section 233.

principle of *non-refoulement*, however limited the circumstances may be, and the finding of the minority that Mr Teitiota's rights may have been violated by his deportation may persuade the decisions of South African courts in future cases. If so, persons displaced across borders can rely on the principle of *non-refoulement* and other human rights, such as those contained in the ICCPR, to gain access and protection in South Africa.

The facts of this case are particularly relevant to the South African context. Kiribati is a small island state significantly affected by the impacts of climate change, such as rising sea levels and the salination of freshwater supplies. Several states near South Africa, such as Comoros and the Seychelles, are likely to experience similar issues. Inhabitants of these states may find themselves in circumstances similar to Mr Teitiota and his family. Another similarity is that Mr Teitiota overstayed his visa in New Zealand, and his stay and that of his family became unlawful. As discussed in previous chapters, persons displaced by climate change are unlikely to qualify for any special visas in South Africa and may, therefore, enter the country as illegal foreigners. Alternatively, they may enter as visitors but will become illegal foreigners when their visas expire, as was the case with Mr Teitiota.

The rights and protections offered by the principle of *non-refoulement* are more limited than those provided by refugee law. So, while this does offer some protection, it does not afford the wide range of rights available to refugees or provide a path to naturalisation in the case of stateless persons.

6. SOUTH AFRICA'S NATIONAL LEGAL FRAMEWORK

6.1. Legislation

As discussed in chapter three, a person seeking asylum in South Africa must apply for an asylum transit visa in terms of section 23 of the Immigration Act,[299] following which they have five days to report to a Refugee Reception Office to apply for asylum. From this point forward, the process is governed by the Refugees Act.[300] Section 1A of the Refugees Act requires the Act to be interpreted and applied in a manner consistent with the UN Convention and Protocol on Refugees, the AU Refugee

[299] Immigration Act supra note 123.
[300] Refugees Act supra note 209.

Convention, The Universal Declaration of Human Rights, and any other relevant convention or international agreement to which the Republic is or becomes a party.

Section 2 of the Refugees Act contains the principle of *non-refoulement*. The section states that no person may be denied access to South Africa or returned to their country of origin if such refusal or return would result in a person being forced to return to or remain in a country where their life, physical safety, or freedom would be threatened by events seriously disturbing or disrupting the public order in either part or whole of the country.[301] The principle of *non-refoulement* in this section reflects the extended definition of refugee contained in the AU Refugee Convention and section 3 of the Refugees Act.

Section 3 of the Refugees Act contains the definition of refugee as contained in the UN Refugee Convention,[302] as well as the extended definition of a refugee contained in the AU Refugee Convention.[303] According to section 3, a person qualifies for refugee status if that person;

> (a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
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> (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality…

A person qualifies for refugee status if, due to events seriously disturbing or disrupting public order in either a part or the whole of the country of their origin, they are compelled to leave their place of habitual residence to seek refuge elsewhere.[304]

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[301] Refugees Act supra note 209 section 2(b).
[302] Refugees Act supra note 209 section 3(a).
[303] Refugees Act supra note 209 section 3(b).
[304] Refugees Act supra note 209 section 3(b).

Should 'events seriously disturbing the public order' be interpreted to include the impacts of climate change, those persons rendered stateless by climate change and its impacts should be protected in South Africa by sections 2 and 3.

An asylum application is made in terms of section 21 of the Refugees Act and regulation 8 of the Refugee Regulations.[305] Although Regulation 8(1)(b)(ii) requires that an asylum application be accompanied by proof of valid identification, it does provide for those who may not have identification by allowing them to make a declaration of identity in writing before an immigration office. This allows undocumented persons who are stateless or at risk of statelessness to apply for refugee status. If the asylum application is successful and asylum is granted, the applicant enjoys refugee status, which affords them certain rights and obligations.[306] Refugees are entitled to all rights in the Bill of Rights except those specifically reserved for citizens.[307] Refugees may also apply for permanent residence after ten years of continuous residence in South Africa from the date asylum was granted, but only if it is determined that they would remain a refugee indefinitely.[308] Refugees are also entitled to identity and travel documents.[309]

If 'events seriously disturbing the public order' is interpreted to include impacts of climate change, those rendered stateless or at risk of statelessness by climate change will qualify for refugee status in South Africa. This will allow them access to identity, travel documentation, and a path to potential citizenship by naturalisation.

6.2. Case Law

The principle of *non-refoulement* contained in section 2 of the Refugees Act and the extended definition of a refugee contained in section 3(b) of the Refugees Act have the most potential to protect persons rendered stateless due to climate change and its impacts. It is, therefore, necessary to see how courts interpret and apply these sections to determine whether this potential can be realised in the future.

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[305] Refugees Regulations of 27 December 2019 in GN 1707 *GG* 42932.
[306] Refugees Act supra note 209 chapter 5.
[307] Refugees Act supra note 209 section 27(b).
[308] Refugees Act supra note 209 section 27(c).
[309] Refugees Act supra note 209 sections 27(d) and (e); Refugees Regulations supra note 305 regulations 18 and 19.

6.2.1. Cases concerned with section 2 of the Refugees Act and the principle of non-refoulement

Various divisions of the High Court have confirmed that when applying the sections of the Refugees Act, sections 2 and 3 must be read together.[310] In *Tantoush v The Refugee Appeal Board*, the court ordered that the applicant be declared a refugee entitled to asylum in South Africa as contemplated by sections 2 and 3 of the Refugees Act.[311] In *Tshiyombo v Members of the Refugee Appeal Board*, the Western Cape High Court stated that, when reading sections 2 and 3 together, the provisions must be construed generously in favour of persons seeking to qualify for asylum.[312] In *Saidi v Minister of Home Affairs,* [313] the Constitutional Court confirmed the importance of section 2 of the Refugees Act, stating that

> all other provisions of the Refugees Act are subordinated to those of section 2.[314]

This is based on the wording of the section, which begins with the phrase;

> [n]otwithstanding any provision of this Act or any other law to the contrary…[315]

This stance has been repeated by the Constitutional Court in *Ruta v Minister of Home Affairs,* stating that section 2 is a remarkable provision that places itself above any contrary provisions in the Refugees Act and any other statute or legal provision. The Court described this as a 'powerful decree'.[316] Various amendments to the Refugees Act came into effect on 1 January 2020,[317] but section 2 remained unchanged, such is its importance. In a judgment handed down after the amendments, the Constitutional Court referred to its decision in *Ruta.* It reaffirmed the importance of section 2 and the principle of *non-refoulement* in the context of the amended

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[310] *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) para 63 (*Tantoush*); *Tshiyombo v Members of the Refugee Appeal Board and others* [2016] 2 All SA 278 (WCC) para 28 (*Tshiyombo*).
[311] *Tantoush* supra note 310 para 139.
[312] *Tshiyombo* supra note 310 para 28.
[313] *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9.
[314] Ibid para 28.
[315] Ibid para 27.
[316] Ibid paras 23-24.
[317] The Refugees Amendment Act 11 of 2017.

legislation.[318] The implication is that a person cannot be denied refugee status if the principle of *non-refoulement* and section 2 of the Refugees Act are applicable.

Whether the principle of *non-refoulement* protects someone is important to whether they should be given refugee status. As discussed above, section 1A of the Refugees Act requires the Act to be applied and interpreted in line with the UN Refugee Convention.[319] Given the importance placed on the principle of *non-refoulement* by the UN Refugee Convention[320] and the Constitutional Court, refugee status must be granted where the principle applies. This is significant given the growing international support for the idea that the principle of *non-refoulement* can be used to protect persons displaced by climate change.[321]

6.2.2. Cases concerned with section 3(b) of the Refugees Act

The pre-eminency of section 2 over other legal provisions, as well as the recognition of the importance of the principle of *non-refoulement* in international law, make section 2 a powerful tool in the protection of stateless persons in the context of climate change. While it is implied that a person should qualify for refugee status under section 3 if they cannot be returned under section 2, legal certainty and maximum protection for human rights would prefer an approach in which persons qualify for refugee status directly under section 3 of the Refugees Act. Section 3(b), with the extended definition of refugee, contains the potential to qualify those displaced by climate change as refugees.

In the case of *Radjabu v Chairperson of the Standing Committee for Refugee Affairs*,[322] the Western Cape High Court set out the approach to be used when applying section 3(b). First, an objective inquiry must determine whether the circumstances stipulated in section 3(b) exist in the country of origin.[323] So, for instance, in the context of climate-induced displacement, this inquiry could look like a determination of whether there are destructive floods in the country of origin. The second step of the inquiry is a subjective causative inquiry, which looks at whether the circumstances in

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[318] *Abore v Minister of Home Affairs and another* 2022 (4) BCLR 387 (CC)
[319] Refugees Act supra note 209 section 1A.
[320] 1951 Refugee Convention supra note 250, introduction.
[321] *Kiribati* (HRC) supra note 283 para 9.11; UNHCR 'Strategic Framework for Climate Action' at 8, available at *https://www.unhcr.org/604a26d84.pdf*, accessed on 11 May 2022.
[322] *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others* [2015] 1 All SA 100 (WCC).
[323] Ibid para 6.

question were the cause of the person concerned being compelled to leave.[324] This inquiry would look at whether the destructive floods impacted the person in question and caused them to leave the country. The court stated that the predominant reason for leaving must be compulsion rather than volition. This entails a value judgement.[325] It would have to be determined whether the destructive floods were the predominant reason for the person being compelled to leave their country of origin. According to the High Court in *Radjabu*, compulsion must be the predominant reason for leaving, but not necessarily the only reason. The court also states that section 6 of the Refugees Act (before amendment) requires a humanitarian approach to deciding refugee status, which promotes human welfare and alleviates suffering (the contents of the old section 6 are now contained in section 1A of the Refugees Act as amended).[326]

The approach of the court in *Radjabu*, which other divisions of the High Court have endorsed,[327] suggests that where the impacts of climate change are present, the correct approach in determining refugee status would be a flexible, value-based determination of whether those impacts were the predominant reason for the person in question fleeing the country of origin, taking into account humanitarian considerations such as human welfare and alleviating human suffering.

The Constitutional Court somewhat lessened the potential of this approach in the *Ruta* case. While the court in *Ruta* emphasised the importance of section 2 of the Refugees Act, it took a slightly more restrictive approach than the court in *Radjabu* in its interpretation of section 3(b). The court in *Ruta* states that, specifically with regards to 'external disruption' contained in section 3(b), the asylum seeker must have left their place of habitual residence under compulsion. This would appear to be a less flexible and nuanced approach than one that allows consideration of the *predominant* reason for fleeing, as well as considerations of human welfare. It is unclear whether this interpretation relates to section 3(b) in its entirety. Given the Constitutional Court's generous and humanitarian approach to interpreting the Refugees Act, as evidenced across all of the case law discussed, it is likely that a more generous and humanitarian approach to interpreting section 3(b) is to be preferred. This approach,

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[324] Ibid para 6.
[325] Ibid para 6.
[326] Ibid para 7.
[327] See *FNM v RAB and others* [2018] 4 All SA 8 (GP). It is important to note that in this case, the applicant for refugee status would have qualified under both sections 3(a) and 3(b) of the Refugees Act 130 of 1998.

especially when combined with the principle of *non-refoulement* in section 2, opens the possibility that the section can be relied on to support a claim for refugee status for persons displaced by the impacts of climate change.

6.3. Policy

On paper, South Africa has one of the most generous asylum regimes globally.[328] The UNHCR has previously described the Refugees Act and South Africa's asylum policies as some of the world's most progressive and advanced protection systems.[329] Unfortunately, this is not reflected in South Africa's current policy. In 2012, South Africa's ruling political party, the African National Congress, declared in a policy document that 95% of asylum seekers are economic migrants looking to take advantage of the system.[330] The DHA has repeated this statistic.[331] As a result of this belief, South African policy tends towards exclusion rather than inclusion.[332] In 2022, the UNHCR recognised that in South Africa, which was once generous in its refugee legislation and towards refugees in practice, there is a movement towards more restrictive legal measures.[333] The tendency of refugee status determination officers and the Refugee Appeal Board to reject valid asylum claims, as was the case in the case law discussion above, may be evidence of this movement.

7. LAW IN PRACTICE

South Africa's restrictive policy towards asylum seekers results in other challenges, such as being falsely categorised as security risks.[334] This can lead to dire results, such as deportation, especially since South Africa has a history of large-scale, forced

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[328] Khan & Rayner op cit note 236 at 9.
[329] UNHCR 'UNHCR chief commends Pretoria's refugee policy, pledges cooperation' 2007 *https://www.unhcr.org/news/latest/2007/8/46cf10634/unhcr-chief-commends-pretorias-refugee-policy-pledges-cooperation.html*, accessed on 24 February 2023.
[330] African National Congress 'Peace and Stability Policy Discussion Document' March 2012 at 5, available at *https://www.anc1912.org.za/wp-content/uploads/2021/04/4th-National-Policy-Conference-Peace-and-Stability.pdf*, accessed on 15 September 2023.
[331] DHA 'Introductory Remarks by Home Affairs Minister, Malusi Gigaba for Third Roundtable on International Migration: Intra-regional migration within SADC and implications for International Migration policy' 6 February 2015, available at *http://www.dha.gov.za/index.php/statements-speeches/558-introductory-remarks-by-home-affairs-minister-malusi-gigaba-for-third-roundtable-on-international-migration-intra-regional-migration-within-sadc-and-implications-for-international-migration-policy-february-6th-2015*, accessed on 15 September 2023.
[332] Khan & Lee op cit note 53 at 1208-1209.
[333] UNHCR 'Reporting – South Africa Multi-Country Office' 2022, available at *Reporting.unhcr.org/southafricamco*, accessed on 27 February 2023.
[334] Khan & Rayner op cit note 236 at 9.

deportations.[335] Another challenge asylum seekers face is that the process of applying for and obtaining refugee status is lengthy and has cumbersome administrative procedures.[336] The result is that asylum applications may remain undecided for years, especially where appeals and reviews are involved. This is a problem for stateless persons who are left with no legal status, no documentation, and no route to citizenship. It can also be a potential cause of statelessness as asylum seekers are left in a protracted state of displacement from their country of nationality without any status or documentation.[337]

The Minister of Home Affairs, Aaron Motsoaledi, has recognised the backlogs in the asylum system but blamed these on economic migrants. He stated that economic migrants are not accounted for in our asylum system but still apply and appeal when their applications are rejected. According to the Minister, these appeals, and not first-time asylum applications, are the problem, and he has called for an overhaul of the entire asylum application system.[338] While the system may need an overhaul, it is not for the reason that the Minister suggests. Rejected asylum applications that go on appeal are often valid asylum claims that end in applicants being granted refugee status, even if the courts make this decision. The government also could not indicate how many asylum applications received were based on economic grounds.[339] Therefore, no evidence was offered to support the claims that economic migrants are the problem.

8. CRITICAL ANALYSIS AND CONCLUSION

As discussed above concerning the AU Refugee Convention, it is recognised that refugees used to flee violence and persecution, but they now flee phenomena such as famine and natural disasters. The UNHCR has recognised that 80% of the world's refugees and IDPs come from the most climate-vulnerable countries.[340] Dr George

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[335] Khan & Rayner op cit note 236 at 10.
[336] Khan & Rayner op cit note 236 at 9.
[337] UNHCR Climate Change Factsheet op cit note 5.
[338] EWN 'Motsoaledi: SA's refugee and asylum seeker system needs complete overhaul' 20 September 2022, available at *https://ewn.co.za/2022/09/20/motsoaledi-sa-s-refugee-and-asylum-seeker-system-needs-complete-overhaul*, accessed on 11 January 2023.
[339] Ibid.
[340] UNHCR 'UNHCR and partners rush aid to thousands in Mozambique after Tropical Cyclone Gombe' 22 March 2022, available at *https://www.unhcr.org/news/briefing/2022/3/623992774/unhcr-partners-rush-aid-thousands-mozambique-tropical-cyclone-gombe.html*, accessed on 30 March 2022; UNHCR 'UNHCR ramps up aid to thousands displaced by Somalia drought' 11 March 2022,

Barrie suggests that this is why the AU extended the refugee definition in the AU Refugee Convention. He argues that human security has become the guiding principle in refugee law, which is reflected in section 3 of the Refugees Act. Refugee law focuses on assisting people regardless of the cause of the harm they are fleeing. Barrie does recognise that it can be challenging to determine whether someone qualifies for asylum in practice.[341] This generous interpretation of South Africa's asylum laws is unfortunately not realised, as the restrictive approach to asylum applications, coupled with incorrectly classifying asylum seekers as economic migrants or security risks, leaves many unprotected.

The legal regimes on statelessness and refugees both aim to protect vulnerable persons and ensure the widest possible access to human rights. These regimes should complement each other to ensure the cumulative protection of refugees, asylum seekers and stateless persons.[342] Persons rendered stateless or at risk of statelessness by the impacts of climate change could be granted refugee status in South Africa, even if they do not meet the traditional definition of refugee, on one of three bases. Persons may be entitled to refugee status based solely on their statelessness status and inability to return to their country of origin, absent any requirements of persecution or fear. Persons may be entitled to refugee status due to the application of the principle of *non-refoulement* and section 2 of the Refugees Act. Suppose the return of a person would result in harm to their human rights or imminent risk of death. In that case, they must be allowed entry to South Africa and, if section 2 applies, section 3 surely applies too, meaning that such persons must be granted refugee status. Alternatively, persons could be granted refugee status on a reading of section 3(b) and the extended definition of a refugee. While providing the broadest possible protection for stateless persons and those impacted by climate change, these interpretations have yet to be tested. They are unlikely to receive support, especially in a country moving to a more restrictive approach to asylum seekers in general.

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available at *https://www.unhcr.org/news/briefing/2022/3/622b03ba4/unhcr-ramps-aid-thousands-displaced-somalia-drought.html*, accessed on 27 February 2023.

[341] Barrie op cit note 259.

[342] UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014 at 3, CEDAW/C/GC/32, available at: *https://www.refworld.org/docid/54620fb54.html*, accessed on 15 November 2023.

While refugee law has the potential to protect persons rendered stateless by the impacts of climate change, recognising this potential would take a concerted effort. It would likely entail strategic litigation regarding the interpretation and application of the Refugees Act or legislative reform of the Refugees Act. Since such changes are likely to be slow, the climate crisis is ongoing, and the refugee system is already overburdened, the duty to protect such persons cannot fall solely on refugee law.

CHAPTER FIVE: THE LEGAL FRAMEWORK ON DISASTERS AND DISPLACEMENT

1. INTRODUCTION

The UNHCR has stated that displaced persons and stateless persons are at the forefront of the climate crisis.[343] In 2019, approximately 95% of displacements worldwide were triggered by weather events.[344] Over the past decade, 21.5 million displacements were triggered by weather events, more than twice the number of displacements caused by conflict.[345] As discussed in chapter one, Southern Africa is a region that is particularly vulnerable to the effects of climate change. In 2022, four countries in the region were hit by five tropical cyclones, displacing over 1 million people.[346] According to the IPCC's Sixth Assessment Report published in 2023, climate and weather extremes increasingly drive displacement in Africa.[347] Like the refugee law framework, the legal framework on disaster-induced displacement is a source of South Africa's obligations to protect persons rendered stateless by the impacts of climate change. Unlike the preceding legal frameworks, no binding instruments specifically address climate-induced displacement at an international, regional, or national level. Protection for persons displaced by climate change and disasters can be found in individual provisions of instruments addressing other issues or in non-binding policy documents.

Given the rise in the number and severity of disasters and the fact that the effects of climate change are only likely to increase, a formal system of protection for displaced people is of the utmost importance. This is especially true where displacement can have disastrous results, such as rendering persons stateless or at risk of statelessness. Displacement triggered by disasters or climate change can be lengthy, and persons in protracted displacement situations will likely remain so for around 26 years.[348] Such protracted displacement increases the risk of statelessness. The UNHCR

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[343] UNHCR Strategic Directions op cit note 5.
[344] Ibid.
[345] Ibid.
[346] UNHCR 'Regional update – Southern Africa Update on UNHCR operations in southern Africa', available at *https://reliefweb.int/report/democratic-republic-congo/update-unhcr-operations-southern-africa*, accessed on 3 October 2022
[347] IPCC 'Synthesis Report of the Sixth Assessment Report (AR6)' 19 March 2023, available at *https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf*, accessed on 23 March 2023.
[348] UNHCR Strategic Directions op cit note 5.

has recognised that including people of concern, such as stateless persons, in disaster response plans will be fundamental to mitigating the effects of climate change.[349]

Under this framework, dominated mostly by non-binding policy instruments, this chapter will determine whether South Africa has obligations towards persons displaced by disasters, what these obligations are, and whether they are being met.

2. INTERNATIONAL LEGAL FRAMEWORK

2.1. Legal Instruments

As far back as 2011, there has been recognition of the need to develop a framework for protecting persons displaced due to climate change and environmental disasters.[350] Despite this, no such comprehensive framework exists more than a decade later. Some have called for an entirely new international treaty to address the movement of people displaced by climate change.[351] Others have called for an amendment to the UN Refugee Convention to include climate refugees.[352] Others have suggested a Protocol or Declaration to the United Nations Framework Convention on Climate Change (UNFCCC).[353] The UNHCR seems to support an approach whereby the UNFCCC can be utilised to protect environmentally displaced persons and has acknowledged that the UNFCCC will need to recognise the inevitability of external displacement due to climate change and the fact that statelessness may result.[354]

The International Law Commission has published draft articles on the protection of persons in the event of disasters.[355] These draft articles address the reduction of the risk of future disasters and dictate how persons should be treated in the wake of disasters, with a humanitarian approach and respect for human rights. This includes the treatment of displaced persons in the wake of such disasters. While the draft articles do not mention statelessness specifically, they recognise that disasters

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[349] UNHCR 'Reporting – South Africa Multi-Country Office' 2022 op cit note 333.
[350] Scott op cit note 24 at 351
[351] Jane McAdam for the UNHCR 'Legal and Protection Policy Research Series, Climate Change Displacement and International Law: Complementary Protection Standards' May 2011 at 55, available at *https://www.unhcr.org/4dff16e99.pdf*, accessed on 25 January 2023.
[352] Caniban & de Guzman op cit note 9 at 1027; Scott op cit note 24.
[353] McAdam op cit note 351 at 55. See also Tiboris op cit note 278 at 112.
[354] UNHCR 'Climate Change and Statelessness: An Overview' 15 May 2009, available at *https://www.refworld.org/docid/4a2d189d3.html*, accessed on 27 January 2023.
[355] International Law Commission (ILC) Draft articles on the protection of persons in the event of disasters 2016, available at *https://legal.un.org/ilc/texts/instruments/english/draft_articles/6_3_2016.pdf*, accessed on 25 January 2023.

can result in mass displacement.[356] They further provide that the human rights and dignity of affected persons must be respected and that the particularly vulnerable must have their needs taken into account.[357] Respecting the human rights and dignity of affected persons would include guarding against statelessness, and respecting the needs of the most vulnerable would require protection of stateless persons. While these draft articles may eventually provide some measure of protection, they are by no means comprehensive and are not currently in force.

Of course, general human rights obligations will apply to environmentally displaced persons, but specific protections are absent in international legal instruments. Instead, such protections are dictated by various policies and practices globally.

2.2. Policy

In response to the UNHCR's effort to encourage states to work towards a global framework on climate change-induced displacement and migration, the Nansen Initiative Protection Agenda (Protection Agenda) was founded.[358] Its creation followed the recognition that an average of 26 million persons have been displaced each year since 2008 by disaster-related hazards. A framework was needed to protect persons displaced across borders by climate change who do not have the protection of refugee status.[359] The Protection Agenda is a non-binding agenda that points out protection gaps in the international legal framework for persons displaced across borders by climate change. The Protection Agenda specifically recognises that Africa and South America have seen the largest amount of cross-border disaster displacement, and it states that preventing further displacement and protecting displaced persons will require cooperation between states and regions. The Protection Agenda does not propose new legal norms. Instead, it includes existing policies and best practices from various states that are being used to address this form of

[356] Ibid article 3.
[357] Ibid articles 4-6.
[358] The Nansen Initiative Agenda for the Protection of Cross-Border Displaced persons in the Context of Disasters and Climate Change, Volume 1, December 2015, available at *https://disasterdisplacement.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf,* accessed on 27 January 2022 (Nansen Initiative I). See also Jane McAdam op cit note 274.
[359] McAdam op cit note 274 at 1531.

displacement. While the Protection Agenda is not binding on South Africa, it is highly influential, especially since South Africa was involved in its development.[360]

One form of protection for displaced persons is admission into a host country. The Protection Agenda outlines various factors for consideration when determining whether persons should be admitted, such as the direct and serious impact of the disaster on the person in question, the seriousness of the disaster's impact generally, solidarity with the country of origin, and national security.[361] Concerning admission, the Protection Agenda recognises multiple effective practices, such as granting special visas, expedited migration processes, bilateral or regional free movement agreements, and a review of asylum processes to grant refugee status in the context of disaster-induced displacement.[362] Another effective practice identified is that of ensuring that admitted persons have documentation. The Protection Agenda specifically mentions the fact that some of the people displaced across borders may face *de facto* statelessness.[363] An issue identified by the Protection Agenda concerning admission is the extent of the discretionary power authorities possess on the national level.[364]

The Protection Agenda acknowledges that many displaced persons may find themselves in a protracted state of displacement and recognises the following effective practices for protecting these persons: allowing them to apply for permanent residency or otherwise regularising their status. This allows these persons to be self-sufficient.[365] The Protection Agenda recommends the following general steps that need to be taken by states to protect displaced persons. States need to collect comprehensive and reliable data on the issue of disaster displacement in their territory and region. States also need to enhance the use of existing humanitarian protection measures for disaster-displaced persons, such as expanding refugee legislation to include those displaced by climate change. This can entail a review of existing laws and policies to include

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[360] See the Concept Paper and Draft Agenda Nansen Initiative Southern Africa Consultation In cooperation with the Development and Rule of Law Programme (DROP) at Stellenbosch University Disasters, Climate Change and Human Mobility in Southern Africa: Consultation on the Draft Protection Agenda Stellenbosch, South Africa, 4-5 June 2015, available at *https://disasterdisplacement.org/wp-content/uploads/2015/05/08052015-Draft-Concept-Note-and-Agenda-Nansen-Initiative-Southern-Africa-Consultation.pdf*, accessed on 2 November 2022.
[361] Nansen Initiative I op cit note 358 at 22-23.
[362] Nansen Initiative I op cit note 358 at 25.
[363] Nansen Initiative I op cit note 358 at 28.
[364] Nansen Initiative I op cit note 358 at 27.
[365] Nansen Initiative I op cit note 358 at 30.

particularly vulnerable persons and developing new national, bilateral, and regional humanitarian response mechanisms.[366]

In 2015, the same year the Nansen Initiative Protection Agenda was published, the Paris Climate Change Agreement mandated the creation of the UNFCCC Special Task Force on Displacement within the Warsaw International Mechanism for Loss and Damage.[367] The Task Force developed recommendations for states that are party to the UNFCCC on addressing displacement in the context of climate change. They invite states to formulate laws, policies, and strategies that address all forms of migration linked to climate impacts while considering the state's human rights obligations.[368] These recommendations are not binding. Nevertheless, they should be persuasive to South African authorities as South Africa is a party to the UNFCCC.

When protecting children's rights in the context of climate change, the Committee on the Rights of the Child has stressed the importance of international cooperation in situations of climate change-induced cross-border displacement. The Committee emphasised the obligation of all states to take legislative, administrative, and other measures to ensure that children's rights under the Convention on the Rights of the Child are protected when children are displaced across borders by the impacts of climate change.[369] One of these rights is the right of all children to a nationality. Like the Nansen Initiative and Protection Agenda, the Committee recommends that states consider the impacts of environmental degradation and climate change on children's rights when deciding claims for protection status, such as refugee status.[370]

Although these policies do not impose binding obligations on South Africa, they set standards for South Africa. South Africa should, therefore, take the following steps to protect persons displaced by disasters. Admission into the country should be granted to displaced persons based on special humanitarian visas or refugee status, and authorities' discretion to deny admission should be limited. Authorities should ensure

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[366] Nansen Initiative I op cit note 358 at 46.
[367] World Migration Report 2022 op cit note 35 at 241.
[368] World Migration Report 2022 op cit note 35 at 241.
[369] Committee on the Rights of the Child 'General comment No. 26 (2023) on children's rights and the environment, with a special focus on climate change' 22 August 2023 at 9, available at *https://www.ohchr.org/en/documents/general-comments-and-recommendations/crccgc26-general-comment-no-26-2023-childrens-rights#:~:text=Summary,environmental%20harm%20and%20climate%20change*, accessed on 16 November 2023.
[370] Ibid at 9.

that persons are provided with documentation at admission to prevent *de facto* statelessness from becoming *de jure* statelessness. Where displacement is protracted, displaced persons should be allowed to apply for permanent residence in South Africa.

3. REGIONAL LEGAL FRAMEWORK

3.1. Legal Instruments

As with the international legal framework, the regional legal framework on displacement in the context of climate change is mainly governed by policy rather than binding legal instruments. Some legal instruments do not address climate change-induced displacement directly but can be used to assist persons displaced in this context.

The AU 2018 Free Movement Protocol seeks to facilitate the free movement of persons between African states by abolishing visa requirements and giving free entry, employment and residence rights.[371] While the Protocol does not explicitly deal with disaster displacement, free movement would allow persons displaced by disasters to move more freely into safer territories. South Africa is not a party to this Protocol or bound by it.

Within the SADC region, the SADC Free Movement Protocol seeks to eliminate obstacles to the free movement of people between SADC member states.[372] The protocol's objectives include facilitating visa-free entry into member states for a maximum period of 90 days per year, permanent and temporary residence in the territory of another member state, and the ability to establish a business or work in the territory of another member state.[373] The Protocol also strictly dictates when the expulsion of individuals is permitted, which prevents arbitrary expulsion.[374] While the SADC Free Movement Protocol does not directly deal with disaster or climate change-induced displacement, it does provide for persons to reside and work in another member state, which would benefit persons displaced across borders by climate

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[371] AU 2018 Free Movement Protocol, available at *https://au.int/sites/default/files/treaties/36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf*, accessed on 26 January 2023.
[372] SADC Protocol on the Facilitation of Movement of Persons, available at *https://www.sadc.int/sites/default/files/2021-11/Protocol_on_Facilitation_of_Movement_of_Persons2005.pdf,* accessed on 26 January 2023.
[373] Ibid article 3.
[374] SADC Protocol on the Movement of Persons op cit note 372 articles 22-25.

change. South Africa has ratified this Protocol, but it is not yet in force and, therefore, not binding.[375]

3.2. Policy

The AU's Migration Policy Framework for Africa (2018-2030) seeks to ease border migration within Africa in various circumstances, such as where there is gradual climate change.[376] The AU Migration Policy recognises that climate change is a significant push factor for migration and that environmental degradation is a root cause of mass migration and forced displacement on the African continent.[377] It recommends that governments develop evidence-based migration and related policies based on accurate data on migration trends, environmental degradation, and climate change.[378] In conjunction, the Migration Policy recommends that states draw up reliable policies to protect the environment, which will avoid major environmental sources of displacement.[379] The AU Policy provides states with policy guidelines, and South Africa is not bound to implement these recommendations. South Africa should nevertheless take the opportunity to develop policies on climate change-related migration and displacement.

In the SADC region, the SADC Climate Change Strategy and Action Plan addresses the issue from the opposite perspective, i.e., avoiding disaster or climate change-induced displacement as opposed to protecting already displaced persons.[380] The Action Plan recognises that climate change can exacerbate existing challenges, decrease the availability of resources, and lead to displacement.[381] It, therefore, recommends strengthening adaptive knowledge and adaptive measures to climate

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[375] Fatima Khan and Nandi Rayner 'Reference Paper for the 70th Anniversary of the 1951 Refugee Convention - A historical overview of forcibly displaced persons in Southern Africa (2011-2020): Realising the Expectations of the Global Compact on Refugees' 31 July 2020, available at *https://www.unhcr.org/people-forced-to-flee-book/wp-content/uploads/sites/137/2021/10/Fatima-Khan-and-Nandi-Rayner-_A-historical-overview-of-forcibly-displaced-persons-in-Southern-Africa.pdf*, accessed on 19 September 2022.
[376] African Union Migration Policy Framework for Africa and Plan of Action (2018 – 2030), available at *https://au.int/sites/default/files/documents/35956-doc-2018_mpfa_english_version.pdf*, accessed on 26 January 2023. See also Shazia Chaudhry & James Ouda 'Perspective on the Rights of Climate Migrants in the Horn of Africa: A Case Study of Somalia' (2021) 8 *Journal of Somali Studies* 32.
[377] AU Migration Policy Framework op cit note 376 at 20 and 74.
[378] AU Migration Policy Framework op cit note 376 at 30.
[379] AU Migration Policy Framework op cit note 376 at 74.
[380] SADC Climate Change Strategy and Action Plan, available at *https://www.sadc.int/sites/default/files/2021-11/SADC_Climate_Change_Strategy_and_Action_Plan-English.pdf,* accessed on 26 January 2023.
[381] Ibid at 20.

change events, strengthening disaster risk reduction strategies, improving knowledge about the effects of climate change, and developing early response measures. The Action Plan also recommends that states harmonise regional immigration policies to reduce vulnerability to extreme climate events.[382] This combined approach, in conjunction with the SADC Free Movement Protocol, aims to prevent and address displacement in the region in the context of climate change.

4. SOUTH AFRICA'S NATIONAL LEGAL FRAMEWORK

There is a lack of international obligations under the disaster-induced displacement framework related to the protection of persons displaced across borders and rendered stateless due to climate change. Nevertheless, multiple persuasive guidelines and recommendations aim to protect all persons displaced by disasters, particularly stateless persons. Such guidelines include humanitarian-based admissions onto the national territory, providing documentation, and providing routes to regularisation, such as permanent residence. South Africa does not have national legislation or policy dealing with climate-induced cross-border displacement. The following discussion will examine existing laws and policies in South Africa to determine whether they are following or attempting to follow these recommendations and guidelines. The discussion will look at whether these current laws and policies can be used to protect stateless persons displaced by climate change or whether development is required. All current legislation is interpreted using a value-based approach.

4.1. Legislation

4.1.1. National Environmental Management Act[383]

The National Environmental Management Act (NEMA) does not reference climate change, displacement or displaced persons. The principles of the legislation may nevertheless be relevant in determining how those displaced into South Africa by the impacts of climate change should be treated. These principles are contained in section 2 of NEMA. This section provides that

> [e]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly

[382] Ibid at 21.
[383] The National Environmental Management Act 107 of 1998 (NEMA)

> discriminate against any person, particularly vulnerable and disadvantaged persons.[384]

As previously stated, displaced persons and stateless persons are at the forefront of the climate crisis. [385] Stateless persons and those at risk of statelessness are also some of the most vulnerable groups in society.[386] This section implies that the proper pursuit of environmental justice would protect these persons from the impacts of climate change that have occurred and will occur in the future. Therefore, the principles of NEMA can be interpreted to require the protection of displaced and stateless persons impacted by climate change.

Section 2 further states that the

> [p]articipation of all interested and affected parties in environmental governance must be promoted … and participation by vulnerable and disadvantaged persons must be ensured.[387]

This section, on a value-based interpretation, implies that displaced, stateless persons must be allowed to participate in discussions regarding environmental governance that will affect them.

These principles contained in NEMA require the protection and inclusion of vulnerable groups affected by the impacts of climate change, which necessarily includes stateless persons displaced into South Africa by climate change. While this may be required in principle, no concrete provisions aim to achieve this protection. The law should be developed to concretise these principles.

4.1.2. Disaster Management Act[388]

The Disaster Management Act provides for rapid and effective response to disasters and post-disaster recovery. Like NEMA, it makes no mention of displacement. Section 7, which contains the contents of the national disaster management framework, may assist persons displaced from other states. This section states that South Africa's national disaster management framework must facilitate South Africa's cooperation in international disaster management and regional cooperation in disaster management

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[384] Ibid section 2(4)(c).
[385] UNHCR Strategic Directions op cit note 5.
[386] Ibid.
[387] NEMA supra note 383 section 2(4)(f).
[388] Disaster Management Act 57 of 2002.

in Southern Africa.[389] Such cooperation could and should include assisting persons displaced from other countries in the wake of disasters, specifically assisting such persons with documentation and confirmation of nationality to ensure that statelessness is prevented or to address existing cases of statelessness.

4.1.3. Climate Change Bill[390]

The first draft of the Climate Change Bill was published for public comment in 2018. The National Assembly has passed the Bill and the National Council of Provinces is now considering it. If passed by the National Council of Provinces, the Bill can be signed into law by the president. The version discussed herein is the version of the bill as of 30 January 2023. This latest version makes no mention of displacement. The preamble to the Bill does state that climate change policy needs to be implemented in the context of sustainable development objectives.[391] The phrase 'sustainable development' is used multiple times in the Bill. While the Bill does not explicitly reference the sustainable development goals (SDGs),[392] any sustainable development should consider these goals. SDG 16 promotes peace, inclusive societies, and justice for all.[393] Within this goal is the target of providing legal identity for all by 2030.[394] The SDGs, therefore, recognise the importance of legal identity in a peaceful and just society. Therefore, legal identity and statelessness must form a part of the sustainable development context in which South Africa's climate change policy is implemented.

Section 2 contains the objectives of the Bill, which include providing for the effective management of inevitable climate change impacts.[395] The UNHCR recognises displacement and statelessness as results of these inevitable impacts of climate change.[396] These should, therefore, be provided for in the final version of the legislation. Section 3 dictates how the Bill is to be interpreted and applied. Decision-

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[389] Ibid section 7(2)(c)(i) and (ii).
[390] Climate Change Bill [B9-2022] (*Climate Change Bill*) as introduced in the National Assembly, prior notice having been given of its introduction in GN 1026 in *GG* 45299 of 11 October 2021. The *Climate Change Bill* was first published in GN 580 in *GG* 41689 of 8 June 2018.
[391] *Climate Change Bill* op cit note 22, Preamble.
[392] United Nations 'Sustainable Development Goals' available at *https://sdgs.un.org/goals*, accessed on 27 March 2023.
[393] United Nations 'Sustainable Development Goals' Goal 16, available at *https://sdgs.un.org/goals/goal16*, accessed on 27 March 2023.
[394] United Nations 'Sustainable Development Goals' Goal 16 target 16.9., available at *https://sdgs.un.org/goals/goal16*, accessed on 27 March 2023.
[395] *Climate Change Bill* op cit note 372, section 2(b).
[396] UNHCR 'Climate Change and Statelessness' op cit note 354 at 3.

making must consider the unique needs and circumstances of particularly vulnerable people and groups.[397] While displaced and stateless persons are not specifically mentioned, they would undoubtedly qualify as vulnerable and would, therefore, need to be considered in decision-making under the Bill. Section 3 further states that the costs of responding to the adverse impacts of climate change must be borne by those responsible for causing the adverse impacts.[398] South Africa is ranked as the 13th largest source of greenhouse gases globally and emits 40% of Africa's cumulative emissions total.[399] Between 1990 and 2014, through its emissions, South Africa caused $144.7 billion in damages to other countries.[400] South Africa recognised as far back as 2009 that it is a perpetrator of climate change.[401] As a significant perpetrator of climate change, South Africa must bear the costs for the impacts thereof, including any resulting displacement and statelessness.

One of the criticisms of the current version of the Bill is that it fails to centre the Bill in the Constitution and Bill of Rights. It fails to recognise that climate change is a human rights issue and should be framed in a human rights framework.[402] Framing the Bill in a human rights framework would allow for including interrelated human rights such as the right to a nationality. A more human rights-based approach would allow for the inclusion of protections for displaced, stateless persons in the context of climate change.

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[397] Climate Change Bill op cit note 372 section 3(f).
[398] Climate Change Bill op cit note 372 section 3(j).
[399] Hochstetler op cit note 11 at 970; Business Tech 'How South Africa will spend the $8.5 billion from the deal to move away from coal' 7 November 2022, available at *https://businesstech.co.za/news/energy/641171/how-south-africa-will-spend-the-8-5-billion-from-the-deal-to-move-away-from-coal/,* accessed on 11 January 2023.
[400] Christopher W Callahan & Justin S Mankin 'National attribution of historical climate damages' (2022) 172 *Climate Change*. For a discussion of this study, see Ethan van Diemen for the Daily Maverick 'Pioneering study attributes $6 trillion in global warming-related economic losses to USA, China, and others' 24 July 2022, available at *https://www.dailymaverick.co.za/article/2022-07-24-pioneering-study-attributes-6-trillion-in-global-warming-related-economic-losses-to-usa-china-and-others/?utm_medium=email&utm_campaign=Our%20Burning%20Planet%2027%20July%202022&utm_content=Our%20Burning%20Planet%2027%20July%202022+CID_ea8055a828c25e56282e3e7d199c6584&utm_source=TouchBasePro&utm_term=Pioneering%20study%20attributes%206-trillion%20in%20global%20warming-related%20economic%20losses%20to%20USA%20China%20and%20others*, accessed on 2 August 2022.
[401] Hochstetler op cit note 11 at 975.
[402] Ethan van Diemen for the Daily Maverick 'Is SA's Climate Change Bill good enough? It depends on who you ask' 12 September 2022, available at *https://www.dailymaverick.co.za/article/2022-09-12-good-but-not-good-enough-the-flaws-in-south-africas-climate-change-bill/?utm_source=addthis&utm_medium=mailto*, accessed on 11 January 2023.

The fact that none of South Africa's laws addressing environmental protection, disasters, and climate change specifically address displacement is problematic, especially since displacement is a recognised consequence of climate change and disasters. While the Acts and Bill discussed above may offer some guidance on how displaced and stateless persons should be treated, such an approach or interpretation is not certain. To adequately protect persons rendered stateless due to climate change, the Legislature must explicitly recognise displacement and statelessness as consequences of climate change, either in existing laws or new legislation.

4.2. Policy

4.2.1. National Climate Change Response White Paper[403]

Like the legislation discussed above, the National Climate Change Response White Paper makes no mention of displacement or displaced persons. This White Paper recognises that South Africa is a relatively significant contributor to global climate change.[404] South Africa has relatively high emissions for a developing country and is, by any measure, a substantial emitter of greenhouse gases (GHGs).[405] The White Paper also recognises that extreme weather events often cross borders and impact the region as a whole. A region-wide approach to disaster management is therefore required.[406] These recognitions indicate an acknowledgement by South Africa that it plays a role in the impacts of global warming on the region and must cooperate with other role players to assist those impacted. While it is not explicitly stated, this should include displaced and stateless persons. South African policy should specifically include such persons in its climate change response.

4.2.2. National Climate Change Adaptation Strategy[407]

The National Climate Change Adaptation Strategy (NCCAS) was approved by the Cabinet of South Africa and the Department of Environment, Forestry and Fisheries in 2020. It specifically mentions persons displaced by the impacts of climate change.

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[403] *The White Paper on National Climate Change Response* (GN 757 in *GG* 34695 of 19 October 2011).
[404] Ibid at 8.
[405] Ibid at 26.
[406] Ibid at 24.
[407] *National Climate Change Adaptation Strategy (NCCAS)* Version UE10 of 13 November 2019, available at *https://www.dffe.gov.za/sites/default/files/docs/nationalclimatechange_adaptationstrategy_ue10november2019.pdf,* accessed on 27 March 2023. The original *Draft National Climate Change Adaptation Strategy* can be found in GN 644 in *GG* 42446 of 6 May 2019.

The NCCAS aims to develop a coordinated climate services system providing products and services for key climate-vulnerable sectors and geographic areas.[408] To achieve this, an action item contained in the NCCAS is to develop adaptation strategies for those displaced by climate change.[409] This involves assisting persons displaced by climate change and its impacts to plan their future lives. The NCCAS, therefore, realises the importance of helping persons displaced by the effects of climate change. This recognition is, unfortunately, only on a national scale.[410] The NCCAS is a national strategy and does not apply to the wider regional or international community. South Africa still lacks a policy addressing cross-border displacement and statelessness arising from climate change and its impacts.

5. CHAPTER FIVE CONCLUSION AND CONCLUSION TO RESEARCH QUESTIONS ONE AND TWO

The first two research questions addressed in this dissertation examine whether South Africa is meeting its international obligations to reduce and prevent climate change-induced statelessness and the extent to which South Africa's current laws and policies prevent statelessness and protect stateless persons affected by climate change.

Chapter two approached these questions through the right to a nationality framework. The findings of chapter two are that South Africa is, on paper, largely meeting its international obligations concerning protecting the right to nationality. South Africa's nationality laws are gender neutral, prohibit deprivation of citizenship of South African citizens and guarantee the right of every child born in South Africa to a nationality at birth. South African law further provides that every child born in South Africa who would otherwise be stateless shall be a South African citizen by birth. One area where South African law is lacking is its failure to recognise the rights of all adult persons to a nationality. Even where South Africa's laws protecting the right to nationality meet its international obligations, implementing these laws falls short. In practice, gender neutrality is not realised as unmarried fathers are unable to register their children, which compromises the child's right to a nationality. Children who are born stateless in South Africa have difficulty taking advantage of the law to

[408] Ibid at 66, intervention 2.
[409] Ibid at 36 and 67.
[410] Ibid. See pages 10 and 19 where the NCCAS is described as a national strategy and a country-driven approach.

provide them with South African citizenship due to administrative failings and lack of adequate regulations.

Chapter three considered the first two research questions concerning the legal framework of statelessness. Because South Africa is not a party to the Stateless Conventions, it does not have many obligations under international law regarding the prevention of statelessness and the protection of stateless persons. Perhaps as a result of this, it was found that South Africa's legal framework fails to prevent climate change-induced statelessness and provides very few protections for stateless persons impacted by climate change. Laws such as those in the Citizenship Act aimed at preventing or reducing statelessness by providing South African citizenship to persons born in South Africa fail to meet their objective because they are poorly regulated and implemented. These laws also depend on other legislation, such as the BDRA, which creates obstacles for persons without documentation, which many persons displaced by climate change do not have. There are also currently no laws addressing statelessness in foundlings or adults who were not born in South Africa. South Africa's laws also fail to protect stateless persons impacted by climate change because such persons have no recognised protection status in South Africa and, therefore, have minimal humanitarian rights available to them. Even those rights available to stateless persons under humanitarian law and the Bill of Rights are challenging to access because such persons do not have the necessary status to enforce these rights.

South Africa's laws on nationality and statelessness, and the implementation thereof, fail to meet its international obligations to prevent and reduce statelessness. The current laws and policies do not adequately prevent statelessness or protect stateless persons affected by climate change.

Chapter four examined South Africa's failure to protect stateless persons impacted by climate change through the refugee law framework. South Africa has a progressive refugee law framework that complies with its international and regional obligations. This compliance is being increasingly compromised by South Africa's move towards an exclusionary, rather than inclusive, approach to refugees. Even if this were not the case, South Africa's refugee laws are unlikely to protect stateless persons impacted by climate change because, as it currently stands, stateless persons and persons displaced due to the impacts of climate change do not qualify for refugee status unless there are coexisting circumstances. While there is potential for the

Refugees Act to be interpreted to include such persons, this is both uncertain and unlikely given South Africa's exclusionary policies. Where such persons qualify for refugee status, the law requires them to wait ten years before applying for permanent residency and a further five years before applying for citizenship. These delays inhibit efforts to reduce and prevent statelessness and can lead to generational statelessness.

Chapter five approaches preventing statelessness and protecting stateless persons impacted by climate change through the framework of disaster-induced displacement. Since no international instruments addressing climate change-induced displacement exist, South Africa has no obligations under international law other than those prescribed by general human rights law. It, therefore, cannot be said that South Africa is failing to meet international obligations regarding protecting persons rendered stateless by climate change. This does not mean that South Africa's current laws and policies in this area are sufficient. The national framework addressing disasters, environmental management, and climate change fails to consider the issue of displacement or resulting issues such as statelessness. The only document addressing climate-induced displacement applies solely on a national level and, therefore, fails to address the issue of cross-border displacement and the consequences thereof.

Research on migration trends in the region, particularly in the context of migration under climate change, indicates that South Africa absorbs the largest number of migrants in the region.[411] People from neighbouring countries such as Mozambique and Malawi regularly move into South Africa due to disasters or weather events such as flooding.[412] It has also been suggested that a large number of refugees coming to South Africa are climate refugees.[413] Therefore, regardless of whether persons are dubbed migrants, refugees, or illegal immigrants, there is evidence of cross-border displacement into South Africa due to the impacts of climate change. South Africa's legal framework needs to be developed to address the protection needs

[411] Sylvester Mpandeli et al. 'Migration under Climate Change in Southern Africa: A Nexus Planning Perspective' (2020) 12 *Sustainability* 5.
[412] Nansen Initiative II op cit note 272 at 14.
[413] Sabina Taderera of Earthlife Africa writing for the Mail & Guardian 'Inform people about climate change to reduce conflict, violence with migrants in South Africa' 6 August 2022, available at *https://mg.co.za/opinion/2022-08-06-inform-people-about-climate-change-to-reduce-conflict-violence-with-migrants-in-south-africa/,* accessed on 28 March 2023.

of those displaced, particularly where these needs coincide with the needs of stateless persons or can lead to statelessness.

Having discussed how South Africa is failing to meet its international obligations and how South African law and policy fail to prevent climate change-induced statelessness and protect stateless persons affected by climate change, the next chapter will address the third research question. The third research question examines how South Africa's laws and policies can be developed to prevent climate change-induced statelessness and protect stateless persons.

CHAPTER SIX: BRAZIL'S LEGAL FRAMEWORK ON CLIMATE CHANGE-INDUCED STATELESSNESS

1. INTRODUCTION

The previous chapters discuss the various legal frameworks that impose obligations on South Africa to prevent and reduce climate change-induced statelessness and protect persons rendered stateless due to climate change. This chapter looks at the same legal frameworks in a different national context to determine whether South Africa can learn anything from this foreign experience about how its laws can be developed.

Brazil was chosen for this comparative analysis for various reasons. It possesses many similarities to South Africa. Economically, both are considered emerging economies.[414] Although South Africa and Brazil consider themselves developing countries, they have both developed and grown in economic status, differentiating them from other developing countries.[415] According to their respective gross national incomes, both are considered medium-income countries.[416] Despite this, both have extreme levels of inequality and prioritise reducing this inequality and alleviating poverty in their respective policy choices.[417] South Africa and Brazil are both members of more than one international economic grouping of countries such as BRICS[418] and BASIC[419].

Both countries are located in the global South and are similarly vulnerable to the impacts of climate change. Like Southern Africa, climate models suggest that countries in South America will see an increase in the severity of slow-onset disasters such as desertification, coastal erosion, and flooding.[420] Despite being faced with the negative consequences of climate change, both have fossil fuel industries that

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[414] IPCC 'Annual Report 6 Working Group III' 4 April 2022 at 262, available at *https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf*, accessed on 20 April 2023.
[415] Hochstetler op cit note 11 at 966.
[416] Zuzana Selementova 'Common but Differentiated Responsibilities for Developed and Developing States: A South African Perspective' in Piotr Szwedo, Richard Peltz-Steele &Dai Tamada (eds) *Law and Development Balancing Principles and Values* (2019) at 92.
[417] IPCC 'Annual Report 6' op cit note 414 at 451; Selementova op cit note 416 at 92.
[418] BRICS (Brazil, Russia, India, China and South Africa) website available at *http://infobrics.org/,* accessed on 21 September 2023.
[419] Stockholm Environment Institute 'Together alone?: Brazil, South Africa, India, China (BASIC) and the Climate Change Conundrum' January 2010, available at *https://www.jstor.org/stable/resrep00459*, accessed on 20 November 2023.
[420] Nansen Initiative II op cit note 272 at 22.

influence government decisions on climate action and create challenges to the ambition of their climate policies.[421] As both countries have developed economically, they have also grown in status as global GHG emitters. At the time of writing, Brazil was considered the 7th largest emitter of GHGs globally, and South Africa was the 13th largest.[422]

In terms of their respective approaches to migrants of all kinds, including those seeking asylum, both are popular destinations for migration in their respective regions, and both populations are reported to have high levels of xenophobic sentiment and violence towards migrants, especially those from poorer countries.[423]

Some important differences between the two nations make Brazil particularly useful as a comparator. Although Brazil is considered a large emitter, it has also implemented significant mitigation efforts,[424] and despite having issues of xenophobia towards migrant populations, Brazil's policy towards migrants is one of hospitality and welcome, and Brazil is often considered a global reference for humanitarian policy.[425] In short, Brazil was chosen for this comparative analysis because it faces similar challenges to South Africa in the context of climate change and statelessness, and it has similar resources to address these challenges. Despite these similarities, Brazil's laws and policies regarding the prevention and reduction of climate change-induced statelessness and the protection of persons rendered stateless by climate change are more generous and ambitious than South Africa's. Brazil's model is, therefore, a realistic example developmentally but an aspirational example of law and policy from which South Africa can learn.

Of course, the two states are not identical. Brazil is significantly larger and more populous than South Africa. Brazil has a population of over 217 million and a

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[421] IPCC 'Annual Report 6' op cit note 414 at 170.
[422] Supremo Tribunal Federal Fundo Clima Case ADPF 708 60 Distrito Federal Acao Direta De Inconstitucionalidade Por Omissao 'The Right to a Healthy Environment in Brazil: Amicus curiae brief from the United Nations Special Rapporteur on Human Rights and the Environment' 21 September 2022 at 3, available at *https://www.ohchr.org/sites/default/files/Brazilian_climate_change_case.pdf*, accessed on 5 April 2023; Business Tech op cit note 399.
[423] UNHCR Reporting 'South Africa Multi-Country Office' 2016, available at *Reporting.unhcr.org/southafricamco*, accessed on 20 April 2023; Thiago Assuncao *Statelessness: The absence of nationality and the construction of a Brazilian policy of hospitality* (unpublished PhD thesis, University of Sao Paulo, 2018) 270.
[424] IPCC 'Annual Report 6' op cit note 414 at 467.
[425] Assuncao op cit note 423 at 271.

geographic size of approximately 8.5 million square kilometres. In contrast, South Africa has a population of just over 61 million and a geographic size of approximately 1.2 million square kilometres. Brazil also has a larger economy. As of April 2023, Brazil is ranked as the 12th largest economy globally with a gross domestic product (GDP) of $ 1 894.7 billion, whereas South Africa is ranked as only the 39th largest economy with a GDP of $ 411.5 billion.[426] These differences must be considered when deciding what lessons South Africa can realistically embrace.

2. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

2.1. Legal Instruments

Brazil is a party to many of the same international instruments as South Africa, which focus on the importance of nationality specifically and the protection of human rights more generally. These include CEDAW, the Convention on the Rights of the Child, and the UN Refugee Convention.[427] Brazil also has the same customary international law obligations. Unlike South Africa, Brazil has also ratified and domesticated both Statelessness Conventions.[428] Brazil, therefore, has additional obligations on the prevention of statelessness and the protection of stateless persons.

Regionally, Brazil is a party to the American Convention on Human Rights,[429] which protects the right to a nationality[430]. Brazil is also a party to the 1984 Cartagena Declaration on Refugees. This is essentially the equivalent of the AU Refugee Convention,[431] but with a notable difference for the South American region: it is not binding on State parties. At the 30th anniversary of the Cartagena Declaration, in 2014, the Brazil Declaration and National Action Plan were established.[432] The Declaration

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[426] 'World's largest economies Top Heavy: Countries by Share of the Global Economy' 2023, available at, *https://www.visualcapitalist.com/countries-by-share-of-global-economy/#:~:text=Just%20five%20countries%20make%20up,as%20a%20top%20five%20economy.,* accessed on 7 April 2023.
[427] 1948 Universal Declaration of Human Rights; UN General Assembly, CEDAW supra note 59; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at *https://www.refworld.org/docid/3ae6b38f0.html*, accessed on 21 April 2023 (CRC); 1951 Refugee Convention supra note 250.
[428] 1954 Statelessness Convention supra note 6; 1961 Statelessness Convention supra note 21.
[429] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at *https://www.refworld.org/docid/3ae6b36510.html*, accessed on 24 April 2023 (ACHR).
[430] Ibid article 20.
[431] 1969 AU Refugee Convention supra note 258.
[432] Brazil Declaration and National Action Plan at the 30th Anniversary of the Cartagena Declaration on Refugees 1984, available at *https://www.acnur.org/fileadmin/Documentos/BDL/2014/9865.pdf*, accessed on 23 September 2022.

recognises the importance of the fight against statelessness. It credits good work done to resolve the issue in the region but declares that statelessness is still a problem that States need to resolve. The Declaration explicitly recognised the challenges posed by climate change in the region and that these may lead to increased cross-border displacement. The Declaration promotes non-discrimination towards displaced persons and facilitates naturalisation and eradicating statelessness in the region. Brazil, therefore, has fewer protection obligations under refugee law but more protection obligations under the disaster displacement framework. Brazil's National Action Plan aims to eradicate statelessness within its borders by 2024.

2.2. Policy

The previous chapter on disaster-induced displacement included a discussion of the Nansen Initiative and Protection Agenda on disaster displacement.[433] Brazil was one of the founding members of the Nansen Initiative.[434] This is evidence of Brazil's leading role in the region and globally on specific issues of disaster displacement and the consequences thereof. Brazil has also emerged internationally as a key promoter of the right to nationality and the rights of stateless people.[435] Brazil is considered a leader in the region in the fight against statelessness.[436] It is part of and has led regional efforts to end statelessness through various instruments, such as the 2014 Brazil Declaration and National Action Plan discussed above. Brazil aims to help other countries in the region accede to the Statelessness Conventions, establish statelessness determination procedures, and facilitate naturalisation.[437]

3. NATIONAL LEGAL FRAMEWORK

While there is no official data on the number of stateless persons in Brazil, there are thought to be very few stateless people in Brazil due to the strict application of *jus soli* and the automatic granting of citizenship to anyone born on the territory. Unofficial

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[433] Nansen Initiative I op cit note 358; Nansen Initiative II op cit note 272.
[434] McAdam op cit note 274 at 1532.
[435] Institute for Statelessness and Inclusion (ISI) 'Mainstreaming Statelessness and the Right to Nationality in the Universal Periodic Review: UPR Third Cycle Evaluation and Lessons for the Future' available at *https://www.institutesi.org/resources/mainstreaming-statelessnessand-the-right-to-nationality-in-the-universal-periodic-review*, accessed on 5 April 2023.
[436] Open Society Justice Initiative 'Born in the Americas: The Promise & Practice of Nationality Laws in Brazil, Chile, & Colombia' 2017 at 10, available at *https://www.justiceinitiative.org/uploads/8c4136e4-c25d-4255-9afd-d66d20e71da1/born-in-the-americas-20170323.pdf*, accessed on 17 October 2022.
[437] Ibid.

data from 2012 also suggests that over 3 000 stateless persons had already been given documentation by the Brazilian government.[438] This was before Brazil's new legislation was passed in 2017, providing extra protection for stateless persons and safeguards against further statelessness.

3.1. Legislation

3.1.1. The Constitution of the Federative Republic of Brazil[439]

Chapter III of Brazil's Constitution deals with Brazilian nationality. Article 12 states that all persons born on Brazilian territory are considered Brazilian nationals by birth unless they are born to parents in the service of a foreign country. The fact that the child's parents may be foreign is irrelevant to the child's ability to acquire Brazilian nationality at birth. This is a crucial form of protection for children born to asylum seekers, migrants, and foreigners in general on Brazilian soil. According to Constitutional Amendment 45, found in Chapter 1 of Brazil's Constitution, international human rights treaties and conventions are equal to constitutional amendments if approved by both houses of the National Congress by a 3/5 majority in two different sessions. Both Statelessness Conventions have achieved this status.[440] The Constitutional status of the 1954 and 1961 Statelessness Conventions guarantees additional protection for stateless persons.

3.1.2. Law No. 10.215 of 2001[441]

This law provides additional safeguards for all children born in Brazil. It provides for free birth registration and states that parents cannot be fined for late registration. This prevents climate change-induced statelessness by removing unnecessary obstacles to foreigners who may be in Brazil due to disaster displacement, whose children could otherwise be at risk of statelessness due to lack of birth registration.

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[438] UNHCR 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Brazil' May 2012, *available at https://www.refworld.org/pdfid/4ed360b12.pdf*, accessed on 24 April 2023.
[439] The Constitution of the Federative Republic of Brazil of 1988, as amended.
[440] Open Society Justice Initiative 'Born in the Americas' op cit note 436 at 41.
[441] Presidency of the Republic General Secretariat Sub-Command for Legal Affairs Law No. 10.215 of 2001, as discussed in Open Society Justice Initiative 'Born in the Americas' op cit note 436 at 43.

3.1.3. Law No. 13.445 of 2017[442]

Brazil's previous legislation only protected stateless persons who also qualified as refugees. In 2017, new legislation introduced humanitarian visas for stateless persons and persons affected by environmental disasters. Law No. 13.445, promulgated on 24 May 2017, 'provides for the rights and duties of migrants and visiting aliens and regulates their entry and stay in the country'. This law improved access to documentation for immigrants, including those in the country for humanitarian reasons or those seeking asylum. It also enhanced protection for those whose lives or personal integrity would have been at risk if forced to return to their country of origin.

Law 13.445 introduced a specific section for the protection of stateless persons and the reduction of statelessness.[443] The section creates an SDP and provides for a simplified naturalisation procedure once statelessness status has been confirmed.[444] Once statelessness is confirmed, the applicant for statelessness status is given the option of acquiring Brazilian citizenship. Should the applicant opt for Brazilian citizenship, a simplified 30-day naturalisation procedure is commenced.[445] Even if the applicant opts not to receive Brazilian citizenship, they will nevertheless be granted a residence permit,[446] which is granted for an indefinite period.[447] If statelessness status is not recognised, the applicant can appeal the decision.[448] In either event, regardless of status, it is forbidden to return the applicant to a country where their life, personal integrity, or freedom will be at risk.[449]

Other protection measures in Law 13.445 include temporary humanitarian visas and residence permits. Stateless persons or nationals of other states may be granted temporary humanitarian visas in Brazil if they come from a country in a situation of serious or imminent institutional instability or experiencing a major

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[442] Presidency of the Republic General Secretariat Sub-Command for Legal Affairs Law No. 13.445 of May 24, 2017 (Law 13.445) available at *http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13445.htm*, accessed on 21 September 2023.
[443] Ibid Chapter III, Section II.
[444] Ibid article 26.
[445] Ibid article 26(7).
[446] Ibid article 26(8).
[447] Presidency of the Republic General Secretariat Sub-Command for Legal Affairs Decree No. 9.199 of November 20, 2017 (Decree 9.199) Article 100, available at *https://www.gov.br/mj/pt-br/acesso-a-informacao/atuacao-internacional/legislacao-traduzida/decreto_n__9-199__de_20_de_novembro_de_2017_ingles_final-docx.pdf*, accessed on 21 September 2023.
[448] Law 13.445 supra note 442 article 26(9).
[449] Law 13.445 supra note 442 article 26(1); Decree 9.199 supra note 447 article 101.

calamity or environmental disaster.[450] Residence permits for humanitarian reception may be granted where the person in question benefits from refugee, asylum, or stateless person protection.[451] Decree 9.199 expands on this and states that residence permits may be granted for humanitarian reception to stateless persons or nationals of any country in a situation of serious or imminent institutional instability, a calamity of great proportion, environmental disaster, or serious violation of human rights or international humanitarian law.[452]

Chapter VI governs nationality and naturalisation. It states that a person can apply for Brazilian citizenship through naturalisation if they have resided on the territory for at least four years.[453]

3.1.4. Decree No. 9,199 of 2017[454]

Decree No. 9.199 of 20 November 2017 regulates the implementation of Law 13.445. It removes or lessens documentation requirements in various circumstances. For instance, persons entering the country without a passport will be given a Brazilian *laissez-passer* (permit) to which a visa can be affixed.[455] Persons applying for temporary visas and residence permits on the grounds of statelessness and humanitarian reception only need to produce the documents they have available, as well as their name and nationality, where available.[456] These temporary visas for humanitarian reception may be granted to a stateless person coming from a state in a situation of serious or imminent institutional instability, major calamity, environmental disaster, or serious violation of human rights or international humanitarian law.[457] Where a person applies for statelessness status, this application only needs to be accompanied by those documents available to the applicant.[458] Decree 9.199 also stipulates that where statelessness is recognised, the period of residency required for naturalisation is reduced from four to two years.[459]

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[450] Law 13.445 supra note 442 article 14(1)(c).
[451] Law 13.445 supra note 442 articles 30(I)(c) and II(e).
[452] Decree 9.199 supra note 447 article 145.
[453] Law 13.445 supra note 442 article 65.
[454] Decree 9.199 supra note 447.
[455] Decree 9.199 supra note 447 article 4(3).
[456] Decree 9.199 supra note 447 Chapter III, Section II.
[457] Decree 9.199 supra note 447 article 33(1)(c).
[458] Decree 9.199 supra note 447 article 96.
[459] Decree 9.199 supra note 447 article 99.

A residency requirement of two years would not be a difficult hurdle to overcome since residency permits can be granted for humanitarian reception where a person is a beneficiary of refugee, asylum, or stateless person protection.[460] Residence permits are granted to stateless persons for an indefinite period.[461] It would, therefore, be possible for a person to live in Brazil on a residency permit for two years before going through the simplified naturalisation procedure.

Another vital protection in Decree 9.199 is waiving consular and visa fees for vulnerable groups, including persons awarded temporary visas or residence permits for humanitarian reception, such as stateless persons affected by environmental disasters.

3.1.5. Law No. 9.474 of 22 1997[462]

Law No. 9.474 of 22 July 1997 domesticates the UN Refugee Convention and provides for the treatment of refugees and asylum seekers in Brazil. Article 1 defines a refugee according to the definition in the UN Refugee Convention. Article 1(III) provides for an additional category of refugees: those obliged to leave their country of nationality to seek refuge in another country due to serious and widespread human rights violations. This slightly extended definition of refugee would not appear to include climate refugees, but since Brazil's legal framework offers various other protections, such as humanitarian visas and residency options for those displaced by disasters, inclusion in Brazil's refugee law is probably unnecessary.

4. LAW IN PRACTICE

There have been multiple events over the past few decades where Brazil has proven its humanitarian approach to disaster displacement and statelessness. Following the 2010 earthquakes in Haiti, Brazil received a significant number of disaster-affected foreigners. Persons fleeing to Brazil did not qualify as refugees, but as of May 2012, hundreds were granted permanent visas on humanitarian grounds by the National Immigration Council.[463] By mid-2015, approximately 26 000 Haitians had benefited

[460] Decree 9.199 supra note 447 article 142.
[461] Decree 9.199 supra note 447 article 156.
[462] Presidency of the Republic General Secretariat Sub-Command for Legal Affairs Law No. 9.474 of July 22, 1997, available at *https://www.refworld.org/pdfid/3f4dfb134.pdf*, accessed on 21 September 2023.
[463] UNHCR 'Universal Periodic Review: Brazil' op cit note 438.

from admission granted by Brazil.[464] Brazil implemented a special visa policy for Haitian migrants after the quake to avoid them using irregular migration methods, which put their lives at risk. This policy initially allowed permanent visas on humanitarian grounds to be granted to 1200 Haitians per year. This quota was subsequently abolished. Brazil also implemented policies of non-return of Haitians residing in the country.[465]

There are multiple examples of Brazil's welcoming policies towards foreigners fleeing various types of hardship. Since 2017, over 800 000 Venezuelans have fled to Brazil to escape economic and political hardship. This was a historic influx of migrants and refugees. Brazil accepted large groups of fleeing Venezuelans through 'Operation Welcome'.[466] Following the invasion of Ukraine by Russia in 2022, Brazil offered Ukrainians, as well as stateless persons displaced or affected by the armed conflict in Ukraine, temporary visas and residence permits for humanitarian purposes.[467] Following the removal of the nationality of hundreds of Nicaraguans, Brazil's ambassador to the UN, Tovar da Silva Nunes, stated that Brazil was available to receive these persons and put itself at their disposal. Nunes noted that

> by reaffirming its humanitarian commitment to the protection of stateless persons and the reduction of statelessness, the Brazilian government makes itself available to welcome the people affected by this decision under the special statute provided for in the Brazilian migration law.[468]

While these examples are not related to environmental disasters, they are further evidence of Brazil's welcoming policy towards stateless persons and the functioning of its laws on humanitarian reception and statelessness.

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[464] Nansen Initiative II op cit note 272 at 22.
[465] Nansen Initiative II op cit note 272 at 22.
[466] Global Compact on Refugees '"Welcomed Through Work" – Integration of Venezuelans in Brazil' available at *https://globalcompactrefugees.org/good-practices/welcomed-through-work-integration-venezuelans-brazil#:~:text=The%20Government%20of%20Brazil's%20%E2%80%9COperation,Refugees%20and%20Migration%20(PRM),* accessed on 14 July 2023.
[467] UNHCR 'Brazil Factsheet September 2022' available at *https://reliefweb.int/report/brazil/unhcr-brazil-factsheet-september-2022*, accessed on 3 November 2022.
[468] Anadolu Agency 'Brazil expresses concern about human rights violations in Nicaragua' 7 March 2023, available at *https://www.aa.com.tr/en/americas/brazil-expresses-concern-about-human-rights-violations-in-nicaragua/2839606*, accessed on 20 March 2023.

While Brazil does have good laws and practices, there are sometimes gaps between the laws and how they are implemented.[469] For instance, the unrestricted application of *jus soli* should benefit all children born on Brazilian territory, but undocumented migrants are affected by the inefficient implementation of this law. Part of the problem is that there are 26 different states within Brazil, each with its own privately run civil registry system. Civil registration practices can, therefore, be inconsistent.[470] Brazil has made significant progress in addressing deficits in birth registration and has almost eliminated the problem of births not being registered. In 2002, 20.9% of births went unregistered. By 2010, this was down to 6.6%. However, this 6.6% is the hardest to reach, and those located in geographically remote areas are the most affected.[471]

5. SOUTH AFRICA VERSUS BRAZIL: COMPARATIVE ANALYSIS

5.1. International Obligations

The most apparent difference in South Africa and Brazil's international obligations to persons rendered stateless by climate change stems from the fact that Brazil is a party to both Statelessness Conventions, while South Africa is a party to neither. As a result, Brazil has additional responsibilities related to the prevention and reduction of statelessness and protection of stateless persons, such as implementing a statelessness determination procedure, simplifying naturalisation procedures for stateless persons, and guaranteeing rights for stateless persons in the territory.

Other than this one key difference, South Africa and Brazil's international obligations relating to nationality rights generally are reasonably similar, but there are differences in how these obligations are implemented. South Africa is, in some ways, lagging behind its regional neighbours, some of which have acceded to one or both of the Statelessness Conventions.[472] This is despite South Africa's pledge to accede to the statelessness conventions over a decade ago.[473] Conversely, Brazil is viewed as a key promoter of the right to nationality and the rights of stateless persons globally and

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[469] Open Society Justice Initiative 'Born in the Americas' op cit note 436 at 19 and 27.
[470] Open Society Justice Initiative 'Born in the Americas' op cit note 436 at 37 and 42.
[471] Open Society Justice Initiative 'Born in the Americas' op cit note 436 at 44.
[472] Botswana, Malawi, Zambia and Zimbabwe are party to the 1954 Statelessness Convention. Angola is a party to the 1961 Statelessness Convention. The Democratic Republic of Congo, Eswatini, Lesotho and Mozambique are party to both Conventions.
[473] UNHCR Pledges op cit note 44 at 36; UNHCR & LHR 'Statelessness and Nationality in South Africa' op cit note 118 at 17.

a leader in the region in the fight against statelessness.[474] It has used its influence to encourage other South American nations to accede to the Statelessness Conventions. It has expressly recognised climate change's role in the region, specifically in the fight against statelessness.

Regarding South Africa's international law obligations, the obvious recommendation is for South Africa to accede to and domesticate both Statelessness Conventions. This recommendation has been made multiple times over more than a decade and should be prioritised.[475] This would enhance protection for all stateless persons in South Africa, regardless of cause.

5.2. Domestic Law and Policy

Brazil has legislation and regulations specifically addressing statelessness and disaster-induced displacement on the territory. South Africa does not have such legislation but rather has various pieces of legislation that deal partially with the treatment of stateless persons and the prevention of statelessness, and none that address cross-border disaster displacement. It would be preferable if South Africa followed Brazil's example and devoted legislation specifically to this effort. This will likely be the case if South Africa accedes to both Statelessness Conventions as it will be necessary for their domestication. As it stands, the various elements of the two legal regimes that prevent statelessness or protect stateless persons will be compared.

5.2.1. Birth Registration

In South Africa, citizenship by birth is determined according to *jus sanguinis*. In contrast, in Brazil, all children in the territory automatically acquire Brazilian citizenship due to the strict application of *jus soli*. While this may have obvious benefits for preventing childhood statelessness, it is not realistic or even necessary to require such a drastic shift in South Africa's legal system. South Africa already has laws aimed at preventing childhood statelessness. The issue with these laws is their implementation. What makes the implementation of these laws difficult is impediments to birth registration. Laws aimed at reducing statelessness at birth require the child's birth to be registered in South Africa.[476]

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[474] ISI 'Mainstreaming Statelessness' op cit note 435; Assuncao op cit note 423 at 298.
[475] UNHCR Reporting 'South Africa Multi-Country Office' 2016 op cit note 423.
[476] Citizenship Act supra note 50 section 2(2).

As discussed in chapter two, South Africa's legal system makes it impossible for undocumented migrants to register the births of their children in South Africa. Even where birth registration is possible, South Africa has further obstacles to birth registration, such as requiring the payment of a fee when births are registered late. In Brazil, on the other hand, all children can be registered, regardless of the status of their parents, and there is no fee for late birth registration.

People displaced by climate change currently do not qualify for any special visa or refugee status in South Africa. They are, therefore, likely to be considered undocumented. Should such persons have children while in South Africa, the inability to register these children may render them stateless. Thus, while South Africa need not implement a strict framework of *jus soli*, it should follow Brazil's example in providing for birth registration of all children born in the territory, regardless of their parent's status, and it should remove penalties for late birth registration.

5.2.2. Naturalisation Procedures

Brazil's simplified naturalisation procedure for stateless persons is another benefit of its accession to and domestication of the Statelessness Conventions, which automatically comes into play once the SDP makes a positive finding of statelessness. South Africa does not have an SDP nor a specialised and simplified naturalisation procedure for stateless persons. The only procedure in South African law that has the potential to offer a stateless person naturalisation is section 4(3) of the Citizenship Act,[477] discussed in chapter three, which allows persons to apply for South African citizenship upon reaching the age of majority. Other naturalisation options include that available to permanent residents who have been permanent residents of South Africa for at least five years.[478] Persons with confirmed refugee status in South Africa can apply to be permanent residents of South Africa after ten years of continued residency from the date asylum was granted.[479] After an additional five years, they can apply for naturalisation. For a refugee who is also stateless, this is at least a fifteen-year wait for citizenship.

In Brazil, an ordinary application for naturalisation requires continued residency of four years and an application for naturalisation of a stateless person half

[477] Citizenship Act supra note 50.
[478] Citizenship Act supra note 50 section 5(1)(c).
[479] Refugees Act supra note 209 section 27(c).

that time. South Africa's residency requirements are significantly longer than Brazil's. South Africa's options for naturalisation also offer no relief for persons displaced and rendered stateless by climate change who do not qualify as refugees and cannot obtain permanent residence. South Africa must implement a naturalisation procedure specifically for stateless persons. This procedure should form part of South Africa's domestication of the Statelessness Conventions. It should provide for a significantly shorter residency period or do away with residency requirements where statelessness status is confirmed.

5.2.3. Humanitarian Visas

South Africa does not have humanitarian visas for stateless persons or those displaced by disasters. Brazil offers temporary visas and residence permits for stateless persons and nationals of any country experiencing a major calamity or an environmental disaster. These visas provide protection by allowing safe access to Brazil and the opportunity for visa holders to regularise their status. South Africa only has the special exemption permit allowed by section 31(2)(b) of the Immigration Act.[480] This option is insufficient as both the granting and the withdrawal of the permit are discretionary, and it may not give holders the option of obtaining permanent residence or naturalisation.[481]

5.2.4. Refugee Law

South Africa's refugee law is the one area of its legal regime with more potential than Brazil's legal regime to assist in the fight against climate-induced statelessness through the recognition and protection of climate refugees. The UN and AU Refugee Conventions are binding on South Africa.[482] The UN Refugee Convention is binding on Brazil but not the Cartagena Declaration on Refugees. The AU Convention and the

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[480] Immigration Act supra note 123.

[481] Several news articles discuss the Zimbabwean Exemption Permits which were granted in 2009 and which were withdrawn in 2021. This withdrawal is subject to ongoing litigation. A Sunday Times article discusses that the Minister of Home Affairs does have the power to end the special exemption permits. A Ground Up article further states that these permits specifically excluded the possibility of applying for permanent residence. Many Zimbabweans were therefore residents in South Africa and gave birth in South Africa over a period of more than a decade, yet none are able to apply for permanent residency or naturalisation. See Sunday Times 'Migrants' fate hangs in the balance' available at *https://times-e-editions.pressreader.com/article/281749863647076*, accessed on 24 April 2024. See also Ground Up 'Judgment reserved in case to decide future of Zimbabweans in South Africa' available at *https://www.groundup.org.za/article/judgment-reserved-in-case-to-decide-future-zimbabweans-in-south-africa/*, accessed on 24 April 2024.

[482] 1951 Refugee Convention supra note 250; 1969 AU Refugee Convention supra note 258.

Cartagena Declaration on Refugees include an extended refugee definition. While South Africa has domesticated this extended definition, Brazil has not, or at least not entirely. Therefore, Brazil's national definition of a refugee is unlikely to be interpreted as including climate refugees.

The word 'potential' is key here. While South Africa's definition of refugee could be interpreted to include persons displaced by climate change, this has yet to be tested. Given South Africa's policy of exclusion, it is unlikely to succeed. Brazil also does not need a refugee law framework that protects persons displaced and rendered stateless by climate change, as it already has separate laws dedicated to protecting such persons.

5.3. Law in Practice

Despite both countries facing issues of poverty, inequality, and xenophobia, Brazil maintains a welcoming policy to all migrants, asylum seekers, and displaced persons. As stated in this chapter's introduction, Brazil has a larger economy than South Africa, which is important when determining a country's ability to assist migrants of all kinds. And yet, Brazil's economy is still considered a developing economy. Its economy has struggled and dropped from being the 6th largest economy in 2011 to the 12th largest,[483] partly due to an economic crisis in 2014.[484] Brazil is not without financial struggles but continues to assist those who need it.

Economic struggles also act as a deterrent to an influx of migrants.[485] Because Brazil does have such generous laws towards stateless persons, concerns have been raised that this will lead to an influx of persons seeking to obtain Brazilian citizenship.[486] This concern has not been realised. Issues such as a struggling economy and xenophobia, both of which are even more present in South Africa, discourage migrants of all kinds from choosing these countries as their destination if they do have such a choice.[487] This concern also fails to recognise that a person cannot simply take advantage of the statelessness framework in Brazil by claiming statelessness status.

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[483] Forbes '*Brazil Overtakes Britain To Become World's Sixth Largest Economy' 26 December 2011, available at https://www.forbes.com/sites/andersonantunes/2011/12/26/brazil-overtakes-britain-to-become-worlds-sixth-largest-economy/?sh=58ed8d5d4873*, accessed on 24 April 2023; 'World's largest economies' op cit note 426.
[484] Assuncao op cit note 423 at 251.
[485] Assuncao op cit note 423 at 281.
[486] Assuncao op cit note 423 at 280.
[487] Assuncao op cit note 423 at 302.

This status will still need to be confirmed under Brazil's SDP. An effective SDP can prevent opportunistic applicants from abusing the system.

6. CHAPTER SIX CONCLUSION

South Africa and Brazil are not identical, but economically and developmentally similar, with similar socio-political and environmental challenges. One notable difference is the position that Brazil has taken on as a regional and global leader in the fight against disaster or climate change-induced displacement and statelessness. Despite being similarly placed as a regional power, South Africa has yet to take up such a role.

Many of Brazil's national laws and policies in the fight against statelessness, of any cause, stem from their accession to and domestication of the Statelessness Conventions. South Africa should follow this example as a first step in the fight against climate change-induced statelessness. Beyond this, Brazil has entrenched its reputation of humanitarian reception by providing humanitarian visas and residency for stateless persons displaced by environmental disasters and major calamities. Not all of Brazil's national laws are suitable for South Africa. For instance, it is unnecessary to change to a system of citizenship by birth based on *jus soli*. It is also ill-advised for South Africa to have multiple different, privately run civil registries addressing issues such as birth registration. South Africa is geographically smaller than Brazil and does not require such a system. Even in Brazil, this system has had downsides, such as inconsistency in applying the law.

Still, following Brazil's example would significantly improve many areas of South Africa's law. For instance, birth registration should be free, even if it is late, and available to all children born on the territory, regardless of their parents' status. Should South Africa not reform its refugee laws to include climate refugees, it should legislate separate categories of humanitarian visas for persons affected by disasters who do not qualify as refugees.

The Brazilian legal system shows that these laws do not necessarily lead to an influx of migrants seeking citizenship and can be achieved even in a medium-income, developing economy.

CHAPTER SEVEN: CONCLUSION

1. SUMMARY OF THE RELEVANT FACTUAL CONTEXT AND SOUTH AFRICA'S ACCOUNTABILITY

Before summarising the findings of this dissertation, it is worth revisiting the factual context in which South Africa finds itself, specifically related to climate change, displacement, and statelessness in Southern Africa. Countries in Southern Africa are experiencing some of the worst impacts of climate change. Mozambique has experienced flooding, heavy rains, and multiple tropical cyclones, which have displaced hundreds of thousands of persons within the country and across borders.[488] Other countries, such as Zimbabwe and Malawi, are likewise affected by these storms.[489] It is estimated that rising sea levels, coastal erosion, and salination of water supply are likely to displace 10% of the population of Comoros by 2050.[490] This equates to approximately 90 000 persons at the time of writing. This issue is also expected to impact countries such as Mauritius and the Seychelles.[491]

According to Earthlife Africa, climate-induced displacement into South African territory is already a reality. There has been an influx of climate refugees from neighbouring countries like Mozambique, Zimbabwe, and Malawi. Earthlife Africa states that a large portion of the refugees coming to South Africa are climate refugees.[492] This, combined with the fact that most of South Africa's stateless population is thought to be foreigners from countries like Mozambique,[493] shows that climate change-induced statelessness is a problem currently affecting South Africa that must be addressed.

South Africa cannot be held responsible for all the impacts of climate change affecting the region, but it is accountable for a significant portion. Historically, large, developed nations have been responsible for the majority of greenhouse gas emissions

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[488] UNHCR 'Country Fact Sheet Mozambique May 2022' available at *https://reliefweb.int/report/mozambique/unhcr-mozambique-fact-sheet-may-2022*, accessed on 9 June 2022; UNHCR 'Country Fact Sheet February 2023 Mozambique' available at *https://reliefweb.int/report/mozambique/unhcr-mozambique-country-factsheet-february-2023*, accessed on 24 November 2023.
[489] Nansen Initiative II op cit note 272 at 14; UNHCR 'Southern Africa Operational Update' op cit note 8.
[490] Nansen Initiative II op cit note 272 at 15.
[491] Nansen Initiative II op cit note 272 at 15.
[492] Taderera op cit note 413. See also Nansen Initiative II op cit note 272 at 14.
[493] Mbiyozo op cit note 49.

and the impact thereof on the global climate. For this reason, developing states such as South Africa have not been expected to take the lead in addressing climate change and its impacts.[494] As South Africa has developed, it has become the 13th largest greenhouse gas emitter globally and the largest emitter on the continent.[495] A study conducted by Dartmouth University attributed economic damages to various countries based on their historic emissions between 1990 and 2014.[496] This study found that South Africa has caused $144.7 billion in economic damages to other countries. South Africa itself has suffered $118 billion in damages due to other countries, but this is still less than the amount of damage South Africa has caused.[497] As a significant emitter, South Africa must be accountable to persons who suffer as a result of climate change, including persons rendered stateless due to the impacts thereof.

2. SUMMARY OF RECOMMENDATIONS

Throughout this dissertation, multiple findings have been made on South Africa's failure to prevent climate change-induced statelessness and protect stateless persons, and many recommendations have been made on how to reform South Africa's legal regime to better prevent or reduce climate change-induced statelessness and to better protect persons rendered stateless by climate change. The main findings and recommendations are briefly summarised below.

2.1. Recommendations aimed at preventing and reducing climate change-induced statelessness

This dissertation finds that South Africa's laws on nationality and statelessness fail to prevent climate change-induced statelessness for several reasons. Firstly, the laws fail to provide a path to citizenship for foundlings and adult stateless persons who were not born in South Africa.[498] Many persons displaced by the impacts of climate change across borders into South Africa will fit into these categories. Second, the Citizenship Act, which provides pathways to citizenship for persons born in South Africa, is not properly implemented due to poor administration and regulation. It also cannot be implemented where there has not been compliance with the BDRA regarding

[494] Selementova op cit note 416.
[495] Business Tech op cit note 399; Hochstetler op cit note 11 at 970.
[496] Callahan & Mankin op cit note 400.
[497] Callahan & Mankin op cit note 400; van Dieman op cit note 400.
[498] See chapter 2 section 6.2, and chapter 3 section 6 above.

registering a child's birth. [499] This provides a further obstacle to children born to persons displaced by climate change, as often these persons will not have documentation and will not be able to register the birth of their children. These failings can be addressed by implementing the following recommendations.

2.1.1. Amending the Citizenship Act

Several amendments must be made to the Citizenship Act to prevent and reduce climate change-induced statelessness. The words of the Constitutional Court in *Chisuse v Director General, DHA* should frame these amendments; citizenship is not merely a legal status but goes to the core of one's identity, and the spirit of the Citizenship Act is to widen pathways to South African citizenship rather than restricting them.[500]

First, the Act must be amended to include a definition of stateless persons and an SDP. The Minister of Home Affairs, Aaron Motsolaedi, has defined a stateless person as someone with no link to the country of origin of their forebears.[501] The definition should also encompass the words of the court in *Chisuse*, the definition of nationality in the *Nottebohm* case, and the notion of a genuine connection. The SDP should be modelled after other countries with effective SDPs, like Brazil.[502]

To prevent childhood statelessness, particularly for children born to parents displaced by the impacts of climate change, the Minister must issue regulations to sections 2(2) and 4(3) of the Citizenship Act. This is not a new recommendation but merely a repetition of court orders the Minister must follow.[503] These regulations must ensure protection for all persons born on the territory.[504]

While sections 2(2) and 4(3) address the statelessness status of people born in South Africa, the Act currently fails to provide citizenship for foundlings and stateless adults displaced into South Africa. A section needs to be introduced that provides for South African nationality to be acquired by children found on South African territory who are stateless and for a simplified naturalisation procedure for stateless adults.[505]

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[499] See chapter 3 sections 5 and 6, and chapter 5 section 5 above.
[500] *Chisuse* supra note 23 paras 28 and 76.
[501] Business Live 'Statelessness in spotlight' op cit note 22.
[502] See chapter 6, sections 5.2 and 5.3 above.
[503] *DGLR v Minister of Home Affairs* supra note 220 para 4(d); *Minister of Home Affairs v Ali* supra note 229; *Jose* supra note 230.
[504] See chapter 3, sections 5 and 6 above.
[505] See chapter 2 section 6.2 and chapter 3 section 6 above.

These amendments will allow persons rendered stateless by climate change to acquire South African nationality, thereby reducing climate change-induced statelessness.

2.1.2. Amending the Births and Deaths Registration Act and Regulations

The BDRA and Regulations currently create a risk of statelessness in various ways by imposing barriers to birth registration.[506] The Act and Regulations must be complied with if persons born in South Africa who would otherwise be stateless are to obtain South African citizenship. Currently, the Act and Regulations create a barrier to this by imposing fees for late registration of births and by failing to provide for the registration of births of children born to undocumented parents. Once these obstacles are removed, legislation aimed at preventing statelessness, such as sections 2(2) and 4(3) of the Citizenship Act, can be properly implemented.

2.2. Recommendations aimed at protecting persons rendered stateless by climate change

This dissertation finds that South Africa's laws on statelessness, its refugee law framework and its laws on disaster-induced displacement fail to protect stateless persons impacted by climate change. South Africa does not have statelessness laws which provide a special protection status for stateless persons. While refugees have a special protection status in South Africa, it is currently uncertain whether stateless persons displaced due to the impacts of climate change will qualify as refugees. Given increasing xenophobia and exclusionary policies, this interpretation seems unlikely. Aside from refugee status, there are no special visas or humanitarian laws that aim to specifically protect persons displaced across borders into South Africa due to the impacts of climate change. These failings can be addressed by implementing the following recommendations.

2.2.1. Amending Section 3 of the Refugees Act

Section 3 of the Refugees Act, which contains the requirements for refugee status, should be amended to include climate refugees. Alternatively, the section can remain as is but should be interpreted and read as including climate refugees. This would protect persons rendered stateless by climate change by guaranteeing them the rights

[506] See chapter 2, section 6.1 above.

and protections afforded to refugees and providing an eventual route to citizenship by naturalisation.[507]

2.2.2. Introduce New Classes of Visas

As an alternative, or in addition to amending the Refugees Act, the Immigration Act should be amended to include an additional humanitarian visa for persons displaced by climate change and disasters. Like the humanitarian visas available in Brazil, this visa should be accompanied by laws providing residency and regularisation of legal status for stateless persons.[508]

2.3. Addressing State Practice

As is evidenced by the bevvy of litigation concerning refused applications for citizenship, the best laws count for very little if not accompanied by effective state practice. According to Carol A Batchelor, it is not only laws that create statelessness that must be addressed. States must also take action to resolve practice that causes statelessness.[509] Refusing to register the births of children born to foreigners and denying valid applications for both refugee status and citizenship are all forms of state practice that can cause or exacerbate statelessness. It is, therefore, vital that a shift in state practice accompanies any law reform.

2.4. Methods of implementing recommendations

Each of the above recommendations must be implemented by distinct branches of South Africa's government. The executive branch is responsible for acceding to the Statelessness Conventions, implementing new policies, and overhauling the DHA. The legislative branch is responsible for amending South Africa's legislation in the manner suggested, for passing new legislation to give effect to South Africa's climate change obligations, and for domesticating the Statelessness Conventions, should these be ratified by the executive branch. Should these branches fail to take action, the responsibility of implementing these recommendations will be left to the judicial branch of government. The judiciary cannot, of its own accord, introduce these changes. This must occur by way of strategic litigation. For instance, should the legislature fail to amend section 3 of the Refugees Act to include climate refugees,

[507] See chapter 4, section 8 above.
[508] See chapter 6, section 5.2 above.
[509] Batchelor op cit note 156 at 169.

litigation may be brought seeking an order that the section be read to include climate refugees.

Judicial intervention through strategic litigation is the least attractive option for implementing recommendations. To be successful, the right case with the right facts and the right judge are necessary.[510] This method also cannot address all of the recommendations proposed. The executive and legislature, South Africa's democratically elected bodies, are far better placed to reform South Africa's law on climate change and statelessness. The question remains whether there is the political will to do so.

3. CHALLENGES

There are multiple challenges to implementing the proposed recommendations. Two of the most significant challenges are xenophobia and funding. President Cyril Ramaphosa has decried xenophobia in South Africa. He has stated that South Africa should never be viewed as a place of intolerance and that xenophobia and intolerance are a betrayal of South Africa's constitutional values.[511] Despite these strong words, xenophobia is a reality for foreigners in South Africa.[512] Changing public attitudes must start at the top with government policies. Departments such as the DHA need to stop fuelling the flames of xenophobia by accusing asylum applicants of being economic migrants.[513] The same department opposes valid citizenship applications on the unfounded basis that illegal migrants are taking advantage of loopholes and compromising national security.[514] Xenophobia will never be addressed until the department responsible for dealing with asylum and citizenship applications changes its attitude. Officials must be trained appropriately, and the department should adopt a culture of inclusion and humanity instead of opposition and inflexibility.[515]

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[510] McAdam op cit note 274 at 1539.
[511] News24 'Africa Day: Our brother and sisters on the continent are not our enemies – Ramaphosa' 25 May 2022, available at *https://www.news24.com/news24/southafrica/news/africa-day-our-brothers-and-sisters-on-the-continent-are-not-our-enemies-ramaphosa-20220525*, accessed on 12 January 23.
[512] *Chisuse* supra note 23 para 28.
[513] Report of the Special Rapporteur op cit note 69 at 17.
[514] Dr Katharine Vincent for Africa Portal 'Southern Africa lags behind in protection of (climate) migrants' 27 May 2020, available at *https://www.africaportal.org/features/southern-africa-lags-behind-protection-climate-refugees/,* accessed on 27 March 2023.
[515] *Khoza* supra note 222 para 79

It may be possible to address both of these issues simultaneously. Evidence has proven that migration has positive effects on South Africa's economy. For every migrant that comes to South Africa, two new jobs are created.[516] Therefore, encouraging tolerance towards foreigners in South Africa can improve South Africa's economy and assist in funding laws, policies, and programmes to address climate change-induced statelessness.

4. CONCLUSION

To reduce the risk of further climate change-induced displacement and statelessness, it is necessary to take mitigating actions to reduce climate change. Therefore, a holistic approach to addressing climate change-induced statelessness requires South Africa to enhance its laws and practices to reduce climate change, such as enforcing limits on greenhouse gas emissions and improving resource management.[517]

A holistic approach must also include the participation of affected groups in policymaking and implementation.[518] Including stateless persons displaced by climate change will not only allow for the inclusion of valuable knowledge that these persons may have but can also provide affected persons with a sense of agency.

As a precursor to adopting new laws and policies, it is also necessary to conduct empirical research on the extent of the problem of climate change-induced statelessness in South Africa. Currently, South Africa does not have a mechanism to identify and document stateless persons and, therefore, has no insight into the problem.[519] Realistically, given the government's lack of political will in this area and limited resources, this research may need to be conducted by a non-governmental organisation such as Lawyers for Human Rights or could form the basis of a PhD or LLD.

South Africa's Constitution enshrines humanitarian principles and respect for the dignity of all persons.[520] It is time for South Africa as a state to walk the talk and lead the region in the fight against climate change-induced statelessness. Case studies of countries such as Brazil show that preventing climate change-induced statelessness

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[516] Dr Katharine Vincent op cit note 514.
[517] Kelley op cit note 279 at 146.
[518] UNHCR 'Reporting – South Africa Multi-Country Office' 2022 op cit note 333.
[519] UNHCR & LHR 'Statelessness and Nationality in South Africa' op cit note 118 at 25.
[520] The Constitution supra note 15.

and protecting stateless persons can be done. South Africa's laws and policies can potentially address this issue but need some development. With the necessary political will and support from South African society, South Africa can ensure respect for the right to nationality and a sense of identity and belonging for all persons on South African territory.

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