

**UNDOCUMENTED AND INVISIBLE: ARE SADC MEMBER
STATES IMPLEMENTING THE RIGHTS TO BIRTH
REGISTRATION AND NATIONALITY FOR MIGRANT
CHILDREN?**

Submitted in partial fulfilment of the requirements of the degree LLM (Public International Law)

By

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DEDICATION

To the millions of children on the move, I hope you find your way home.

ABSTRACT

The Southern African Development Community sees high levels of migration. Many children within these groups are undocumented and have no means to prove their identities. This greatly increases their risks of statelessness, which opens the way to abuse, exploitation, trafficking, and the inability to claim their human rights. Birth registration represents one of the main protections undocumented children have in avoiding statelessness, as this reduces their chances of abuse, as well as provides them with a better chance of accessing nationality. Providing nationality is also important in reducing statelessness, as birth registration is not enough on its own. Therefore, whether birth registration and nationality are available for undocumented migrants in SADC member states is examined within both the international and regional legal contexts.

International human rights treaties go a long way in providing rights to birth registration and nationality, but the scope of these rights is not infinite. International law takes a strong stance on birth registration, as it is provided in many of the main treaties, as well as the fact that it is linked to the best interests of the child principle. The right to nationality on the other hand is generally understood to have restrictive application in that migrants do not have the right to the nationality of the host state, a state must just ensure that a child has the right to “a” nationality. This reduces the ambit of protection.

In turning to the SADC, the region in general was found to have a number of barriers to birth registration and nationality. For birth registration, gender discriminatory laws, centralised organisational structures, the COVID-19 lockdown, and penalties for late registration were counted as among the leading barriers to registration. This was similarly the case for South Africa and Zambia which were two key country profiles analysed. For nationality, there were many gaps in protection, such as uneven protection for foundlings and children who would otherwise be stateless, as well as onerous barriers to naturalisation. Given these findings, this dissertation concluded that SADC members are not adequately giving effect to their international obligations.

LIST OF ABBREVIATIONS

AU	African Union
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACPHR	African Commission on Human and Peoples' Rights
BDRA	Births and Deaths Registration Act
CRC	Convention on the Rights of the Child
CRVS	Civil registration and Vital Statistics Systems
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
COVID-19	Coronavirus Disease of 2019
DHA	Department of Home Affairs
DRC	Democratic Republic of the Congo
EU	European Union
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers
ICCPR	International Covenant on Civil and Political Rights
LHR	Lawyers for Human Rights
LSL	Lesotho Loti
SADC	South African Development Community
SITA	State Information Technology Agency
TZS	Tanzanian Shilling
UDHR	Universal Declaration of Human Rights
UN	United Nations
USD	United States Dollar
UNICEF	United Nations International Children's Emergency Fund
UNESCO	United Nations Educational, Scientific and Cultural Organization

UNHCR

United Nations High Commissioner for Refugees

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. Introduction

Among its numerous objectives, the Southern African Development Community mission statement aims to create solidarity, peace, security, and the fulfilment of universal human rights and the rule of law.¹ Yet despite this, it is estimated that hundreds of thousands, or even millions of people still cannot claim a nationality or have their children's births registered.² Undocumented migrants are particularly affected by this, as accessing social services becomes frustrated or even insurmountable due to the lack of the requisite documents to prove their identities.³ International conventions provide for both the rights to birth registration and nationality, however the effectiveness of this on the ground appears tenuous at best, given the above-mentioned statistics. Therefore, what this thesis aims to achieve is an analysis on the SADC's implementation of birth registration and nationality laws to uncover whether undocumented children are being accounted for.

¹ SADC Towards a Common Future 'SADC Mission', available at <https://www.sadc.int/about-sadc/overview/sadc-mission/>, accessed on 12 August 2021.

² Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons 'The Right to Nationality in Africa' (2014) at 5, available at www.refworld.org/pdfid/54cb3c8f4.pdf, accessed on 15 March 2021.

³ UNICEF 'State of the World's Children 2006' (2006) 38, available at <https://www.unicef.org/reports/state-worlds-children-2006>, accessed on 20 March 2021.

1.1.1. *Undocumented Migrants and Nationality*

Undocumented migrants are a category of people who reside in a country without the required immigration documents to lawfully justify their stay.⁴ As societal and legal outsiders, undocumented migrants and their children have difficulty establishing a legal identity within their host state.⁵ The absence of legal identity frustrates access to birth registration and makes children invisible and unable to establish links with their parents or to the state.⁶ In this respect, it is important that the laws and practices of host states do not leave migrants or their children alienated,⁷ and provides the foundation for them to claim their rights, such as the right nationality.⁸ Both *law* and *practice* are mentioned, because while it is true that certain African countries, such as South Africa and Angola, allow for such pathways to nationality in their constitutions.⁹ This does not necessarily mean that nationality will be available in practice.¹⁰ Consequently, undocumented migrants that cannot access nationality are left in a particularly vulnerable position and an increased risk of statelessness. Having no access to the legal identity that nationality confers bars the enjoyment of ancillary rights such as education, suffrage, healthcare, and employment.¹¹ Fundamentally, having a nationality provides one with the foundation for the acquisition of almost all rights.¹²

In Southern Africa, it was estimated that by mid-2020 there were 6.4 million international migrants in the region. Migratory patterns run parallel with political instability, job searching, war, and natural disasters.¹³ A few states in the region stand out as migratory hotspots, such as South Africa,

⁴ Laura Van Waas ‘The Children of Irregular Migrants: A Stateless Generation?’ (2007) 25 *Neth. Q. Hum. Rts* 437 at 440.

⁵ *Ibid* at 437.

⁶ *Ibid*.

⁷ Bronwen Manby *Citizenship Law in Africa a Comparative Study* 2 ed (2010) 9, available at <https://www.unhcr.org/4ebc60ce6.pdf>, accessed on 22 March 2021.

⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 7, available at <https://www.refworld.org/docid/3ae6b38f0.html>, accessed on 20 March 2021.

⁹ The Constitution, section 28(1)(a); The Constitution of the Republic of Angola, article 32.

¹⁰ Bronwen Manby *Citizenship Law in Africa: A Comparative Study* 3 ed (2016) 45, available at <https://www.refworld.org/docid/56a77ffe4.html>, accessed on 22 March 2021.

¹¹ Aimée-Noël Mbiyozo ‘Statelessness in Southern Africa Time to end it, not promote it’ 2019 *Southern African Report* 32 at 3.

¹² *Ibid*.

¹³ Migration Data Portal ‘Migration Data in the Southern African Development Community (SADC)’ available at <https://migrationdataportal.org/regional-data-overview/southern-africa>, accessed on 20 March 2021.

According to UNHCR statistics, 70 000 children are born stateless every year.²⁴ The total number of stateless people worldwide ranges from 12 - 15 million,²⁵ with a third of this amount being children.²⁶ In Sub-Saharan Africa, it is estimated that there are 95 million children under age 5 that do not have their births registered.²⁷ Additionally, 120 million children do not have a birth certificate.²⁸ It is also thought that if these trends continue, by 2030 there could be as many as 115 million unregistered children.²⁹ These statistics illuminate a troubling trend. First, that the number of unregistered children is on the rise, which may indicate that birth registration does not rank very high on the government agenda,³⁰ and second, that there are barriers to birth registration, which pose considerable risk of the rights of children to be curtailed. These barriers could relate to accessibility,³¹ inadequate or non-existent procedural rights and avenues,³² as well as the laws themselves if they contain gaps or discriminatory provisions.³³

1.1.3. *Effects of Statelessness on Children*

Child migrants are particularly vulnerable when stateless due to their overlapping position of being both children and migrants.³⁴ Without legal identities they are at higher risk of exploitation, not having their births registered, and being rendered invisible; which makes them unable to benefit from protections made to address their vulnerabilities.³⁵ Furthermore, they may be subjected to early marriage, sexual exploitation, military recruitment, reduced freedom of movement, and child

²⁴ Institute on Statelessness and Inclusion ‘Statelessness in Numbers: 2020 An Overview and Analysis of Global Statistics’ (2020) at 3, available at https://files.institutesi.org/ISI_statistics_analysis_2020.pdf; accessed on 16 March 2021.

²⁵ Aimée-Noël Mbiyozo op cit note 11 at 4.

²⁶ Christiano D’Orsi ‘Statelessness Affects Millions in Africa. Madagascar is Tackling the Problem, The Conversation’ available at <https://theconversation.com/statelessness-affects-millions-in-africamadagascar-is-tackling-the-problem-84349>, accessed on 12 March 2021.

²⁷ State of the World’s Children op cit note 3 at 1.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Aimée-Noël Mbiyozo op cit note 11 at 4.

³¹ The World’s Stateless Children op cit note 15 at 160-161.

³² Ibid.

³³ Ibid.

³⁴ Zana Vathi & Elizabeth Richards ‘Every Child Matters? Ambivalences and Convergences in Migration Management and Child Protection in Albania’ (2019) 27 *Child Care in Practice* 19-34 at 20.

³⁵ The World’s Stateless Children op cit note 15 at 205-6.

labour.³⁶ Stateless children could also have little or no access to education and healthcare.³⁷ Similar abuses occur when there is a lack of birth registration, as the consequences overlap to an extent.³⁸ It is therefore vital that domestic jurisdictions in the SADC region, whether party to the relevant child and statelessness conventions or not, ensure that their domestic law and practice regarding birth registration are up to par with international norms as not to infringe on the rights of children. This will be a key point of analysis in this thesis.

1.1.4. *The Legal Framework Pertaining to Nationality and Birth Registration*

The legal framework spans a variety of conventions and will be critically discussed throughout this paper. As a basis, the Universal Declaration of Human rights provides under article 15 that “*Everyone has the right to a nationality*”, and “*No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*”³⁹ These rights are given more content in the two main statelessness conventions. The 1954 Convention relating to the Status of Stateless Persons protects the stateless from discrimination,⁴⁰ as well as provides guidance in socio-economic and civil rights and duties related to property,⁴¹ employment,⁴² access to courts,⁴³ and education,⁴⁴ among others.

The second main statelessness convention is the 1961 Convention on the Reduction of Statelessness.⁴⁵ It establishes a number of ways in which a child can access nationality, such as

³⁶ Fatima Khan ‘Exploring Child Statelessness in South Africa’ (2020) 23 *PELJ* at 13.

³⁷ UNHCR ‘Global Action Plan to End Statelessness’ (2010) at 6, available at <https://www.unhcr.org/ibelong/global-action-plan-2014-2024/>, accessed on 25 March 2021.

³⁸ The Statelessness Index op cit note 17 at 3.

³⁹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 15, available at <https://www.refworld.org/docid/3ae6b3712c.html>, accessed on 22 March 2021.

⁴⁰ Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117, art 3, available at <https://www.refworld.org/docid/3ae6b3840.html>, accessed on 22 March 2021.

⁴¹ Ibid arts 13 and 14.

⁴² Ibid art 17.

⁴³ Ibid art 16.

⁴⁴ Ibid art 22.

⁴⁵ Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 12 December 1975) 989 UNTS 175, available at <https://www.refworld.org/docid/3ae6b39620.html>, accessed on 22 March 2021.

article 1 which provides that children need to be provided with the nationality of their place of birth if they would otherwise be stateless, in other words allowing for *jus soli* nationality attribution, and article 2 which provides nationality access for foundlings.⁴⁶

The rights to nationality and birth registration are confirmed in the United Nations Convention on the Rights of the Child,⁴⁷ as well as the African Charter on the Rights and Wellbeing of the Child.⁴⁸ The fact that the child's right to nationality and birth registration is provided for in both of these conventions entrenches and solidifies their importance in member states.⁴⁹ There are a number of other relevant conventions that will be touched upon in addition to these mentioned.

It is asserted that birth registration law and practice in the SADC region needs urgent improvement to reduce the incidences of statelessness. It is argued that for the rights of undocumented migrant children to be fulfilled, the SADC region needs to adjust both its domestic law, practice, and implementation to achieve this. Therefore, the focus of this dissertation is to critically analyse to what extent SADC states are achieving their mandate, with a focus on two key country profiles. After an analysis of the general situation and main issues, recommendations will be suggested.

1.2. Research Question

The lack of birth registration is linked to an increased risk of statelessness. Despite this, it is not uncommon for civil registration law and practice to curtail the child's right to nationality and birth registration. This significantly increases the risk of statelessness for children of undocumented migrants. Therefore, the main research question is the following: To what extent are SADC states adhering to their international obligations by ensuring that birth registration is being facilitated - and ultimately access to nationality - is taking place?

⁴⁶ 1961 Convention, arts 1 and 2.

⁴⁷ CRC, arts 1 and 2.

⁴⁸ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49, arts 1 and 2, available at <https://www.refworld.org/docid/3ae6b38c18.html>, accessed on 22 March 2021.

⁴⁹ ACRWC art 6; CRC art 7.

Sub-questions:

1. Are the rights to birth registration and nationality provided for in international conventions?
2. Are the SADC states ensuring that their birth registrations law and practice are in alignment with these international norms?
3. How can the international framework be used to mend the legal gaps in law and practice which occur in the region?

1.3 Methodology

This dissertation solely involves desktop research. It uses both primary and secondary sources. In terms of primary sources, reference is made to the main international conventions such as the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention on the Reduction of Statelessness, the United Nations Convention on the Rights of the Child, and the African Charter on the Rights and Wellbeing of the Child. Certain cases are discussed as far as they are relevant to discussing the application of international law. Reference is also made to the relevant domestic laws of the SADC states. As for secondary sources, academic textbooks, journal articles, and various studies, are considered and analysed where appropriate.

There is focus placed on SADC states, because as shown above, birth registration in the region is severely limited, as well as the fact that there are high levels of migration. Furthermore, narrowing the focus in this way allows for a more detailed discussion on the particulars of the region. The position of children is analysed due to their particularly vulnerable situation as undocumented migrants. However, there is also reference to the plights of migrant women affected by statelessness insofar as they relate to the rights of children and the various impediments to birth registration.

Two country profiles are made. The selection criteria of focus countries considers first whether the state has problems surrounding the implementation of birth registration, and second, whether there

is sufficient availability of statistics and other data, as well as primary sources such as constitutions, legislation, and case law.

The analysis on birth registration and nationality highlights the following key aspects: (i) barriers to nationality access for undocumented migrants, (ii) whether the civil registry system is centralised or decentralised, and (iii) which problems persist in barring the way to effective birth registration. This model is a modified version of the method used by the United Nations Department on Economic and Social Affairs Statistics Division.⁵⁰ It will be applied to the SADC as a whole, as well as to two country profiles on South Africa and Zambia.

The justification for the selection of these two SADC states are that: (i) both have sizable migrant populations, which makes an analysis of their nationality and birth registration laws important,⁵¹ and (ii) both share English as an official language,⁵² therefore making access to the necessary legal resources more practical.

1.4 Literature Review

1.4.1. *The link between birth registration and statelessness*

Statelessness can result in widespread marginalization, discrimination, and displacement.⁵³ This is because the lack of a legal identity means one becomes invisible in society.⁵⁴ It is thought that civil

⁵⁰ United Nations Department of Economic and Social Affairs Statistics Division ‘Status of Civil Registration and Vital Statistics in the SADC Region Technical Report’ (2010) at 18, available at <https://unstats.un.org/unsd/demographic/CRVS/Technical%20report%20SADC%20final%20v2.pdf>, accessed on 25 March 2021.

⁵¹ IOM UN Migration ‘Migration in Zambia A Country Profile 2019’ (2019) at 33, available at <https://www.iom.int/countries/zambia>, accessed on 30 July 2021; State of the World’s Children op cit note 3 at 36.

⁵² Rebekah Gordon ‘Language of Education Planning in Zambia’ (2014) *Linguistic Portfolios Vol.3* at 1, available at https://repository.stcloudstate.edu/stcloud_ling/vol3/iss1/6, accessed on 21 August 2021; The Constitution of Republic South Africa, 1996, section 6(1).

⁵³ Michelle Foster & Helene Lambert ‘Statelessness as a Human Rights Issue: A Concept Whose Time Has Come’ (2016) 28 *IJRL* 4 at 567-9.

⁵⁴ UNHCR ‘I am Here, I Belong the Urgent Need to End Childhood Statelessness’ (2015) at 15, available at <https://www.refworld.org/docid/563368b34.html>, accessed on 25 March 2021.

registration issues are largely to blame, as a lack of registration means a lack of legal identity,⁵⁵ and not having a legal identity means that people are side-lined from social benefits and access to nationality.⁵⁶ However, the significance of birth registration and the benefits it provides are not universally agreed upon.

The UNHCR has by far been the flag bearer of the argument that birth registration reduces the risks of statelessness.⁵⁷ The Human Rights Committee,⁵⁸ the Committee on the Rights of the Child, and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families⁵⁹ all reiterate this viewpoint. From the academic literature Manby and Van Waas agree as well.⁶⁰ Van Waas has summed this connection as follows:

*“One of the most tragic and, until recently, most underestimated sources of statelessness is a deficient birth registration system. I say most tragic, because a child could be born to the “right” parents, on the territory of the “right” state yet still be stateless from birth. Why? Because he was not registered or given a birth certificate elaborating all the details needed to prove these fortunate circumstances.”*⁶¹

Paradoxically, it is also widely thought that birth registration does not necessarily *lead* to nationality.⁶² This has been confirmed by the African Committee on the Rights and Welfare of the Child.⁶³ Van Waas herself has accepted this reality.⁶⁴ This apparent incongruence is not without justification, as states generally have the discretion to decide how their nationality is to be

⁵⁵ Executive Committee of the High Commissioner’s Programme ‘Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons’ (2006) at 3, available at <https://www.unhcr.org/excom/exconc/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html>, accessed on 25 March 2021.

⁵⁶ Ibid.

⁵⁷ Ensuring Birth Registration op cit note 22 at 3.

⁵⁸ Human Rights Council ‘Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law’ 2014 at 7, available at <https://www.refworld.org/docid/53ff324e4.html>, accessed on 25 March 2021.

⁵⁹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of the Child ‘Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return’ (2017) at 7, available at <https://www.refworld.org/docid/5a12942a2b.html>, accessed on 25 March 2021.

⁶⁰ Bronwen Manby *Statelessness in Southern Africa* (2011) 12; The Children of Irregular Migrants op cit note 4 at 437.

⁶¹ Nationality Matters op cit note 16 at 153.

⁶² Ensuring Birth Registration op cit note 22 at 3.

⁶³ African Committee of Experts on the Rights and Welfare of the Child ‘General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: Right to Birth Registration, Name, and Nationality’ (2014) at 10, available at <https://www.refworld.org/docid/54db21734.html>, accessed on 25 March 2021.

⁶⁴ Nationality Matters op cit note 16 at 159.

conferred. However poignant this discretion may be, it is not unfettered.⁶⁵ Thus there is a balancing act between state-sovereignty and their international obligations.

The fact remains, however, that there is some disagreement between these perspectives. How can birth registration reduce statelessness if it cannot even guarantee nationality? It would appear that instead, the right to birth registration provides the potential that one can attain nationality by having been prescribed a legal identity.⁶⁶ Furthermore, it provides access to ancillary rights that are linked to having a nationality, such as education, healthcare, and identity documents.⁶⁷ The Human Rights Committee has somewhat muddled the waters by stating that the ‘main’ focus of birth registration is to reduce incidences of abduction, trafficking, and sale.⁶⁸ However if this were truly the case, birth registration would not be considered as the main driving force behind the reduction of statelessness today.⁶⁹ This thesis will aid in clarifying how pronounced the link between statelessness and birth registration is, by showing how subpar registration in the Southern African Development Community certainly contributes to statelessness.

1.4.2. *Birth registration and social benefits*

It is not unanimously accepted that birth registration provides for social benefits typically associated with it, such as access to education, healthcare, and identity documents.⁷⁰ For example, there is the assertion that there is not necessarily a causal link between birth registration and access to these social benefits,⁷¹ and that a nuanced view that considers factors such as context, poverty, or discrimination should be considered. In this respect, Vandenabeele states:

⁶⁵ General Comment on Article 6 of the African Charter op cit note 63 at 32.

⁶⁶ Ibid at 10.

⁶⁷ Citizenship Law in Africa 2010 op cit note 7 at 55.

⁶⁸ UN Human Rights Committee ‘CCPR General Comment No. 17: Article 24 (Rights of the child)’ (1989) para 7, available at <https://www.refworld.org/docid/45139b464.html>, accessed on 26 March 2021.

⁶⁹ Ensuring Birth Registration op cit note 22 at 2 - 3.

⁷⁰ Citizenship Law in Africa 2010 op cit note 7 at 55.

⁷¹ Jacqueline Bhabha ‘From Citizen to Migrant: The Scope of Child Statelessness in the Twenty-First Century’ (2011) at 9, available at http://mitp-content-server.mit.edu:18180/books/content/sectbyfn?collid=books_pres_0&fn=9780262015271_sch_0001.pdf&id=8397, accessed on 26 March 2021.

*“In general, the research found that the causal connections between legal identity and access depend on the country as well as the benefit, service, or opportunity in question.”*⁷²

Bhabha,⁷³ and the Refugee Studies Centre reiterates this view.⁷⁴ For example, there is the fact that other documents may be just as necessary as birth registration for making claims to social security.⁷⁵ It is accepted that there is merit to this argument. What this shows is that each country’s laws need to be analysed on a case-by-case basis to ascertain whether birth registration can provide the requisite access to social benefits, as an assumption that birth registration would necessarily provide migrants with the protection they need could be as damaging as denying them these documents to them altogether.

1.4.3. *Barriers to birth registration and COVID-19*

It has become evident that southern Africa sees a general trend of good laws which can reduce the incidence of statelessness and increase birth registration.⁷⁶ However, there is the counter trend characterized by poor implementation of these laws, which dampens their effectiveness and allows for an increased risk of statelessness.⁷⁷ This discrepancy can be attributed to a number of factors, such as government inaction or a lack of political will;⁷⁸ statistical gaps which make stateless, migrant or otherwise at risk populations invisible and difficult to trace;⁷⁹ lack of awareness of the importance of birth registration;⁸⁰ a centralized civil registration system or other access barriers;⁸¹

⁷² Caroline Vandenebeele & Christine V. Lao ‘Legal Identity for Inclusive Development’ (2007) at 5, available at <https://www.think-asia.org/handle/11540/4860>, accessed on 20 March 2021.

⁷³ Jacqueline Bhabha op cit note 71 at 9-10.

⁷⁴ Refugee Studies Centre ‘Forced Migration Policy Briefing 3 Statelessness, Protection and Equality’ (2009) at 28, available at <https://www.refworld.org/docid/4e5f3d572.html>, accessed on 22 March 2021.

⁷⁵ Ibid.

⁷⁶ The World’s Stateless Children op cit note 15 at 37-8.

⁷⁷ Ibid.

⁷⁸ Nationality Matters op cit note 16 at 361; The Children of Irregular Migrants op cit note 4 at 455-56.

⁷⁹ Lawyers for Human Rights ‘Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioners Guide’ (2014) *PULP* at 50; Nationality Matters op cit note 16 at 10.

⁸⁰ State of the World’s Children op cit note 3 at 37; Nationality Matters op cit note 16 at 161.

⁸¹ Nell Gray & Juliet Bedford ‘Birth Registration in Angola’ (2016) *Anthrologica* at 84.

non-compulsory or weak civil registration systems;⁸² and laws which indirectly discriminate or frustrate the registration process.⁸³ Often authors assessing birth registration practices cite a combination of these reasons as contributing factors to low birth registration. Currently, however, the COVID-19 pandemic (and the measures used to address it such as lockdowns and the closing of borders), has added a novel impediment to civil registration systems.⁸⁴ This new dimension to the ongoing crisis facing stateless migrants will be examined in this thesis.

1.5 Chapter breakdown

Following this chapter, chapter 2 will critically analyse the international and regional legal frameworks regarding birth registration. Chapter 3 will analyse the rights framework for nationality, as this is also an important aspect to consider when engaging with statelessness. Chapter 4 will analyse the SADC at large, giving an overview of the challenges relating to birth registration and nationality. Chapter 5 will feature two country profiles, namely South Africa and Zambia. Each profile will discuss the birth registration laws and structures in the country in question, and whether they are effective in allowing migrants to access registration. Finally, chapter 6 will conclude and answer the thesis question, as well as provide recommendations which it will suggest can help secure protection for undocumented migrant children.

⁸² Statelessness in Southern Africa 2011 op cit note 60 at 13.

⁸³ Ibid at 12-13.

⁸⁴ UNICEF 'Reaching out to Partners in the Time of COVID-19 Key Results for Children Birth Registration' (2021) at 2, available at <https://www.unicef.org/wca/documents/reaching-out-partners-time-covid-19-birth-registration>, accessed on 10 July 2021.

CHAPTER 2: INTERNATIONAL LAW BASIS FOR BIRTH REGISTRATION

2.1. Introduction

The rights to birth registration and nationality are by now firmly set within international law conventions, however these rights in themselves have little meaning if they are not interpreted and given proper content. For example, under article 24 of the International Covenant on Civil and Political Rights, it states that everyone has the right to a nationality;⁸⁵ however does this mean the right to the nationality of any state that one chooses? It is questions such as these that inform the research of this chapter. While it is clear that birth registration and nationality have a legal basis, the extent to which they apply to undocumented migrants is not clear cut, and even though nationality is a fundamental right, it exists somewhat awkwardly alongside principles such as state sovereignty.⁸⁶

This chapter, together with chapter 3, aims to provide a two-pronged analysis of both birth registration and nationality as they are expressed in international law, and then critically analyse these laws based on the interpretations provided for by various UN and AU committees, case law, and academic literature. The aim being to ascertain the *extent* to which birth registration and nationality laws protect undocumented migrants from statelessness from international law standpoint.

⁸⁵ The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 24, available at <https://www.refworld.org/docid/3ae6b3aa0.html>, accessed on 5 May 2021.

⁸⁶ Nationality Matters op cit note 16 at 152.

2.2. Birth Registration

This research objective in this section is to analyse the extent to which international and regional frameworks provide birth registration to undocumented migrants.

2.2.1. *Comparative overview of the normative frameworks*

Awareness of birth registration's importance has steadily increased in the past decade. The UNHCR global action plan has made birth registration one of its key priorities. Action 7 has specifically been created to implore states to “*ensure birth registration for the prevention of statelessness*,” with the overall goal to eradicate statelessness by the year 2024.⁸⁷ What follows in this section of the international and regional frameworks as related to birth registration, and a critical look at how its provisions are interpreted by various bodies and authorities. The aim being to uncover whether the international and regional frameworks provide undocumented migrant children an adequate right to birth registration that can effectively be used to reduce the likelihood of statelessness.

The CRC includes an explicit right to birth registration, stating under article 7 that a “*child shall be registered immediately after birth*”, furthermore adding that the child has a “*right to acquire a nationality*.”⁸⁸ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families aims to create a set of minimum standards that protect migrant workers and their families.⁸⁹ It states in article 29 that the children of migrant workers have a right to a name, to a nationality, and to registration.⁹⁰ Article 24 of the International

⁸⁷ Global Action Plan op cit note 37 at 1.

⁸⁸ CRC, art 7.

⁸⁹ OHCHR ‘The International Convention on Migrant Workers and its Committee Fact Sheet No. 24 (Rev.1)’ (2005) at 4, available at <https://www.ohchr.org/documents/publications/factsheet24rev.1en.pdf>, accessed on 20 May 2021.

⁹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158, art 29, available at <https://www.refworld.org/docid/3ae6b3980.html>, accessed on 12 September 2021.

Covenant on Civil and Political Rights supplies a registration right, and states that a child's right to birth registration under this convention is to be applied indiscriminately on a wide range of grounds, including but not limited to: race, sex, national or social origin, and religion.⁹¹ The right can also be found in the Universal Declaration of Human Rights under article 6 under the wording of "recognition", and in article 18 in the Convention of the Rights of Persons with Disabilities.

On the regional side, the African Charter on the Rights and Wellbeing of the Child provides a right to immediate birth registration under article 6(2).⁹² Subsection 3 of the article includes a general right to nationality as well. The right to birth registration is restated in the Optional Protocol on the Rights of Persons with Disabilities, where under article 28(4)(d) it provides a right to registration and nationality, which largely echoes the provision in the ACRWC.⁹³ It also provides that the best interests principle must take the primary consideration in all matters pertaining to the disabled child.⁹⁴ To achieve its mandate to ensure birth registration, the African Union has expressed in its Agenda 2040 under aspiration 3 to ensure that every child is registered.⁹⁵ It is apparent that there is congruence with the right to birth registration at both of these levels.

2.2.2. Overview of committee comments and guidelines

Various UN and AU committees issue general comments which elucidate certain aspects of human rights themes based on provisions within the UN human rights framework, such as the CRC, ICCPR, and ICRMW, and the AU human rights framework under the ACRWC and ACPHR, among others.⁹⁶ These general comments are considered authoritative insofar as they provide such guidance, and are therefore essential when assessing whether party states are upholding their human rights obligations.⁹⁷ For example, the UN Committee on the Rights of the Child provides

⁹¹ Ibid, art 24.

⁹² ACRWC, art 6.

⁹³ Optional Protocol to the Convention on the Rights of Persons with Disabilities of 2006 (adopted 13 December 2006, entered into force 3 May 2008) A/RES/61/106 Annex II, art 28(4)(d), available at <https://www.refworld.org/docid/4680d0982.html>, accessed on 10 May 2021.

⁹⁴ Ibid art 28(3).

⁹⁵ ACRWC 'Africa's Agenda for Children Fostering an Africa Fit for Children' (2016) at 7, available at https://au.int/sites/default/files/newsevents/agendas/africas_agenda_for_children-english.pdf, accessed on 20 August 2021.

⁹⁶ Nationality Matters op cit note 16 at 158.

⁹⁷ UNHCR 'Study of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration

guidance in the application of birth registration.⁹⁸ Via its periodic reports, the committee has continually stressed the significance of the right.⁹⁹ General comment No. 6 notes that governments are required to create adequate systems to give effect to the rights provided for in the CRC. Such as to create domestic legislation to empower these rights, and on the other hand to create administrative bodies to implement them.¹⁰⁰ This is vital for birth registration, as adequate laws and administration are necessary to achieve higher registration counts.¹⁰¹ Linked to this is the requirement of research and data compilation as it is the only way to address the invisible nature of migrant and stateless groups.¹⁰²

The Human Rights Committee which monitors the implementation of the ICCPR, states that birth registration is closely linked to the idea of legal personhood, and in addition it acts to safeguard children from abuses such as trafficking, abduction and sale.¹⁰³ There is the concomitant requirement upon states to provide its measures taken to show that there has been action in terms of its implementation.¹⁰⁴ The Human Rights Council, as well as the African Committee of Experts on the Rights and Welfare of the Child, have stated that the right to birth registration is connected to other socioeconomic rights such as the right to education and healthcare. The connection being that when birth registration is not carried out or implemented, affected children would have restricted access to these amenities.¹⁰⁵ Additionally, birth registration is linked to non-discrimination, as a country would need to implement the right in such a way that it does not discriminate on grounds such as race, gender, ethnicity, or other statuses. These grounds include being a migrant, refugee, asylum seeker or being stateless.¹⁰⁶

(2010) at 6, available at <https://childhub.org/en/child-protection-online-library/study-office-unhchr-challenges-and-best-practices-implementation>, accessed on 22 May 2021.

⁹⁸ United Nations Committee on the Rights of the Child 'General Comment No. 7: Implementing Child Rights in Early Childhood' (2005) at 12, available at <https://www.refworld.org/docid/460bc5a62.html>, accessed on 2 May 2021.

⁹⁹ Nationality Matters op cit note 16 at 158.

¹⁰⁰ United Nations Committee on the Rights of the Child 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (2005) at 6, available at <https://www.refworld.org/docid/42dd174b4.html>, accessed on 2 May 2021.

¹⁰¹ General Comment No. 7 op cit note 98 at 12.

¹⁰² Statelessness in Southern Africa 2011 op cit note 60 at 26

¹⁰³ CCPR General Comment No. 17 op cit note 68 at 3.

¹⁰⁴ Ibid.

¹⁰⁵ Birth Registration and the Right of Everyone to Recognition op cit note 58 at 3; General Comment on Article 6 of the African Charter op cit note 63 at 40.

¹⁰⁶ Ibid at 4.

The Committee on the ACRWC has affirmed that the interpretation of article 6(2) of the ACRWC is to be interpreted in such a way that undocumented children should be afforded the right to birth registration.¹⁰⁷

2.3. The Substantive Requirements for the Implementing the Right

Both the CRC committee and the ACRWC committee have confirmed that the right to birth registration has three main components: it must be universal, free, and accessible.¹⁰⁸ It must be universal in the sense that it must be available to any child regardless of their status, such as being a undocumented migrant or asylum seeker.¹⁰⁹ The UNHCR adds a little more to this factor, in that “universal” birth registration considers non-discrimination and inclusiveness as core principles.¹¹⁰ A proper civil registration system is essential for fulfilling the universal requirement.¹¹¹ Universal birth registration also has the potential to increase the visibility of marginalised children,¹¹² as the lack of registration tends to leave children invisible in government statistics.¹¹³

Birth registration should be free of charge to anyone who wishes to register.¹¹⁴ Where this becomes more controversial however relates to the issue of late registration. Late registration as a rule should be provided to parents wishing to register their children.¹¹⁵ It has been argued that states should ideally waive fees for late registration.¹¹⁶ If this is not possible, there should be the option of reduced fees.¹¹⁷

¹⁰⁷ General Comment on Article 6 of the African Charter op cit note 63 at 24.

¹⁰⁸ Ibid at 19; General Comment No. 7 op cit note 98 at 11-12.

¹⁰⁹ Ibid.

¹¹⁰ Ensuring Birth Registration op cit note 22 at 4.

¹¹¹ Ibid at 7.

¹¹² General Comment on Article 6 of the African Charter op cit note 63 at 12.

¹¹³ State of the World’s Children op cit note 3 at 36.

¹¹⁴ General Comment on Article 6 of the African Charter op cit note 63 at 26; General Comment No. 7 op cit note 98 at 12.

¹¹⁵ General Comment No. 7 op cit note 98 at 12.

¹¹⁶ Executive Committee of the High Commissioner’s Programme ‘Conclusion on Civil Registration’ (2013) at 2, available at <https://www.refworld.org/docid/525f8ba64.html>, accessed on 20 April 2021.

¹¹⁷ Ensuring Birth Registration op cit note 22 at 4.

Finally, it must be accessible. In places with large numbers of displaced persons, to properly discharge the right to birth registration, the service must be brought to the people, such as to their camps or settlements.¹¹⁸ This can be achieved via the decentralisation of birth registration via mobile registration points.¹¹⁹ Bringing the service to the people has widely been regarded as a dependable way of ensuring that birth registration becomes more accessible. The facts provided for *Yean and Bosico* affirm this where it is seen that a witness struggled and ultimately failed to acquire an important document from the mayor, which was necessary for birth registration, because it was too far.¹²⁰ The court held unanimously that the Dominican Republic had to ensure that its procedures for late registration were more accessible.¹²¹

2.4. International Aid and Implementation

Within the SADC context, it may appear that some states would not have the means to make the necessary legislative and administrative adjustments to ensure universal, free and accessible birth registration - especially those with low registration counts.¹²² There are certain barriers that cause great difficulty for states to implement birth registration, such as access barriers, legal barriers, and historical/contextual barriers.¹²³ Chapter 3 will discuss these problems in greater depth, however for the purposes of this section, the CRC provides some solutions. Article 22(1) of the convention obliges states to take appropriate measures to ensure that refugee children, or children applying for refugee status, receive “*appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention.*”¹²⁴ Under article 22(2), the convention provides that:

¹¹⁸ General Comment on Article 6 of the African Charter op cit note 63 at 22.

¹¹⁹ General Comment No. 7 op cit note 98 at 12.

¹²⁰ *Yean and Bosico Children v the Dominican Republic* 2005 (IACRTHR) para 85, available at <https://www.refworld.org/cases,IACRTHR,44e497d94.html>, accessed on 11 May 2021.

¹²¹ Ibid para 260

¹²² State of the World’s Children op cit note 3 at 37.

¹²³ Nell Gray op cit note 81 at 5.

¹²⁴ CRC, art 22(1).

*“States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United National and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child...”*¹²⁵

The committee extends this clause to many of the rights which protect children, such the right to adequate living standards,¹²⁶ the right to the highest attainable standard of health and facilities,¹²⁷ and the right to access to education,¹²⁸ among others. The committee does not expressly link the article 7 requirement of birth registration to article 22(2) as it does with those other rights just mentioned, however article 22(1)’s wording of “*applicable rights in this convention*” leaves room for the inclusion of article 7 in its scope and could therefore allow for states to seek assistance in implementing that clause. Meaning if a state so requires, they have the option of utilising UNICEF, UNESCO, and UNHCR, among other bodies, for assistance to achieving their birth registration goals.¹²⁹ Zambia is an example of an SADC state that benefited from UN assistance for its birth registration campaign. In that situation, UNICEF had proffered advocacy aid, which the government used to boost an initiative to integrate birth registration into the nation's central healthcare system.¹³⁰

2.5. Procedural Rights for Birth Registration

The birth registration process typically features three components.¹³¹ First, the civil registrars must be informed of the birth of the child. Second, upon notice of the birth, the civil registrars must officially record the birth.¹³² Such registration involves the information provided above, such as the child’s name, birthplace, and parents. The third process is the furnishing of a birth certificate

¹²⁵ Ibid art 22(2).

¹²⁶ General Comment No. 7 op cit note 98 at 14.

¹²⁷ Ibid at 14.

¹²⁸ Ibid at 13.

¹²⁹ Ibid at 13-14.

¹³⁰ UNICEF ‘Every Child’s Birth Right Inequities and Trends in Birth Registration’ (2013) at 8, available at <https://www.unicef.org/documents/every-childs-birth-right>, accessed on 4 May 2021.

¹³¹ Birth Registration and the Right of Everyone to Recognition op cit note 58 at 3.

¹³² Ibid.

which acts as documentary proof of birth.¹³³ The place of registration is important. For example, in pre-war Angola, birth registration used to take place automatically in hospitals, which ensured that the process was done expeditiously, which increased accessibility for new mothers.¹³⁴ Furthermore, the knowledge and education of birth registration officials are important as well, because if they are unaware of these procedures, the entire registration process can be compromised.¹³⁵

2.5.1. *The right to appeal*

The Committee on the Rights of Migrant Workers provides important guidelines for procedural rights for children in need of birth registration. First, the migrant child requires free access to the territory of the host state regardless of lacking or non-existent documentation.¹³⁶ Second, they must have access to the relevant bodies to handle their case, and to be made aware of any proceedings or decisions made, as well as the consequences of such proceedings or decisions.¹³⁷ Third, and vitally, the child must be made aware of their right to appeal.¹³⁸ The right to appeal is a particularly important procedural right because if a child's birth registration application is rejected for whatever reason, an appeal process can be instituted. The right to review decisions must also be implemented for this same reason.¹³⁹ Furthermore, the child ought to receive adequate and free legal advice and assistance that is provided for in an age-appropriate fashion. In this regard, refugee, migrant, and asylum-seeking children should be afforded proper legal representation as well.¹⁴⁰

¹³³ Ibid.

¹³⁴ Nell Gray op cit note 81 at 52.

¹³⁵ Ibid at 4.

¹³⁶ Joint General Comment op cit note 59 at 5.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid at 2.

¹⁴⁰ Ibid at 5.

2.6. Late Registration

Most conventions do not provide clarity pertaining to *late* birth registration, as can be seen in the wording used. For example, the CRC states that a child “*shall be registered immediately after birth.*”¹⁴¹ The ICCPR also includes similar wording.¹⁴² The ICRMW provides a general right to “*registration of birth*” but does not specify when this is to take place.¹⁴³ While the ideal scenario is immediate registration - as suggested by a plain reading of the texts - this has the potential to exclude migrant children who were not born on the territory but were instead born in transit to the host state. To fill this gap the Committee on the Rights of the Child provides there should be sufficient avenues available for children who need to be registered late and that such children have access to the same facilities that registered children have access to.¹⁴⁴ In *Yean and Bosico v the Dominican Republic*, the facts indicated that many Dominican Haitians could only register their children through late registration as they had no other options. This was largely due to the fear that if they registered their children at hospitals, their “illegal” status would be discovered, and they would be reported to authorities.¹⁴⁵ This shows that late registration can be an important tool for migrant inclusion.

The wording of article 6 of the ACRWC suggests that the child should be registered “immediately” after birth. The committee on the ACRWC has stated that the interpretation of “immediately” does not indicate that a child would need to be registered in an unreasonably short amount of time, it means:

*“As soon as possible with due regard to cultural and local practice related to maternity and infant rearing.”*¹⁴⁶

¹⁴¹ CRC, art 7(1).

¹⁴² ICCPR, art 24(2).

¹⁴³ ICRMW, art 29.

¹⁴⁴ General Comment No. 7 op cit note 98 at 24.

¹⁴⁵ *Yean and Bosico* supra note 120 para 85.

¹⁴⁶ General Comment on Article 6 of the African Charter op cit note 63 at 28-9.

The intention of the clause was thus to make birth registration occur days or weeks after birth, not months or years.¹⁴⁷ Additionally, free late registration is allowable if it occurs within a year, however registration thereafter could incur a fee.¹⁴⁸ Using these guidelines, a migrant parent would have at least a few weeks to qualify for early registration, and by most a year for free late registration. Hence, there is adequate protection in place within the ACRWC for late registration. A drawback being that a fee for late registration after one year can still marginalize or deter certain migrant groups from registering.¹⁴⁹ An ideal situation would be that even late registration beyond one year would be free to ensure the most protection.

2.7. The Best Interests of the Child Principle

The CRC and ACRWC make the best interests principle fundamental and all-encompassing.¹⁵⁰ In article 3 of the CRC, it states that “*in all actions concerning the child*” their best interests must be the “*primary consideration.*”¹⁵¹ This is the same for the ACRWC under article 4.¹⁵² This principle needs to be considered and applied in all areas concerning the child. For example in all institutional contexts, whether public or private, judicial, bureaucratic, and at all levels of government.¹⁵³ This equally applies to state bodies that control migration.¹⁵⁴ Furthermore, all decisions made by the administrative bodies need to be guided by the best interests of the child principle, especially those concerning the child’s education, health, protection, asylum, immigration, and access to nationality.¹⁵⁵ Children are also afforded the right to participate or express their views in proceedings that concern them, such as those related to nationality or birth registration.¹⁵⁶ From

¹⁴⁷ Ibid.

¹⁴⁸ Ibid at 29.

¹⁴⁹ Nell Gray op cit note 81 at 6.

¹⁵⁰ CRC, art 3.

¹⁵¹ Ibid.

¹⁵² ACRWC, art 4.

¹⁵³ Study of the Office of the United Nations op cit note 97 at 8.

¹⁵⁴ Ibid.

¹⁵⁵ Committee on the Rights of the Child ‘General Comment No. 14 On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (2013) at 5, available at <https://www.refworld.org/docid/51a84b5e4.html>, accessed on 7 May 2021.

¹⁵⁶ General Comment on Article 6 of the African Charter op cit note 63 at 9.

this we see that the best interests principle spans a wide array of rights for the child. However, this does not fully elaborate on the precise link between the best interests and birth registration.

In this regard, the African Committee notes that:

*“The commitment to reduce the possibility of statelessness is an overarching obligation of the best interests of the child.”*¹⁵⁷

This has largely echoed in *Institute for Human Rights and Development in Africa v the Government of Kenya*, where the court distinctively noted that statelessness is the “antithesis” of the best interest of the child principle.¹⁵⁸ With this in mind, we can turn back to the link that birth registration has to statelessness. It has been argued by a number of UNHCR bodies that a lack of birth registration increases one's risk of statelessness.¹⁵⁹ As put by the Action 7 good practices paper:

*“Individuals may be at risk of statelessness if they cannot prove that they have links to a State. The lack of birth registration and documents certifying birth can create such a risk.”*¹⁶⁰

The African committee has stated that due to the indivisibility and interdependence of rights, the implementation of birth registration necessitates that one considers the best interests of the child principle.¹⁶¹

From these principles we can come to the following conclusions: First, that birth registration reduces the risk of statelessness, this is a fact. Second, that the implementation of birth registration is connected to the best interests principle due to the indivisibility of these rights. Finally, both the CRC and the ACRWC committees reiterate that the best interests principle must be taken into consideration in all matters concerning children. Considering these points, the conclusion reached

¹⁵⁷ Ibid at 33.

¹⁵⁸ *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* 2011 (ACERWC) para 46.

¹⁵⁹ The Statelessness Index op cit note 17 at 3.

¹⁶⁰ Ensuring Birth Registration op cit note 22 at 3.

¹⁶¹ General Comment on Article 6 of the African Charter op cit note 63 at 7.

is that birth registration is not only linked to the best interests principle, but that it is a requirement for its fulfilment.

The best interests principle also solidifies the procedural rights of children, as the CRC commission states that it is a “threefold concept” that embodies procedural rights, substantive rights, and acts as a principle that broadly protects children in all matters that concern them.¹⁶² For example, any decision that is made concerning children should include the impact that decision may have, how the child’s best interests have been considered, the basis upon which the decision was made, and an assessment of the procedural guarantees they are entitled to.¹⁶³

2.8. Conclusion

Harkening back to the research objective for this chapter, that being the extent to which the international and regional frameworks provide an undocumented migrant the right to birth registration, the outcomes found are: (i) The best interests of the child principle underlies the right to birth registration and protects undocumented migrant children; (ii) the right to birth registration intersects with the right to non-discrimination, education, and healthcare; (iii) the best interests principle bolsters procedural rights to birth registration, meaning that a child is guaranteed the right to appeal or review a decision made regarding its birth registration; (iv) birth registration should be free, and late registration should be free for at least one year in terms of the regional provisions, allowing migrant parents a decently wide window to register their children for free; (v) the right spans a broad range of conventions in some form, the specific amount mentioned in this paper being eight conventions encompassing both the international and regional frameworks; and (vi) there is congruence between the international and regional frameworks on birth registration, which helps reinforce and solidify the right. In short, one would not be wrong in stating that birth registration is by and large accepted as a fundamental right within international law. A stumbling block that remains is the fact that a nominal fee is generally accepted as a viable penalty for late registration, despite the potential of marginalising undocumented migrants who cannot pay.

¹⁶² General Comment No. 14 op cit note 155 at 6.

¹⁶³ Ibid at 2.

CHAPTER 3: INTERNATIONAL LAW BASIS FOR THE RIGHT TO NATIONALITY

3.1. Introduction

Birth registration is accepted as a fundamental right within international law, but without an effective right to nationality, many children may nevertheless be at risk of becoming stateless. Therefore, the objective in this section is to analyse the extent to which international framework provides nationality to undocumented migrants.

3.2. International and Regional Framework for Nationality

In 1923, the Permanent Court of Justice stated that:

*“The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations.”*¹⁶⁴

Much has changed since, but the essence of the Permanent Court’s statement remains relevant. International relations - and laws - are not static or ossified in time. This said, nationality is still a fairly sensitive topic in the international community,¹⁶⁵ because with the rise of nation states, questions regarding who does and does not form part of the “many” are affixed to the principles of self-determination and state sovereignty.¹⁶⁶ Over time however, the right to exclusive and

¹⁶⁴ *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco* 1923 (4) at 18, available at <https://www.refworld.org/cases/PCIJ,44e5c9fc4.html>, accessed on 2 June 2021.

¹⁶⁵ UNHCR *Nationality and Statelessness a Handbook for Parliamentarians* (2005) 8.

¹⁶⁶ *Nationality Matters* op cit note 16 at 35.

unilateral powers over nationality have slowly eroded,¹⁶⁷ as can be seen dating back to the UDHR in 1948 which made nationality a fundamental right.¹⁶⁸ Currently it is no longer exclusively within a state's power to grant or revoke nationality,¹⁶⁹ as their ability to do so is limited by the international human rights framework.¹⁷⁰ Effective and enforceable nationality rights still require a fine balancing act between the principles of state sovereignty and international obligations.¹⁷¹ Protecting nationality rights are important for many reasons, for one, it is linked to one's belonging in a community,¹⁷² and second, it secures one's "*right to have rights*."¹⁷³

3.2.1. *International law basis*

Following in the footsteps of the UDHR,¹⁷⁴ the right has hence seen frequent adoption. The CRC provides a clear right to a nationality under article 7(2).¹⁷⁵ This is significant because there is a baseline requirement that children have a right to nationality, which is a good starting point for reducing statelessness. Also, because there is such widespread ratification of the CRC within the SADC, the right to nationality has just about universal application.¹⁷⁶

The Convention on the on the Elimination of All Forms of Discrimination against Women under article 9(1) provides that "*State parties shall grant women equal rights with men to acquire, change or retain their nationality...*"¹⁷⁷ This section addresses gender discrimination in nationality laws which may trickle down and render children stateless.¹⁷⁸ Article 9(2) specifically protects

¹⁶⁷ OHCHR 'OHCHR and the Right to Nationality', available at <https://www.ohchr.org/EN/Issues/Pages/Nationality.aspx> accessed on 12 May 2021.

¹⁶⁸ Universal Declaration of Human Rights of 1948, art 15, available at <https://www.refworld.org/docid/3ae6b3712c.html>, accessed on 30 May 2021.

¹⁶⁹ Nationality Matters op cit note 16 at 39.

¹⁷⁰ OHCHR and the Right to Nationality op cit note 163.

¹⁷¹ Nationality Matters op cit note 16 at 35.

¹⁷² Hannah Arendt *The Origins of Totalitarianism* new ed (1979) 297.

¹⁷³ Ibid at 296.

¹⁷⁴ UDHR, art 15.

¹⁷⁵ CRC, art 7(2).

¹⁷⁶ United Nations Treaty Collection 'Declarations and Reservations to the Convention on the Rights of the Child', available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=IV-11&chapter=4&clang=en#EndDec>, accessed on 2 May 2021.

¹⁷⁷ The Convention on the on the Elimination of All Forms of Discrimination against Women of 1981, art 9(1), available at <https://www.refworld.org/docid/3ae6b3970.html>, accessed on 12 May 2021.

¹⁷⁸ Citizenship Law in Africa 2010 op cit note 7 at 3.

children by stating that women shall have “*equal rights with men with respect to the nationality of their children.*”¹⁷⁹

Nationality rights specifically for migrants finds expression in the ICRMW. It provides that the children of migrant workers have a right to a name, to a nationality, and to registration.¹⁸⁰ This convention is important because it is designed to protect the rights of migrant workers regardless of their migration status.¹⁸¹ For example, by addressing the fact that undocumented migrants are often employed in poorer work conditions than that of nationals.¹⁸² The convention also notes that migration is a difficult situation for migrants and their families as they are placed in very turbulent and vulnerable positions.¹⁸³ The protection of the family as a whole is vital, as the idea of the migrant being a single - usually male - person is no longer understood to be the case. Instead, migrants comprise all types of people, such as women, children, and the elderly.¹⁸⁴

Following these three, the right to nationality can be found in article 24 of the ICCPR,¹⁸⁵ article 1 of the 1961 Convention,¹⁸⁶ article 5 of the Convention on the Elimination of All Forms of Racial Discrimination,¹⁸⁷ and article 18 of the Convention on the Rights of Persons with Disabilities.¹⁸⁸ The repeated appearance of this right emphasizes its significance and import.

Currently, there is no designated convention within the AU framework on nationality.¹⁸⁹ Article 5 of the African Charter on Human and Peoples’ Rights states that “*every Person shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal*

¹⁷⁹ CEDAW, art 9(2).

¹⁸⁰ ICRMW, art 29.

¹⁸¹ ICRMW, preamble at 3.

¹⁸² Ibid.

¹⁸³ Ibid 2-3.

¹⁸⁴ The Children of Irregular Migrants op cit note 4 at 440.

¹⁸⁵ ICCPR, art 24.

¹⁸⁶ 1961 Convention, art 1.

¹⁸⁷ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 24 January 2007) 660 UNTS 195, art 5, available at <https://www.refworld.org/docid/3ae6b3940.html>, accessed on 27 May 2021.

¹⁸⁸ Convention on the Rights of Persons with Disabilities (adopted 21 December 1965, entered into force 4 January 1969) A/RES/61/106, art 18, available at <https://www.refworld.org/docid/45f973632.html>, accessed on 27 May 2021.

¹⁸⁹ African Union Commission ‘The African Union Approach to the Right to Nationality in Africa’ para 5, available at https://www.achpr.org/public/Document/file/Any/presentation_approach_on_statelessness_in_africa_dpa_auc.pdf, accessed on 3 May 2021.

*status.*¹⁹⁰ This article has been interpreted to protect nationality rights and reduce statelessness. In the *Nubian Minor's* decision, the committee develops the argument that first, one's juridical legal personality is a protected right, as can be seen in international jurisprudence. This is because a juridical personality means that one can be a subject of rights and obligations, which secures one's legal status.¹⁹¹ Second, it reiterates the reasoning provided for in *Yean and Bosico*, stating that nationality ensures that one has a juridical personality.¹⁹² With this link in mind, the commission continued by stating that article 5 protects one's right to nationality as it is an important legal status.¹⁹³ This makes sense when placed within the context of article 5 which is meant to ensure a right to the recognition of one's legal status. The African Committee on Human and People's Rights has stated the following in one of its resolutions:

*"The right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and People's Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter."*¹⁹⁴

The ACRWC states under article 6 that every child has the right to a nationality.¹⁹⁵ Further, it provides that if a child would not be granted nationality in other states (if they would otherwise be stateless), they shall get the nationality of the host state.¹⁹⁶ In this regard, states do not have unfettered discretion in how nationality can be conferred, as they need to align their laws with international norms.¹⁹⁷ The ACRWC committee has also emphasised that the best interest of the child principle applies to the right to nationality, as children are reliant on nationality for their protection, survival and development.¹⁹⁸

¹⁹⁰ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art 5, available at <https://www.refworld.org/docid/3ae6b3630.html>, accessed on 21 August 2021.

¹⁹¹ *The Nubian Community in Kenya v The Republic of Kenya* 2006 (ACERWC) para 138, available at https://www.achpr.org/public/Document/file/English/communication_317.06_eng.pdf, accessed on 8 May 2021.

¹⁹² Ibid para 139.

¹⁹³ Ibid para 140.

¹⁹⁴ ACHPR 'Resolution on the Right to Nationality' (2013), available at <https://www.achpr.org/sessions/resolutions?id=260>, accessed on 25 May 2021.

¹⁹⁵ ACRWC, art 6.

¹⁹⁶ Ibid.

¹⁹⁷ General Comment on Article 6 of the African Charter op cit note 63 at 32.

¹⁹⁸ Ibid.

3.3. Does the right to ‘a’ nationality in the CRC and ACRWC protect undocumented migrants from becoming stateless?

Despite the explicit provisions on the right to nationality provided for in the CRC, ACRWC, ICRMW, and ICCPR; there is a salient qualification which greatly limits its protective qualities. That being that the child has the right to *a* nationality, but not to *the* nationality of the host state.¹⁹⁹ This is mainly because the authors of the ICCPR decided that there could not be an “unqualified” right to nationality.²⁰⁰ This has been echoed by both the African committee²⁰¹ and the CRC commission.²⁰² To help balance this catch, the host state must still take any necessary measures to establish a nationality for a child that is at risk of statelessness.²⁰³

Unfortunately, nationality determination can be a lengthy process, which has the potential to drag on and leave the child in a state of legal limbo.²⁰⁴ For example when a host state investigates whether nationality can be found for the child elsewhere, the child may be left with an increased risk of statelessness if the process takes too long.²⁰⁵ This is in contradiction of article 3 - as being subjected to an extended period of indeterminate legal status is not in the best interests of the child; registration must therefore be expeditious.²⁰⁶ The better option would be to provide nationality based on birth on the territory of the state, as this would sidestep the process of determining nationality elsewhere.²⁰⁷ If nationality cannot be provided at birth, the leftover option is naturalisation. This process should ideally be quick and occur in childhood. Naturalisation that is only available at 18 years of age would not adequately give effect to the right to nationality, as the child is barred from protection during the entirety of childhood.²⁰⁸

¹⁹⁹ Professor Jaap E. Doek ‘The CRC and the Right to Acquire and to Preserve a Nationality’ (2006) 25 *Refug. Surv. Q* at 26.

²⁰⁰ *Ibid* at 27.

²⁰¹ General Comment on Article 6 of the African Charter op cit note 63 at 33.

²⁰² Joint General Comment No. 4 op cit note 59 at 7.

²⁰³ *Ibid*.

²⁰⁴ Doek op cit note 199 at 28.

²⁰⁵ *Ibid*.

²⁰⁶ UN Refugee Agency ‘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’ (2012) at 3, available at <https://www.refworld.org/docid/50d460c72.html>, accessed on 25 June 2021.

²⁰⁷ General Comment on Article 6 of the African Charter op cit note 63 at 33.

²⁰⁸ *Ibid*.

The committee in *Nubian Minor's* has touched on this exact issue by interpreting article 6(2) of the ACRWC. In the case, the complainants provided an overview of how Nubians have been historically excluded from nationality. The Nubians were removed from their place of origin within South Sudan and then compelled to join the British colonial military. From thereon they were provided alternative land by the British in a settlement called Kibera (on the outskirts of Nairobi) but were not given British citizenship. The main issue came about at the time of the Kenyan independence in 1963, during which the new Kenyan government had pointedly decided not to pronounce on Nubian nationality.²⁰⁹ Henceforth the complainants argued that the Nubians were treated as aliens by the Kenyan government.²¹⁰

The committee highlighted how the Nubians struggled to register their children, which in turn reduced their ability to claim nationality.²¹¹ Registration difficulties go further back, as the parents themselves had no identity documents,²¹² which is a requirement in some jurisdictions for birth registration such as South Africa.²¹³ Furthermore, even if naturalisation can be applied for later on, unregistered children would still be in an uncertain position and would not have access to amenities which require such registration or a birth certificate.²¹⁴ The complainants argued that their rights to birth registration and nationality in article 6 of the ACRWC were contravened as a result of these issues.²¹⁵

Henceforth the committee gave some interpretive guidance on how the right to a nationality is to be interpreted:

²⁰⁹ *Children of Nubian Descent* supra note 158 para 3.

²¹⁰ Ibid para 3.

²¹¹ Ibid para 4.

²¹² Ibid.

²¹³ Scalabrini 'Birth Registration in South Africa' (2019) para 7, available at <https://www.scalabrini.org.za/news/birth-registration/>, accessed on 01 May 2021.

²¹⁴ Ibid para 3.

²¹⁵ *Children of Nubian Descent* supra note 158 para 7.

“The African Committee notes that Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1), that “every child has the right from his birth to acquire a nationality”. It only says that “every child has the right to acquire a nationality.”²¹⁶

This consolidates the viewpoint of the ICCPR made above. However, in an effort to help curb the narrow application of the right, the court stated that the right should be provided the purposive interpretation that nationality should be given from birth, as this would align with the best interests of the child principle.²¹⁷ Therefore, the legal limbo effect - at least in law - should be impermissible, as nationality should be provided for from birth. As such, it can be said that undocumented migrants who would who are at risk of statelessness should be provided nationality from birth. However, the absence of a right to the nationality of the host state leaves much to be desired, and in practice many children may still find themselves in a legal limbo.

3.4. Modes of nationality attribution

Nationality is predominantly conferred in three ways. *Jus sanguinis*, *jus soli*, and through naturalisation.²¹⁸ States are free to choose which methods of nationality they wish to use,²¹⁹ subject to the condition the method chosen is balanced with international obligations. Such as the obligations in the CRC²²⁰ and ACRWC²²¹ which ensures a child is provided nationality if they would otherwise be stateless.

Jus sanguinis, or law of the blood, is a mode of conferral that is based on descent or lineage. One's ancestry therefore establishes one's genuine link to a state.²²² In the migrant context, it is inherently exclusionary, because if a state decides to use *jus sanguinis* exclusively, migrant children would

²¹⁶ Ibid para 42.

²¹⁷ Ibid para 42.

²¹⁸ Ibid at 32.

²¹⁹ General Comment on Article 6 of the African Charter op cit note 63 at 33.

²²⁰ CRC, art 7(2).

²²¹ ACRWC, art 6.

²²² Nationality Matters op cit note 16 at 33.

by default be barred from gaining nationality in that state as they cannot establish a bloodline link. Marginalising people from access to nationality in this way can lead to instability, conflict, and widespread public unrest.²²³

Jus soli establishes a genuine link with a state on the basis that one has been born on the state's territory.²²⁴ It is therefore spatial in nature. *Jus soli* is advantageous for undocumented migrants because it allows a child access to nationality based on where they were born.²²⁵ The interaction between *jus soli* and *jus sanguinis* can at times result in statelessness if there are no safeguards put into place within a state's domestic law. For example, if country A only provides nationality on the basis of *jus soli*, and country B only via *jus sanguinis*, a child who was born outside of country A would have missed the window to make use of *jus soli*, and cannot gain nationality in country B because nationality only passes via descent.²²⁶ This conflict of nationality laws is regarded as one of the so-called "technical" causes of statelessness.²²⁷ The 1961 Convention, as well as the ACRWC and CRC prevents this by providing a child the right to a nationality.

Naturalisation has typically been associated with high levels of discretion; however, this has slowly been changing.²²⁸ It is based on the idea that one develops a relationship with a state over time.²²⁹ It therefore opens the possibility of gaining nationality for people who have remained within the territory of a state for a number of years. For example, naturalisation in South Africa is provided to people who have been resident in the country for ten years, according to new regulations.²³⁰ It is therefore a useful avenue for reducing statelessness. However, the discretionary nature of this avenue limits its protective capacities.²³¹ Which makes sense considering that the

²²³ UNHCR 'Self-Study Module on Statelessness' (2012) at 35, available at <https://www.refworld.org/docid/50b899602.html>, accessed on 30 May 2021.

²²⁴ Nationality Matters op cit note 16 at 32.

²²⁵ Katelyn A Horne 'Navigating Nationality: The Rights to Birth Registration and Nationality in Refugee Magnet States' (2014) 53 *COLUM. J. Transnat'l L.* 114 at 147.

²²⁶ Fatima Khan op cit note 36 at 11.

²²⁷ Nationality Matters op cit note 16 at 50.

²²⁸ Bronwen Manby 'Citizenship and Statelessness in the Member States of the Southern African Development Community' (2020) at 107.

²²⁹ Nationality Matters op cit note 16 at 33, 172.

²³⁰ Citizenship and Statelessness op cit note 228 at 76.

²³¹ Ibid at 74.

right to a nationality does not mean a right to naturalisation.²³² However this does not mean that states should not still implement or facilitate naturalisation procedures altogether.²³³

There is some variance regarding one's status when it comes to habitation. For example, the European Convention on Nationality requires for naturalisation that one has lawful habitual residence.²³⁴ Lawful habitation has the outcome that one's status in a country can determine ones access to nationality, which in the case of undocumented migrants leaves a gap in protection.²³⁵ The 1961 Convention does not have this lawful habitation requirement, as article 1(b) only requires habitual residence, which means it should be "stable" and "factual."²³⁶ Furthermore, the UNHCR has made it a point that this should not be construed to mean lawful residence.²³⁷ In the SADC, Lesotho requires lawful residence for naturalisation, and provided the applicant has not been charged with a criminal offence.²³⁸

Residential time requirements can be lengthy. International laws generally allow for residential time period requirements, such as the 1961 Convention.²³⁹ The UNHCR appears cognizant that this can become an issue, as it noted that five to ten years is a long time, especially considering the standards set by the CRC.²⁴⁰ There is the further issue that the nature of migration may result in certain migrant children not being able to fulfil the habitual time frame requirement.²⁴¹ However this has been partially offset by allowing people who live nomadically or who move between two states at a time, to have habitual residence in both.

²³² Nationality Matters op cit note 16 at 172.

²³³ 1954 Convention, art 34.

²³⁴ European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166, art 6(2)(b), available at <https://www.refworld.org/docid/3ae6b36618.html>, accessed on 10 June 2021.

²³⁵ Nationality Matters op cit note 16 at 174-5.

²³⁶ Guidelines on Statelessness No. 4 op cit note 206 at 9.

²³⁷ Ibid.

²³⁸ Citizenship and Statelessness op cit note 228 at 41.

²³⁹ 1961 Convention art 1(b); Laura Van Waas op cit note 4 at 172.

²⁴⁰ Guidelines on Statelessness No. 4 op cit note 206 at 9.

²⁴¹ Nationality Matters op cit note 16 at 175.

3.5. The deprivation of nationality

Deprivation of nationality can be voluntary or involuntary. Voluntary deprivation occurs where a person has renounced their nationality in favour of another, for example through marriage and appropriation of the nationality of the other spouse.²⁴² It is important that there are safeguards in place that protect against situations where the spouse does not actually gain the nationality of the other state, by allowing for reacquisition of the renounced nationality.²⁴³

Involuntary deprivation of nationality is allowed in specific limited circumstances under international law.²⁴⁴ The 1961 convention provides these grounds in article 8(3), which are: (i) if a person had tendered services or gained profits from another state despite an express interdiction not to do so, (ii) if a person had acted in such a manner to cause significant detriment to the “*vital interests of the state*”, and (iii) if a person had broken the fealty of the state in favour of another by making a binding oath, declaration, or via renouncement of such fealty.²⁴⁵ However nationality cannot be revoked if it was arbitrary as provided for in the UDHR,²⁴⁶ if it would result in the person becoming stateless (aside from the above mentioned situations),²⁴⁷ or if it were on grounds such as race, ethnicity, and religion.²⁴⁸ Furthermore, a change in nationality of the parents must not affect the nationality of the child.²⁴⁹ This allows migrant children an extra layer of protection.

Safeguarding nationality once attained is just as important as conferring the right. This protection has been highlighted in article 8 of the CRC. Many African countries allow for the deprivation of nationality for people who have been naturalised, such as by committing treason or other grave crimes.²⁵⁰ Discretionary deprivation of nationality of naturalized persons unfortunately occurs as

²⁴² Ibid at 75.

²⁴³ Statelessness in Southern Africa op cit note 85 at 26.

²⁴⁴ Citizenship and Statelessness op cit note 228 at 60.

²⁴⁵ 1961 Convention, art 8(3).

²⁴⁶ UDHR, art 15.

²⁴⁷ 1954 Convention, art 8.

²⁴⁸ 1961 Convention, art 9.

²⁴⁹ General Comment on Article 6 of the African Charter op cit note 63 at 36.

²⁵⁰ Citizenship and Statelessness op cit note 228 at 50.

well.²⁵¹ Moreover, it is not uncommon African states apply a direct bar on the ability to appeal against decisions made regarding their naturalisation.²⁵² This has occurred within the context of denationalisation of certain political figures who were targeted by their governments, such as in *Amnesty International v Zambia*. In the case, Zambia expelled John Chinula and William Banda from the country even though this had violated their right to a fair hearing under the ACHPR.²⁵³ The commission in that case reaffirmed the right to be heard, which is vital for questions on nationality.²⁵⁴ This also highlights how important procedural rights are in nationality matters and would be exceptionally important for vulnerable groups such as undocumented migrants. However only time will show whether this judgment will set in and protect these migrants in practice.

One can discern the fine balancing act between state sovereignty and international law in this example, because even though a state can decide which methods of conferral it wants,²⁵⁵ it cannot revoke nationality unless it were on the specified grounds, and provided that they exercise their deprivation powers under a court of law by allowing the person a right to impartial legal proceedings.²⁵⁶

3.6. Conclusion

The right to nationality, as can be seen, is not absolute or unlimited. It is very finely balanced with the power of states to determine their own methods to whom nationality should be conferred. This stated, the international framework tries to push the boundaries of protection, so far as to provide a right to nationality. However, the right to nationality has a significant qualifier in that it does not generally allow for the nationality of the host state but rather that the host state should take measures to ensure that the child is provided nationality. The CRC and the ACRWC are consistent in this regard. There is the possibility that the child would be left in a legal limbo if the state takes

²⁵¹ Citizenship Law in Africa 2010 op cit note 7 at 8.

²⁵² Ibid at 9.

²⁵³ *Amnesty International v Zambia* 1999 Comm. No. 212/98 Comm. No. 212/98 (ACERWC) para 52, available at <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1999/1>, accessed on 24 May 2021.

²⁵⁴ Ibid.

²⁵⁵ General Comment on Article 6 of the African Charter op cit note 63 at 33.

²⁵⁶ 1961 Convention, art 8.

too long to find such nationality, however. The Commission in the *Nubian Minor's* case has provided key guidance in this regard, especially by stating that “a nationality” should be given a purposive reading to say that children should be registered from birth. This may have the effect that a protracted period of statelessness for children awaiting nationality is reduced.

The right of a state to decide which nationality it wishes to use has the potential to create statelessness if that state decides to use exclusive *jus sanguinis*. Both the CRC and ACRWC commissions have provided recommendations on states to provide a nationality at birth to counteract the exclusive nature of *jus sanguinis*. Furthermore, any nationality attribution must not be based on arbitrary or discriminatory grounds. A state still has the option of revoking nationality, but even this is limited by the UDHR and the 1961 Convention, for example any deprivation of nationality must not result in statelessness.

It is unclear whether naturalisation is an avenue available for undocumented migrants. This is due to several factors, such as the fact that it is discretionary, which has potential for abuse. Furthermore, it appears that children generally do not have the right to naturalisation per se. Statutory mandated naturalisation is provided for in the 1961 Convention, however only four SADC states have ratified the convention thus far, therefore its application is limited.²⁵⁷

As can be seen, there is a definite line that international laws seem hesitant to cross. In terms of providing non-discriminatory nationality, states have a direct and clear obligation. However, in terms of naturalisation, states have more discretionary power. In comparison, it appears that there is a stronger right to birth registration than to nationality, and it is likely that this is because birth registration does not necessarily guarantee nationality, and thus does not extend into this sensitive area. Nevertheless, the protection of vulnerable populations such as migrants has steadily been gaining traction, and international obligations are steadily chipping away at state dominated nationality laws. The right to nationality therefore has a viable, if somewhat limited, international legal basis.

²⁵⁷ United Nations Treaty Collection ‘Convention on the Reduction of Statelessness’, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=V-4&chapter=5&clang=_en, accessed on 31 May 2021.

CHAPTER 4: ANALYSING SADC IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS

4.1. Introduction

From the previous chapters, we see that birth registration and nationality are linked in that registration provides a pathway to nationality for undocumented children and can secure access to social services and reduce instances of abuse and exploitation. It is also shown that migrants have the right to both birth registration and a nationality, which makes the implementation of birth registration a mandate upon states party to core conventions such as the CRC and ACRWC. To analyse whether undocumented migrants are being provided an effective right to birth registration and nationality, the method that will be used is categorised into the following key themes: (i) barriers facing nationality access for undocumented migrants, (ii) whether the civil registry system is centralised or decentralised, and (iii) what barriers exist that impede access to birth registration (such as cultural attitudes or COVID 19 related challenges). This analytical framework will first be applied to the SADC as a whole in a birds-eye-view examination, and thereafter it will zoom into the particular situations of South Africa and Zambia to identify the extent to which these two states are fulfilling their international obligations under the conventions.

4.2. Nationality Barriers in SADC States

4.2.1. *Backdrop of nationality laws in the SADC*

In many countries nationality and civil registration laws were derived from discriminatory colonial era texts.²⁵⁸ The post-colonial era saw quickly filled power-vacuums, economic and forced migration, and in many cases a continuation of discriminatory nationality laws.²⁵⁹ These laws and practices, which were ostensibly meant to protect the native and original members of the community, have historically and generationally marginalised and excluded migrants.²⁶⁰

For example, during the early 20th century the colonial government in Zambia made vital registration compulsory only for Europeans and Asians, in effect setting the stage for mass scale exclusion of indigenous and migrant groups alike.²⁶¹ Even though many years have passed since, these structures still permeate in society, and can in turn inform the creation of laws and practices that are not always reflective of contemporary problems and needs.²⁶² This is also true for the administrative and civil registration frameworks that were in place to give effect to these laws.²⁶³ Poor legal drafting and the lack of adequate guidelines can ossify discriminatory practices, frustrate the functioning of civil registration systems, and contribute to ill-equipped and incompetent registrars and officials.²⁶⁴ Adding another dimension of difficulty is the inadequate assessment and monitoring of implementation of laws, which results in deficient accountability, evaluation of progress, and monitoring of implementation.²⁶⁵ African states have been slow in

²⁵⁸ Economic Commission for Africa 'Reforming and Improving Civil Registration and Vital Statistics Systems in Africa' (2012) *E/ECA/CMRCR/2/EXP/4* para 4, available at <https://bit.ly/3znhETk> accessed on 15 June 2021.

²⁵⁹ Rosalind Elphick & Jessica P George et al 'Statelessness & Nationality in South Africa' (2013) at 8, available at <https://www.refworld.org/docid/519df3594.html>, accessed on 2 June 2021.

²⁶⁰ *Ibid* at 8.

²⁶¹ Zambia Statistics Agency '2018 Vital Statistics Report' (2020) at 3, available at <https://www.zamstats.gov.zm/phocadownload/Demography/2018%20Zambia%20Vital%20Statistics%20Report.pdf>, accessed on 5 June 2021.

²⁶² Economic Commission for Africa op cit note 258 para 16.

²⁶³ *Ibid* para 17.

²⁶⁴ *Ibid* para 21.

²⁶⁵ *Ibid* para 22.

effecting the necessary legal changes to sew-up these problems.²⁶⁶ Whether this is due to a lack of political will or capacity, change is urgently required.²⁶⁷ The following points will offer a brief glimpse of the main issues afflicting undocumented groups within the SADC in relation to nationality access by naturalisation, birth, and descent.

4.2.2. *Nationality at birth*

Nationality at birth is commonly provided to foundlings.²⁶⁸ Some may enter a host state with their family members or relatives but then subsequently become separated due to the death of their caregivers, abandonment, or neglect.²⁶⁹ It is also common that foundlings do not have the requisite documentation to prove their identities, such as birth registration or a birth certificate.²⁷⁰ Therefore there is a real risk of statelessness and exploitation.²⁷¹ In some states that provide nationality to foundlings, there is a presumption that they were born on the territory, such as under Article 35 of the Zambian Constitution that states that foundlings “*shall be presumed to be a citizen by birth.*”²⁷² In this example it can be seen that *jus soli* attribution is provided even if it is unclear whether the child was born in the territory or not, which thereby increases the quality of protection. Many other SADC states are silent on nationality for foundlings, however. Namely, Tanzania, Botswana, Lesotho, Namibia, Malawi, South Africa, and Seychelles.²⁷³

Another way to attribute nationality at birth is to provide it to children who would “*otherwise be stateless.*” This protection is found in the 1961 convention, the CRC, and the ACRWC. In this respect it occupies an important place in reducing statelessness and protecting migrant children. The meaning of “*otherwise be stateless*” needs clarification. According to UNHCR guidelines, it means that a child would be stateless if a linkage to a state cannot be found. For example if a child

²⁶⁶ Ibid para 15.

²⁶⁷ Ibid para 15-22.

²⁶⁸ Citizenship Law in Africa 2016 op cit note 10 at 22.

²⁶⁹ Rosalind Elphick op cit note 259 at 14.

²⁷⁰ Ibid at 14.

²⁷¹ Ibid at 15.

²⁷² The Constitution of the Republic of Zambia, art 35.

²⁷³ Citizenship and Statelessness op cit note 228 at 86.

is able to gain the nationality of one of their parents, it cannot be said that they would otherwise be stateless.²⁷⁴ Currently the SADC states that offer this right include South Africa, DRC, Angola, Lesotho, Mozambique and Malawi.²⁷⁵ While the right can be found in the CRC and ACRWC (both of which have been widely ratified in the SADC),²⁷⁶ it is still important that states ensure that this right is implemented in such a way that children are not left in a legal limbo.

Universal *jus soli* nationality attribution that provides nationality to all children born on the host state (not just foundlings), can provide more complete protection to undocumented migrants. This is more so if double *jus soli* is provided, which provides nationality for two generations.²⁷⁷ Mozambique is currently the only SADC state that provides this type of *jus soli* attribution to any child born on its territory.²⁷⁸ Under article 1(b) of its Nationality Act, nationality is provided to any person born in Mozambique who is “*born of stateless parents or parents of unknown nationality or of unknown parents.*”²⁷⁹ On a practical level, it is unclear whether migrants can actually prove birth in Mozambique however, since much of the population is undocumented.²⁸⁰ Further, there are inconsistencies between the Constitution and the Nationality act, such as different rules pertaining to dual nationality.²⁸¹ As well as general confusion regarding the legal framework and inadequate guidelines in place to ensure proper implementation.²⁸² Implementation issues aside, it would be a great leap in the reduction of statelessness if other SADC states took this example and provided universal *jus soli* attribution to all children by birth.

²⁷⁴ Guidelines on Statelessness No. 4 op cit note 206 at 5.

²⁷⁵ Citizenship and Statelessness op cit note 228 at 86.

²⁷⁶ African Union ‘Status List’, available at <https://au.int/en/treaties/african-charter-rights-and-welfare-child>, accessed on 21 August 2021; Declarations and Reservations to the Convention on the Rights of the Child op cit note 176.

²⁷⁷ Citizenship and Statelessness op cit note 228 at 18.

²⁷⁸ Ibid.

²⁷⁹ Nationality Act 16/1987 of 1975, art 1(b), available at <https://www.refworld.org/docid/3ae6b5238.html>, accessed on 30 June 2021.

²⁸⁰ Patricia Jeronimo ‘Report on Citizenship Law: Mozambique’ (2019) at 3, available at https://cadmus.eui.eu/bitstream/handle/1814/62966/RSCAS_GLOBALCIT_CR_2019_06.pdf?sequence=1, accessed on 30 June 2021.

²⁸¹ Ibid at 4.

²⁸² Ibid.

4.2.3. Gender discrimination and *jus sanguinis*

Some SADC states adopt protectionist stances on nationality. This is especially evident when *jus sanguinis* is used alongside other discriminatory provisions, or when legal gaps allow for statelessness to emerge. First, some SADC states discriminate on the basis of gender, such as Eswatini, Lesotho, and Malawi.²⁸³ In Eswatini, for example, nationality only passes down *jus sanguinis* on a patrilineal line, meaning that women cannot pass their nationality to their children.²⁸⁴ This proves problematic where a migrant mother has nationality, but she cannot pass it on, leaving the child stateless, which is in contravention of article 9 of CEDAW.²⁸⁵ Second, if there are nationals living abroad for whatever reason, some states only allow for *jus sanguinis* to be passed to the first generation, meaning that any subsequent generations, such as grandchildren, cannot claim nationality of the origin state. In the SADC, this qualification can be seen in Tanzania, Malawi, Lesotho, and Mauritius.²⁸⁶ Third, certain states only pass citizenship by descent to specific racial or ethnic groups. Such discriminatory provisions can be seen in Sierra Leone, where a requirement for nationality to be passed the child cannot be a “non-negro.”²⁸⁷ While not an SADC state, this latter example highlights how ethnic and racial biases can affect nationality attribution and leave children at risk of statelessness.

4.2.4. Naturalisation

Naturalisation is aptly situated to protect children from childhood statelessness, because even if they cannot gain nationality through birth or descent, they can still access it provided they fulfil the requirements for naturalisation. Generally, these requirements vary from country to country.

²⁸³ Aimée-Noël Mbiyozo op cit note 11 at 9-10.

²⁸⁴ Citizenship and Statelessness op cit note 228 at 3.

²⁸⁵ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 9, available at <https://www.refworld.org/docid/3ae6b3970.html>, accessed on 14 September 2021.

²⁸⁶ Citizenship and Statelessness op cit note 228 at 39.

²⁸⁷ Ibid at 42.

For example, Angola requires 10 years residence together with proof that one has integrated into Angola.²⁸⁸

Many SADC states provide for naturalisation within their domestic laws,²⁸⁹ however the provisioning of naturalisation itself is quite uncommon.²⁹⁰ Issues that are typical to naturalisation are arbitrary decision-making, discrimination, and high levels of discretion.²⁹¹ In some countries there are systems in place that make naturalisation exceedingly difficult or costly. For example, in the DRC, the application process for naturalisation entails consideration by the Council of Ministers, submission to the National Assembly, and an award by a presidential decree.²⁹² An applicant must show “*distinguished service*”, meaning that the naturalisation must “*represent a real benefit with an observable impact for the country.*”²⁹³ One can wonder whether the average undocumented migrant can fulfil this standard. In Tanzania, the aggregate costs of the entire naturalisation process can amount to \$5000 USD.²⁹⁴ On top of these exorbitant costs, the Minister may still reject an application,²⁹⁵ and any children of the applicant have to undergo separate applications.²⁹⁶

Ethnic discrimination also factors into whether naturalisation is available. In Madagascar, people that are not perceived as ethnically Malagasy cannot access naturalisation.²⁹⁷ This bars people from naturalisation simply based on their status, such as migrants, as it is unlikely that many would be perceived as Malagasy. There are also documentary demands and unfair practices that frustrate naturalisation processes, which further increases the risks of statelessness for applicants.²⁹⁸

²⁸⁸ Citizenship Law in Africa 2010 op cit note 7 at 68.

²⁸⁹ Ibid at 64.

²⁹⁰ Citizenship and Statelessness op cit note 228 at 74.

²⁹¹ Ibid at 74.

²⁹² Citizenship Law in Africa 2010 op cit note 7 at 64

²⁹³ Ibid.

²⁹⁴ Citizenship and Statelessness op cit note 228 at 75.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Caroline McInerney, ‘Accessing Malagasy Citizenship: The Nationality Code and Its Impact on the Karana’ (2014) 19 TiLR at 187, available at <https://tilburglawreview.com/articles/10.1163/22112596-01902018/galley/67/download/>, accessed on 18 June 2021; The World’s Stateless Children op cit note 15 at 35.

²⁹⁸ The World’s Stateless Children op cit note 15 at 35.

4.2. Organisational structures used in the SADC

Organisational structures can be placed into two categories, namely, centralised systems, and decentralised systems.²⁹⁹ A centralised system is typically operated at the national level via an organisation such as a home affairs, or ministry of health.³⁰⁰ Alternatively, it can be split into two national level entities, where one is responsible for civil registration and the other for vital statistics. Centralised systems have a number of defining characteristics, as well as some advantages and disadvantages. It is a top down structure, where all registration data such as records, vital events, and other statistics are processed centrally.³⁰¹ The flow of information from all sectors of a state's territory requires efficient and effective communication between organisational bodies.³⁰² The centrality of the system ensures organisational direction and consistency, suitable allocation of staff and resources, and overall uniformity of structure.³⁰³ As a negative, the centrality of this system can result in delays due to the majority of data being processed at head offices.³⁰⁴

Decentralised systems on the other hand can operate at a number of levels. For example, at a provincial level where each province administers its own populace's vital registration,³⁰⁵ or it can be administered at a lower level where civil registration is facilitated through local registration units. Lower still is a single site registration system where vital events are reported to police officials, village headmen, or scribes.³⁰⁶

Decentralised systems are understood to be more accessible.³⁰⁷ However, it may result in vital registration data being fragmented between various outposts. The consistency and quality of

²⁹⁹ Vito Logrillo 'Technical Report on the Organizational Structure for Civil Registration and Vital Statistics Systems' (1997) 1-6, available at *IIVRS_paper69.pdf (un.org)*, accessed on 19 June 2021.

³⁰⁰ *Ibid* at 2.

³⁰¹ *Ibid* at 3.

³⁰² *Ibid*.

³⁰³ *Ibid*.

³⁰⁴ *Ibid*.

³⁰⁵ *Ibid* at 4.

³⁰⁶ *Ibid* at 6.

³⁰⁷ UNICEF 'Call to Action for Free and Universal Birth Registration Across Africa' (2021), available at <https://www.unicef.org/wca/stories/call-action-free-and-universal-birth-registration-across-africa>, accessed on 21 August 2021.

service may vary as well.³⁰⁸ For this system to work, states need to ensure that there is efficient communication between the various organisational structures to make certain that there is parity in the registration service.³⁰⁹ Providing quality registration services would by extension ensure that the right to birth registration is given proper effect to.

As can be seen, both systems have advantages and disadvantages, and one could certainly make an argument for the usage of either system within the SADC context. However, current data shows that decentralised systems appear to be more suited to tackle SADC challenges due to how accessible they are. A study in Tanzania, for example, depicts how birth registrations in districts which use centralised systems provide much less coverage than those which use decentralised systems. In the study, four districts were analysed according to which registration system was used in a 12-month period.³¹⁰ Out of the four districts, the two that were using a centralised system, namely Dodoma and Kibaha, had an average of 14 percent registration coverage. Iringa and Mbozi, which were the districts that used a decentralised system, had an impressive average of 60 percent coverage.³¹¹ In Iringa particularly, a decentralised system increased registration coverage from 1 percent in 2014 to 67 percent in 2016.³¹² The only states that use decentralised systems are Madagascar, Mozambique, and Comoros.³¹³

4.3. Barriers to birth registration in SADC states

Providing universal and free birth registration to all people, whether they are nationals or foreigners, is an effective method in reducing the risk of statelessness. For migrants who have no proof of identity, birth registration can ensure protection from exploitation, access to social

³⁰⁸ Vito Logrillo op cit note 299 at 5.

³⁰⁹ Ibid.

³¹⁰ Christopher Sanga, Gregory Kabadi & Emilian Karugendo et al 'Decentralization of Birth Registration to Local Government in Tanzania: The Association with Completeness of Birth Registration and Certification' (2020) at 1, available at <https://doi.org/10.1080/16549716.2020.1831795>, accessed on 10 June 2021.

³¹¹ Ibid at 7.

³¹² Ibid.

³¹³ UNICEF 'CRVS - Birth, Marriage and Death Registration in Madagascar', available at <https://data.unicef.org/crvs/madagascar/>, accessed on 19 July 2021; UNICEF 'CRVS - Birth, Marriage and Death Registration in Mozambique', available at <https://data.unicef.org/crvs/mozambique/>, accessed on 19 July 2021; UNICEF 'CRVS - Birth, Marriage and Death Registration in Comoros', available at <https://data.unicef.org/crvs/comoros/>, accessed on 19 July 2021.

services, and access to nationality. There have been varying results within SADC states in the provisions of birth registration for undocumented migrants. The following will provide an overview of some common recurring problems and barriers.

4.3.1. *Fees, documents, and late registration*

It is not uncommon that there are onerous documentation or cost requirements for birth registration, and particularly for late registration.³¹⁴ In Tanzania, all births are recorded automatically if children are born at hospitals and health centres, against payment of 3500 Tanzanian Shillings.³¹⁵ For late registration in Tanzania, the situation is markedly worse; as applicants require a letter from government officials, a baptismal card, and a clinic card.³¹⁶ They are also required to pay 4000 TZS for late registration done between three months and ten years, and after ten years a fee of 10000 TZS is required.³¹⁷ Zimbabwe, despite having free registration, requires both parents' identity cards for live births, as well as a baptismal certificate, and a birth confirmation from the hospital.³¹⁸ These documents make it exceptionally difficult for undocumented migrants to access registration, and in the case of the identity card requirements, it impossible.³¹⁹ Namibia does not require fees for birth registration,³²⁰ but has yet to address the fact that birth registration needs documents such as the identity documents from the mother and father.³²¹ As will be shown in the table below, identity documents are a requirement in the majority of SADC states.

³¹⁴ Ensuring Birth Registration op cit note 22.

³¹⁵ SADC Region Technical Report op cit note 50 at 64.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid at 72.

³¹⁹ Ensuring Birth Registration op cit note 22 at 5

³²⁰ UNICEF 'CRVS - Birth, Marriage and Death Registration in Namibia', available at <https://data.unicef.org/crvs/namibia/>, accessed on 19 July 2021.

³²¹ Committee on the Rights of the Child 'Concluding Observations on the Consolidated Second and Third Periodic Reports of Namibia, Adopted by the Committee at its Sixty-First Session (17 September–5 October 2012)' (2012) at 8, available at https://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-NAM-CO-2-3_en.pdf, accessed on 20 July 2021.

Late registration is often accompanied by punitive measures, despite that fact they can act as a serious deterrent to registration.³²² In the case of Mozambique which has low registration counts, fees for late registration were cited as one of the main causes for this.³²³ On the other hand, there is the argument that having no penalties can act as a disincentive for birth registration. Botswana for example does not require birth registration for a child to access education or healthcare, which was cited by the SADC as a reason why birth registration rates were low in that country.³²⁴ While not fees, it shows that there is a fine balance at play between penalties and incentive for birth registration. It is argued, however, that there are more negative connotations with fee or penalty requirements, as can be seen in Angola where even low fees were “*prohibitive for the high number of people living in poverty.*”³²⁵ A focus on punitive measures to incentivize birth registration is the wrong way to address the issue. Especially considering that it does not consider the phenomenon where migrants avoid authorities and public officials due to fears of their statuses being exposed,³²⁶ therefore making late registration more likely and discriminating or alienating migrants. Instead, states should encourage birth registration through government initiatives and policies, which in Angola had worked for other schemes such as vaccination campaigns and voter registrations.³²⁷

4.3.2. *Laws or regulations that discriminate based on gender*

Legal barriers to registration for women often occur due to - and alongside - patriarchal norms that designate women to subordinate roles within society.³²⁸ Laws can discriminate either directly through provisions that explicitly and arbitrarily distinguish between men and women. Or they can discriminate indirectly, such as laws which require the head of the household to be the person who registers children, which in a patriarchal society bars women from being able to register.³²⁹ For

³²² Nationality matters op cit note 16 at 161.

³²³ SADC Region Technical Report op cit note 50 at 44.

³²⁴ Ibid at 23.

³²⁵ Nell Gray op cit note 81 at 6.

³²⁶ Ensuring Birth Registration op cit note 22 at 3.

³²⁷ Ibid at 12.

³²⁸ World Bank Group ‘Achieving Universal Access to ID: Gender-based Legal Barriers Against Women and Good Practice Reforms’ (2019) at 2, available at <https://openknowledge.worldbank.org/handle/10986/32474>, accessed on 20 July 2021.

³²⁹ Plan ‘Mother to Child How Discrimination Prevents Women Registering the Birth of their Child’ (2012) at 13, available at https://www.ohchr.org/Documents/Issues/Children/BirthRegistration/PlanInternational2_birthRegistration.pdf, accessed on 20 July 2021.

example, birth registration in Mozambique requires both the mother and father to be present.³³⁰ In practical life this can disproportionately affect women, because if fathers abandon their children or otherwise do not acknowledge them, a mother would not be able to apply for birth registration.³³¹ In Namibia, a mother can only register their child by their own volition when or if the father is absent, deceased, or otherwise unable to.³³² This is the same for Eswatini and Seychelles.³³³ By not allowing a mother to do so independently of the father places her in a weaker position.

There are also structural issues which, when operating in concert with bad laws and regulations, can compound and increase the difficulty for women to access registration. Structural problems can include, but are not limited to, poor or non-existent education, travelling limitations, the impaired ability to access funds and information, and the inability to make decisions in the household.³³⁴ These factors doubtless apply to migrant women as well, and may be worsened by the alienation they may feel or experience in the host state, including possible language and resource barriers. Therefore, even in the absence of discriminatory laws, beliefs or customs that discriminate against women are a core concern when discussing non-registration.³³⁵ In Zambia, Zimbabwe, and Malawi, unmarried women may face stigmatization or ignominy when registering their children.³³⁶ This may be due to the perception that women registering their children indicates that they do not know who the father is, implying promiscuity or immorality.³³⁷

³³⁰ SADC Region Technical Report op cit note 50 at 40.

³³¹ Mother to Child op cit note 329 at 10.

³³² World Bank Group op cit note 328 at 7.

³³³ Citizenship and Statelessness op cit note 228 at 62.

³³⁴ World Bank Group op cit note 328 at 2.

³³⁵ Mother to Child op cit note 329 at 10.

³³⁶ Ibid.

³³⁷ Ibid.

4.3.3. *Inadequate training for officials*

In Angola, assistance by UNICEF has brought about increased birth registrations for refugees coming from the DRC.³³⁸ This, together with the National Development Plan of 2013-2017 to register 100 percent of births signifies that there is political will to provide widespread birth registration.³³⁹ However there are still difficulties in providing registration to refugees and asylum seekers due to unclear guidelines and poor training of officials. These issues increase the risk of statelessness for these groups of children.³⁴⁰ As discussed above, outdated laws and resource constraints can contribute to this registration barrier.

4.3.4 *COVID 19 impact on civil registration*

Ensuring that there are protections against the spread of COVID 19 should not be implemented to the detriment of civil registration. In other words, these measures ought not to be seen as mutually exclusive of one another.³⁴¹ Certain countries have suspended birth registration or have stopped the supplying of identity documents during the pandemic as part of their COVID response measures.³⁴² Malawi and Eswatini have not classed civil registration as essential services,³⁴³ meaning they were liable to suspension during a lockdown. Angola and Lesotho have classed civil registration as essential, but have introduced limited service (such as only allowing specific vital events to be registered.)³⁴⁴ Certain states face organisational restraints in light of these new challenges, such as DRC, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, and

³³⁸ Committee on the Rights of the Child ‘Concluding Observations on the Combined Fifth to Seventh Periodic Reports of Angola’ (2018) at 6, available at <https://www.ecoi.net/en/document/1437394.html>, accessed on 11 July 2021.

³³⁹ Ibid at 6.

³⁴⁰ Ibid.

³⁴¹ UNHCR Global Report ‘Safeguarding Fundamental Rights’ (2020) at 1, available at https://reporting.unhcr.org/sites/default/files/gr2020/pdf/Chapter_Safeguarding.pdf, accessed on 7 July 2021.

³⁴² UNHCR ‘The Impact of COVID-19 on Stateless Populations: Policy Recommendations and Good Practices’ (2020) at 3, available at <https://www.refworld.org/docid/5eb2a72f4.html>, accessed on 7 July 2021.

³⁴³ Carla AbouZahr, Martin W. Bratschi & Emily Cercone et al ‘The COVID-19 Pandemic: Effects on Civil Registration of Births and Deaths and on Availability and Utility of Vital Events Data’ (2021) at 1126, available at <https://doi.org/10.2105/AJPH.2021.306203>, accessed on 19 June 2021.

³⁴⁴ Ibid.

Tanzania.³⁴⁵ According to the available data, only Comoros has cited the continuation of civil registration without suspension.³⁴⁶ There are also access barriers which arose due to restrictions on movement,³⁴⁷ decreases in registrations for asylum applicants,³⁴⁸ and general complications and disruptions in efforts to reduce statelessness.³⁴⁹ The problem with these setbacks are that where these identity documents are not provided, there is a protraction of the period of vulnerability where migrants are in a state of limbo.³⁵⁰ This becomes exacerbated by the uncertainty of how long lockdowns and COVID regulations will remain in place. Therefore, governments should ensure that first, civil registration is afforded essential service status,³⁵¹ and second, that these services are rendered in such a way that people are safe and that vulnerable groups can access identity documentation.

4.3.5. *Low accession to core treaties that guard against statelessness*

As stated above, all SADC states are party to the CRC. There have also been no reservations to significant sections such as the article 7 right to birth registration and nationality. Out of the 16 party states, Eswatini and Botswana made reservations to articles 4 and 1 respectively.³⁵² Seychelles made a reservation to article 22 but withdrew it in 2008. The CRC therefore sees almost uniform state acceptance in the SADC.

The ICRMW sees poor support. Only four states, namely Madagascar, Mozambique, Seychelles, and Lesotho are party to the treaty (five counting Comoros being merely a signatory.) The remaining eleven SADC states have not joined the treaty.³⁵³ The low ratification of this convention can be due to a number of factors. For example, perceptions of migrants being less important or

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ UNHCR Global Report op cit note 341 at 177.

³⁴⁸ Ibid at 179.

³⁴⁹ Ibid at 183.

³⁵⁰ The Impact of COVID-19 op cit note 342 at 3.

³⁵¹ Ibid.

³⁵² Declarations and Reservations to the Convention on the Rights of the Child op cit note 176.

³⁵³ United Nations Treaty Collection 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families', available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=IV-13&chapter=4&clang=_en, accessed on 29 June 2021.

threatening to local order than other classes of people (such as children or refugees.) This is especially the case for undocumented migrants.³⁵⁴ Poor implementation of the treaty could be due to the costs and administrative resources required to commit to the reforms. For example, the act of ensuring that domestic legislation is up to par with the convention. On the political end, it may be perceived by states that proffering rights to migrants may be economically unviable.³⁵⁵ Without getting too far into the merits of these arguments, it can be noted that they overlook the fact that migrants are more than just an economic resource,³⁵⁶ and they certainly can include groups such as refugees or children.³⁵⁷ It is clear that from a human rights perspective this convention would be beneficial in securing important rights for migrants. Especially in states which have substantial statelessness issues such as South Africa.³⁵⁸

According to statistics, the 1961 convention also sees generally poor support in the SADC. To date only four SADC states are party to the convention.³⁵⁹ This is unfortunate as the mandatory articles on nationality acquisition (article 1-4) would have been beneficial in securing additional rights.

Table 1: Vital registration statistics in the SADC.

Country	ID or other document requirements for birth registration	Centralised/decentralised organisational structure	Penalties or extra requirements for late registration
Angola	Y. The ID/Nationality of the	Centralised. ³⁶¹	Y, Late registration also becomes less accessible up to a year after

³⁵⁴ Southern African Migration Project 'The UN Convention on the Rights of Migrant Workers: The Ratification Non-Debate Policy Brief No. 21' (2006) at 4, available at <https://www.africaportal.org/publications/the-un-convention-on-the-rights-of-migrant-workers-the-ratification-non-debate/>, accessed on 19 June 2021.

³⁵⁵ Ibid at 5-6.

³⁵⁶ Committee on Migrant Workers 'Migrants: Who are They? FAQ', available at <https://www.ohchr.org/EN/HRBodies/CMW/Pages/FAQ.aspx>, accessed on 19 June 2021.

³⁵⁷ Ibid.

³⁵⁸ The World's Stateless Children op cit note 15 at 36.

³⁵⁹ United Nations Treaty Collection 'Convention on the Reduction of Statelessness' op cit note 257.

³⁶¹ Ibid.

	mother and father. ³⁶⁰		birth. ³⁶²
Botswana	Y. ID or passport of the mother and father, a passport is required if the parents are non-nationals. Additional documents such as a confirmation letter, affidavit, and certified ID's from witnesses required if children are born outside of health facilities. ³⁶³	Centralised. ³⁶⁴	Y. A fee is payable. ³⁶⁵ There are a host of requirements for late registration, such as affidavits, certified identity documents, certified witness identity documents, under 5 medical cards, and a confirmation letter from a Kgosi. ³⁶⁶
Comoros	*. Attestation of birth can be made by the mother, father, a doctor, midwife, the person whose home the child was born in, or any person witnessing the birth. ³⁶⁷ It is uncertain if IDs are required from eligible attestants.	Decentralised. ³⁶⁸	Y. If there has been no proclamation of birth within a 15-day window, a civil registrar can only act under a supplementary judgment by a court or tribunal of Cadis. ³⁶⁹ Which makes late registration reliant on a court order. ³⁷⁰
Democratic Republic of the Congo	N. The parents' consent or attendance is enough. There are no ID or other nationality documents required. A medical certificate of birth is required. ³⁷¹ This may bar some migrants.	Centralised. ³⁷²	Y. A fee is payable. ³⁷³ After 60 days, a birth is considered late, and thereafter registration may only take place by a supplementary judgment, which can incur additional costs. ³⁷⁴

³⁶⁰ UNICEF 'CRVS - Birth, Marriage and Death Registration in Angola', available at <https://data.unicef.org/crvs/angola/>, accessed on 20 August 2021.

³⁶² Citizenship and Statelessness op cit note 228 at 60.

³⁶³ Immigration and Civil Registration 'Birth Registration', available at <https://www.gov.bw/civil-registration/birth-registration>, accessed on 20 August 2021.

³⁶⁴ UNICEF 'CRVS - Birth, Marriage and Death Registration in Botswana', available at <https://data.unicef.org/crvs/botswana/>, accessed on 20 August 2021.

³⁶⁵ Births and Deaths Registration Chapter 30:01 of 1969, art 11 (b).

³⁶⁶ Immigration and Civil Registration op cit note 363.

³⁶⁷ UNICEF 'CRVS - Birth, Marriage and Death Registration in Comoros', available at <https://data.unicef.org/crvs/comoros/>, accessed on 21 August 2021; Civil Status Act 84-10 of 1984, art 34.

³⁶⁸ Ibid.

³⁶⁹ Civil Status Act 84-10 supra note, art 32; Registration in Comoros op cit note 367.

³⁷⁰ Citizenship and Statelessness op cit note 228 at 60.

³⁷¹ UNICEF 'CRVS - Birth, Marriage and Death Registration in Democratic Republic of Congo', available at <https://data.unicef.org/crvs/democratic-republic-congo/>, accessed on 21 August 2021.

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Family Code Law No. 16/008 of 2016, arts 106 & 118; Citizenship and Statelessness op cit note 228 at 61.

Eswatini	Y. National ID, or if born out of wedlock, the fathers ID.³⁷⁵	Centralised.³⁷⁶	Y. Additional documents such as a proof of birth, a certified copy of an ID, an affidavit to request late registration. Furthermore, all late registrations must be acquiesced by the national civil registrar.³⁷⁷
Lesotho	Y. ID documents are required from both the mother and father.³⁷⁸	Centralised.³⁷⁹	Y. A fee of M1.87 LSL (0.12 USD).³⁸⁰
Madagascar	Y. The ID of the mother and the father.³⁸¹	Decentralised.³⁸²	Y. Late registration can be subject to a fine, or imprisonment.³⁸³
Malawi	Y. ID of the mother and father. As well as birth notification, proof of marriage or marriage certificate.³⁸⁴	Centralised.³⁸⁵	Y. A fee is payable for registration after 6 weeks.³⁸⁶
Mauritius	Y. ID cards of parents or informants.³⁸⁷	Centralised.³⁸⁸	Y. No fee requirement, but approval is required from a Registrar of Civil Status if registration is after 45 days, or declaration from a Magistrate if after 3 months.³⁸⁹

³⁷⁵ Ministry of Home Affairs ‘Birth Registration’, available at <http://www.gov.sz/index.php/services-sp-22242747/birth-registration-certificate>, accessed on 19 August 2021.

³⁷⁶ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Swaziland’, available at <https://data.unicef.org/crvs/swaziland/>, accessed on 19 August 2021.

³⁷⁷ Ministry of Home Affairs ‘Birth Registration’ op cit note 375.

³⁷⁸ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Lesotho’, available at <https://data.unicef.org/crvs/lesotho/>, accessed on 19 August 2021.

³⁷⁹ Ibid.

³⁸⁰ UNICEF & DLA Piper ‘Birth Registration - Phase Two A Comparative Report Prepared for UNICEF’ (2016) at 53, available at http://citizenshiprightsafrika.org/wp-content/uploads/2016/08/UNICEF-Comp-laws-Birth-Registration2_2016.pdf, accessed on 15 August 2021.

³⁸¹ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Madagascar’, available at <https://data.unicef.org/crvs/madagascar/>, accessed on 15 August 2021.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Malawi’, available at <https://data.unicef.org/crvs/malawi/>, accessed on 16 August 2021.

³⁸⁵ Ibid.

³⁸⁶ UNICEF & DLA Piper 2016 op cit note 380 at 60.

³⁸⁷ Civil Status Division ‘Birth’, available at <https://csd.govmu.org/Pages/Registration/Birth.aspx>, accessed on 16 August 2021.

³⁸⁸ SADC Region Technical Report op cit note 50 at 34.

³⁸⁹ Ibid.

Mozambique	Y. ID of the father and mother, their nationalities. Stateless births are registered.³⁹⁰	Decentralised.³⁹¹	Y. A fee is payable for registration after four months from birth. The amount is 50 Meticaís (USD 1.18).³⁹²
Namibia	Y. Both the ID and nationalities of the mother and father are required.³⁹³	Centralised.³⁹⁴	N. No fees or additional documentation.³⁹⁵
Seychelles	Y. ID documents or passports are required.³⁹⁶	*	Y. Late registration requires court order and fine.³⁹⁷
South Africa	Y. ID documents are required.³⁹⁸	Centralised.³⁹⁹	Y. There are no fees,⁴⁰⁰ however there are additional documentary requirements.⁴⁰¹
Tanzania	Y. The ID and nationalities of the father and mother.⁴⁰²	Centralised.⁴⁰³	Y. A fee is payable for late registration after 90 days in Tanzania, and 42 days in Zanzibar.⁴⁰⁴

³⁹⁰ UNICEF & DLA Piper ‘Birth Registration - A Comparative Report Prepared for UNICEF’ (2015) at 99, available at <http://www.a4id.org/wp-content/uploads/2017/01/UNICEF-Birth-Registration.pdf>, accessed on 17 August 2021.

³⁹¹ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Mozambique’, available at <https://data.unicef.org/crvs/mozambique/>, accessed on 17 August 2021.

³⁹² UNICEF & DLA Piper 2015 op cit note 390 at 99.

³⁹³ Registration in Namibia op cit note 320.

³⁹⁴ SADC Region Technical Report op cit note 50 at 45.

³⁹⁵ Registration in Namibia op cit note 320.

³⁹⁶ Civil Status ‘Birth Registration’, available at <http://www.ics.gov.sc/civil-status/birth-registration>, accessed on 20 August 2021.

³⁹⁷ Citizenship and Statelessness op cit note 228 at 61.

³⁹⁸ UNICEF ‘CRVS - Birth, Marriage and Death Registration in South Africa’, available at <https://data.unicef.org/crvs/south-africa/>, accessed on 20 August 2021.

³⁹⁹ Ibid.

⁴⁰⁰ Lawyers for Human Rights ‘Joint Submission to the Committee on the Rights of the Child 88th Pre-Sessional Working Group 08-12 February 2021’ (2020) at 6, available at <https://www.lhr.org.za/lhr-resources/joint-submission-to-the-committee-on-the-rights-of-the-child/>, accessed on 15 August 2021.

⁴⁰¹ Home Affairs Civil Services ‘Birth Certificates’, available at <http://www.dha.gov.za/index.php/civic-services/birth-certificates>, accessed on 15 August 2021.

⁴⁰² UNICEF & DLA Piper 2016 op cit note 380 at 108.

⁴⁰³ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Tanzania’, available at <https://data.unicef.org/crvs/united-republic-tanzania/>, accessed on 16 August 2021.

⁴⁰⁴ UNICEF & DLA Piper 2016 op cit note 380 at 103.

Zambia	Y. The ID of the mother and the father is required, as well as their nationalities. Stateless births are registered. ⁴⁰⁵	Centralised. ⁴⁰⁶	Y. For children registered after 12 months, there is a fee of “14 fee units” (USD 00.8), together with an affidavit and the associated costs therewith. ⁴⁰⁷
Zimbabwe	Y. Birth registration requires the ID and nationalities of the mother and father. ⁴⁰⁸ Stateless people can still register provided they fulfil extra requirements of registration. ⁴⁰⁹	Centralised. ⁴¹⁰	Y. There is a fee of 2 USD for late registration, however the time period for early registration is 6 years. ⁴¹¹
Key: Y - Yes N - No * - Unclear			

4.4. Conclusion

As seen in this brief overview, there are many challenges facing migrants in terms of access to birth registration and nationality within the broader SADC. For nationality, a key problem area is providing naturalisation that is cost effective and accessible to the many. It appears it is treated almost as an exceptional avenue, and not one meant to integrate populations in crisis. Nationality at birth is applied restrictively, as foundlings are not provided complete protection in many SADC states. Children who would otherwise be stateless have incomplete protection due to uneven implementation of CRC and ACRWC provisions, and the potential of a legal limbo in the waiting process. There is the additional issue of women being side-lined by patrilineal nationality

⁴⁰⁵ UNICEF & DLA Piper 2015 op cit note 390 at 150.

⁴⁰⁶ National Legislative Bodies & National Authorities ‘Statelessness and Issues Relating to Nationality in Zambia’ (2016) at 17, available at <https://www.refworld.org/topic,50ffbce524d,50ffbce525c,,0,,ZMB.html>, accessed on 15 July 2021.

⁴⁰⁷ UNICEF & DLA Piper 2015 op cit note 390 at 149.

⁴⁰⁸ Ibid at 177.

⁴⁰⁹ Ibid.

⁴¹⁰ UNICEF ‘CRVS - Birth, Marriage and Death Registration in Zimbabwe’, available at <https://data.unicef.org/crvs/zimbabwe/>, accessed on 18 August 2021.

⁴¹¹ UNICEF & DLA Piper 2015 op cit note 390 at 177.

attribution, which further increases the risks of children being left out where they cannot establish a link to their father.

As already stated, properly implemented birth registration is a factor that is important in reducing statelessness in undocumented children. When it comes to barriers facing birth registration, there are many. As stated, the organisational structure that is used to facilitate birth registration is very important, as centralised systems are shown to have less favourable outcomes compared with decentralised systems. This is problematic as most SADC states use a centralised system to deliver birth registration. Other, more specific issues, include fee and documentary requirements, gender discriminatory laws, poor training, inadequate accession to international treaties, poor reporting of implementation, and COVID-19 measures that negatively impact registrations. Taken together, these barriers are unassailable to many undocumented migrants, leaving many children at risk of continued statelessness or legal limbo.

In the next chapter, focus will be turned to South Africa to analyse the specific barriers that may be taking place in that country, as well as to ensure greater depth of discussion of South Africa and Zambia.

CHAPTER 5: SOUTH AFRICA AND ZAMBIA

COUNTRY PROFILES

5.1. Introduction

South Africa does not have a well-developed monitoring system to track stateless populations.⁴¹² Without any firm data on these groups, it is impossible to address the issue adequately and to ensure that these groups of people have access to registration and pathways to nationality.⁴¹³ Despite these knowledge-gaps, statelessness is thought to be a prominent issue in South Africa.⁴¹⁴ Migration into South Africa is predominantly from other Southern Africa countries such as Zimbabwe.⁴¹⁵ These populations may not have the necessary documentation to prove their nationalities or identities.⁴¹⁶ This stated, is clear that an inquiry into the situation is necessary to both understand the position of undocumented migrants, as well as to measure South Africa's adherence to its international obligations.

The South African Constitution under section 28(1)(a) states that all children have a right to a name and nationality at birth⁴¹⁷ The Citizenship Act guides the implementation of these rights, providing for nationality acquisition by descent from one's parents, birth on the territory, and naturalisation for persons who have been resident in a country for a number of years.⁴¹⁸ Section 2(4)(b)(i) provides a safeguard for those who would otherwise be stateless, by stating that a person would be granted nationality if "*he or she does have the citizenship or nationality of any other country or has no right to such citizenship of nationality.*" This protection is qualified in the

⁴¹² The World's Stateless Children op cit note 15 at 36.

⁴¹³ Lawyers for Human Rights and Institute on Statelessness and Inclusion 'Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review' (2016) para 39, available at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=3801&file=EnglishTranslation>, accessed on 19 July 2021.

⁴¹⁴ The World's Stateless Children op cit note 15 at 36.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ The Constitution, sec 28(1)(a).

⁴¹⁸ The Citizenship Act 88 of 1995, s 2(2), s 2(1), s 3.

subsequent sub-section, stating that one's birth must be registered in accordance with the Births and Deaths Registration Act.⁴¹⁹ The implications of this qualification will be discussed below.

All children have a right to birth registration under the BDRA. This can be seen in section 9 of the act which specifically states that for "*any child born alive*" notice should be given of the birth to the relevant authorities.⁴²⁰ Therefore birth registration is available to migrant children.⁴²¹ Article 9 also states the child must be registered by anyone who has taken responsibility for them.⁴²² The wording used here is wide enough to include not only parents, but also people nominated by parents. The notice for births used to be seven days, however this was changed to thirty days under the BDR amendment act of 1995.⁴²³ There are three late registration windows, with more documents required for each. These are: later than thirty days but prior to one year; later than one year but prior to seven years; and later than seven years. These periods provide a reasonably wide window for migrants who have missed the initial thirty-day limit.⁴²⁴

5.2. International Treaty Commitments

South Africa has ratified the majority of the major nationality conventions. Namely, the CRC, the ACRWC,⁴²⁵ the ICCPR, and CEDAW.⁴²⁶ Significantly, South Africa has not ratified the 1961 and 1954 conventions.⁴²⁷

⁴¹⁹ Ibid at s 2(4)(b)(i)(ii).

⁴²⁰ Births and Deaths Registration Act 51 of 1992, s 9(1).

⁴²¹ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 6-7.

⁴²² Ibid at s 9(1).

⁴²³ SADC Region Technical Report op cit note 50 at 48.

⁴²⁴ Home Affairs Civil Services 'Birth Certificates' op cit note 401.

⁴²⁵ African Union 'Status List' op cit note 276.

⁴²⁶ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 10.

⁴²⁷ Joint Submission to the Human Rights Council op cit note 413 para 10.

5.3. Undocumented Migrants and Nationality

5.3.1. *South Africa's restriction on "otherwise be stateless"*

Access to South African nationality relies on birth registration, which proves a harsh barrier to nationality for undocumented migrants,⁴²⁸ because to be eligible for an ID one requires a birth certificate, which can only be obtained through birth registration.⁴²⁹ This can very clearly be seen in the wording of the BDRA under section 4(a)(i)(ii).⁴³⁰

There appears to be discrimination on the basis of status within South African law. Sections 2, 3, and 4 of the BDRA provide pathways to nationality through birth, descent, and naturalisation. If the child is a biological child of any South African parent under these provisions generally, then birth registration is not a requirement for access to nationality.⁴³¹ However for children that are not biological children to South African citizens, or are foreigners that cannot establish a link to a South African Citizen, birth registration becomes a requirement for access to nationality.⁴³² This can be seen in section 2(4)(b)(ii) where access to nationality for children who would otherwise be stateless has the cumulative requirement of birth registration.⁴³³ This would not necessarily pose a problem if birth registration was accessible for people who would otherwise be stateless (and particularly those who do not have documents to link them to a state such as undocumented migrants), however, the reality is that access to birth registration is not easy, and nor is it implemented in such a way as to be inclusive for undocumented migrants. This differentiation is discriminatory because it distinguishes between biological children and children who are stateless, have other nationalities or are of unknown nationality, and adopted children.⁴³⁴ The right to

⁴²⁸ Rosalind Elphick op cit note 259 at 52.

⁴²⁹ Ibid.

⁴³⁰ Citizenship Act, s 2(4)(b)(ii).

⁴³¹ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 2.

⁴³² Ibid.

⁴³³ Citizenship Act, s 2(4)(b)(ii).

⁴³⁴ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 2.

nationality is connected with rights to equality and the best interests principle, because all of these rights are indivisible and interconnected, as established by the ACRWC and CRC commissions. Differentiating between children based on their status and adding an additional barrier to nationality access - which can increase difficulty for undocumented migrants -⁴³⁵ becomes discriminatory because it clashes with these rights.⁴³⁶

5.3.2. Naturalisation at eighteen

Naturalisation is another area where South Africa's nationality laws leave gaps which create vulnerability for undocumented children. As stated above, the African commission recommends that naturalisation is provided for earlier in life. South Africa does not provide early naturalisation however, as in the Citizenship act the age for this is capped at 18, with the added requirement of birth registration.⁴³⁷ For children that are stateless or undocumented, these provisions ensure that they would remain that way for the entirety of childhood. This is not in alignment with international objectives providing for the right to a nationality, as nationality is only accessible at adulthood. Furthermore, naturalisation is subject to ministerial discretion, meaning that an application may potentially be rejected.⁴³⁸

5.3.3. Lack of sufficient regulatory guidelines to give effect to nationality laws

As already stated, section 2(2) of the Citizenship act provides nationality access to children who would otherwise be stateless. However, in practice a child cannot actually use this clause to access nationality.⁴³⁹ There are also no forms or application processes in place which such a child could

⁴³⁵ Ibid.

⁴³⁶ Ibid.

⁴³⁷ Citizenship Act, s 4(3).

⁴³⁸ Joint Submission to the Human Rights Council op cit note 413 at para 22.

⁴³⁹ Ibid para 20.

use to claim this right as well.⁴⁴⁰ Added to this, the Citizenship Act does not offer any direction as to how a determination of statelessness should be made.⁴⁴¹

5.4. South Africa's organisational structure

South Africa's civil registration system is centralised,⁴⁴² and the Department of Home Affairs (DHA) is the central administrative body.⁴⁴³ The result of this being that there is a disjuncture between birth registration coverage in urban areas compared to rural areas.⁴⁴⁴ Further, because people living in rural areas cannot access registration points as easily as urban residents, there is a greater likelihood of needing to apply for late registration.⁴⁴⁵ Therefore there is a disproportionate effect on rural residents trying to access birth registration. The DHA's revised regulations extended the early registration period from 7 days to thirty days,⁴⁴⁶ however; it is not guaranteed that a thirty-day window is wide enough to account for all groups of people.

5.5. Barriers to birth registration access

5.5.1. *Documentary requirements*

In 2016, the High court in *Naki v Director General* dealt with a discriminatory provision in the Regulations of Births and Deaths of 2014. This regulation, which was created to give effect to section 9 of the BDRA (the notice of birth provision), required under subsections (3)(f) and (5) under regulations 3, 4, and 5, that the parents of the child provide proof of having a valid passport

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

⁴⁴² UNICEF 'CRVS - Birth, Marriage and Death Registration in South Africa' op cit note 398.

⁴⁴³ Ibid.

⁴⁴⁴ SADC Region Technical Report op cit note 50 at 50.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid at 48.

and visa permit where one parent is a non-citizen.⁴⁴⁷ These provisions were mandatory in that they required that an application “must” provide such proof, and under subsection 5 that the failure to provide such proof means that the notice of birth “shall not” be accepted.⁴⁴⁸ This meant the child's registration became reliant on the status of the parents.⁴⁴⁹ Seeing that complainants involved one South African citizen and one citizen of the DRC,⁴⁵⁰ the child's birth could not be registered because the parent from the DRC could not provide the documents required under the regulations. The court found these provisions unconstitutional in that they were inconsistent with the right to a name and nationality under section 28(1)(a) of the Constitution and the paramountcy of the best interests principle under subsection 2. They have thus removed the mandatory nature of these regulations and read in the qualification ‘where available’ for documentation requirements.⁴⁵¹ This judgement went far in reducing the discrimination of people based on their status and is consistent with article 7 of the CRC and article 6 of the ACRWC in that respect. It also embodies the spirit of the Inter American Court on Human Rights’ statement that the “*migratory status of a person cannot be a condition for the state of grant nationality.*”⁴⁵² Despite the fact that in law these protections now exist, it is vital that the South African government enforces this court decision to ensure its implementation on the ground to account for the cases where people cannot provide these documents.

5.5.2. Late registration problems

Late registration can discriminate against migrants in South Africa.. To understand why, one must acknowledge that many people are not able to register within the provided time limits,⁴⁵³ particularly when these periods are too short. This is unfortunate as early registration does not have the same number of requirements as late registration. For example, registration after thirty days but before one year requires a notice of birth; a proof of birth; the biometrics of the child; the

⁴⁴⁷ *Naki and Others v Director General: Department of Home Affairs and Another* 2018 (3) All SA 802 (ECG) para 15-17.

⁴⁴⁸ *Ibid* para 18.

⁴⁴⁹ *Ibid* para 30.

⁴⁵⁰ *Ibid* para 1.

⁴⁵¹ *Ibid* para 39.

⁴⁵² *Yean and Bosico* supra note 126 para 156.

⁴⁵³ *Citizenship and Statelessness* op cit note 228 at 60.

fingerprints of the parent or guardian or next of kin; an affidavit which has the reasons for the late registration; and an ID or passport and permit of the parents, among others⁴⁵⁴ There is no longer a fee for late registration according to the DHA (as is the general case with early registration), however the regulations do not reflect this.⁴⁵⁵ Late registration that is between one year and seven years has the additional requirement of an affidavit which must be used to support your notice of birth.⁴⁵⁶ These requirements can potentially alienate undocumented migrants for similar reasons as above, such as the requirement of a ID or passport, as well as increase costs for an application.

5.5.3. COVID 19 and other structural problems

Documentary requirements for registration may be sensible in some respects, however such documentation must be made reachable.⁴⁵⁷ In 2019, access to documentation was forestalled as the Cape Town Refugee Reception Office closed down indefinitely.⁴⁵⁸ Difficulties in accessing documentation became exacerbated by issues such as queue times, corruption, and distance from registration offices.⁴⁵⁹ In a 2021 report the DHA cited numerous budget and circumstance related difficulties which have reduced its productive capacities. In its virtual briefing on the Annual Performance Plan for 2021/2022, the DHA announced that they still face challenges due to the COVID 19 pandemic, budgetary constraints, insufficient staffing, the SITA system being offline which caused delays in applications, and inadequate legislation for refugee encampments.⁴⁶⁰ Funding has been a particular concern for the DHA, as it had cited budget cuts worth R563 million, with additional funds having been reallocated to COVID-19 issues.⁴⁶¹

In the performance quarter 2 and 3 of the 2020-21 period, the DHA provided a number of reasons how COVID has affected productivity. First, the lockdown itself has caused some services to be

⁴⁵⁴ Home Affairs Civil Services 'Birth Certificates' op cit note 401.

⁴⁵⁵ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 6.

⁴⁵⁶ Home Affairs Civil Services 'Birth Certificates' op cit note 401.

⁴⁵⁷ Scalabrini 'Birth Registration in South Africa' op cit note 213 para 7.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ PMG 'Home Affairs 2021/22 Annual Performance Plan: with Ministry PMG', available at <https://pmg.org.za/committee-meeting/32764/>, accessed on 5 July 2021.

⁴⁶¹ Ibid.

suspended, however services such as ID documents and passport applications have resumed recently.⁴⁶² Second, access to health facilities has been strained, which has resulted in frustrated birth registrations.⁴⁶³ This particular problem has in no doubt impacted undocumented migrants as well. Third, social distancing practices have resulted in longer queue times and less staff being available for service.⁴⁶⁴ For example, staff had to work in rotations, and front offices had skeletal staffing which has decreased capacity.⁴⁶⁵ In these respects, South Africa should better balance COVID-19 regulations and the right to birth registration. The main reason for this being that slowed down registration systems will inevitably affect undocumented migrants wishing to access registration. If migrants cannot access registration, then the risks of statelessness and the challenges of non-registration will persist and further marginalize these groups, as well as contravene the right to birth registration, nationality, and best interests of the child doctrine.

5.6. Conclusion

South Africa, while having a firm basis for the right to nationality within its constitution, still fails to evenly address the problem on the ground. For birth registration, barriers include the centralised system, onerous requirements for late registration, and COVID-19 related difficulties. Nationality access is constrained due to unequal requirement of a birth registration because any children other than biological children of South African citizens require this. Furthermore, naturalisation can only be accessed at age of majority, which places children in an uncertain position up until that point. Children who would otherwise be stateless can access nationality, but without proper guidelines for how these laws are to be implemented, there is little translation in practice.

The next country profile will cover the situation in Zambia, with a similar focus and structure as was applied to South Africa.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

5.7. Country Profile: Zambia

Data on Zambia’s stateless population is scarce, and the precise number of stateless people is not well known.⁴⁶⁶ However, statistics show that there are around 92,598 “persons of concern” (a mixture of asylum seekers, refugees and former refugees) in the country.⁴⁶⁷ There are also indicators that show that there are migrants, such as refugees or asylum seekers, that do not have documentation which they can use to legitimise their stay.⁴⁶⁸ The International Organisation for Migrants has identified at least 396 irregular migrants in Zambia,⁴⁶⁹ and around 215 “stranded migrants”, which are migrants residing in Zambia who do not have the documents to legally justify their stay and who are unable or reluctant to leave.⁴⁷⁰ There is a prominent gap in information on the precise amount of migrant children in Zambia, which places these children at heightened risk of being trafficked or otherwise exploited.⁴⁷¹

Furthermore, Zambia has exceedingly low birth registration completeness for both migrants and nationals, as 2018 estimates show this to be 19.3 percent on average.⁴⁷² For children under five the amount is 14 percent, and only six percent of such children have a birth certificate.⁴⁷³ This is despite the fact that Zambia’s Births and Deaths Registrations Act makes birth registration available for all children, regardless of status.⁴⁷⁴ These low counts greatly increase the risks of statelessness and other abuses associated with non-registration. Therefore, whether migrants can claim their rights to identity, registration, and ultimately reduce their risks of statelessness, depends on the legal and structural avenues in place within Zambia to facilitate them.

⁴⁶⁶ National Legislative Bodies & National Authorities op cit note 406 at 13.

⁴⁶⁷ UNHCR ‘Operational Update Zambia’ (2020) at 2, available at <https://reporting.unhcr.org/zambia>, accessed on 19 July 2021.

⁴⁶⁸ National Legislative Bodies & National Authorities op cit note 406 at 15.

⁴⁶⁹ IOM UN Migration op cit note 51 at 33.

⁴⁷⁰ Ibid at 37.

⁴⁷¹ Ibid at 43.

⁴⁷² Zambia Statistics Agency op cit note 261 at 3.

⁴⁷³ Citizenship and Statelessness op cit note 228 at 67.

⁴⁷⁴ The Births and Deaths Registration Act 51 of 1973, art 5.

5.8. Zambia’s track record in ratifying international conventions

Zambia, like South Africa, is party to many of the core statelessness conventions. These include the ACRWC,⁴⁷⁵ CRC, CEDAW, ICCPR, the 1954 Convention, and the UDHR.⁴⁷⁶ Like South Africa, Zambia has not ratified the 1961 Convention on the reduction of statelessness.⁴⁷⁷ Zambia has made a number of reservations to the 1954 convention, such as a reservation against providing education, and a reservation that excludes the right to freedom of movement for stateless people.⁴⁷⁸

5.9. Nationality for undocumented migrants

Zambia’s Constitution of 2016 provides nationality attribution for a number of grounds. These are by birth, by descent, registration, and adoption.⁴⁷⁹ Nationality access for people who do not have a blood link to a citizen to the country, however, is limited, and naturalisation (which Zambia calls registration under its constitution) still leaves a protection gap in place for migrants.

5.9.1. *Acquisition by birth*

For acquisition by birth, Article 35(1) of the Constitution states that “*A person born in Zambia is a citizen by birth if, at the date of that person’s birth, at least one parent of that person is or was a citizen.*” This clause calls for two comments. First, that it allows for nationality acquisition by birth if a parent *was* a citizen. Second, that it requires a bloodline link to a Zambian citizen for nationality to be passed by birth.⁴⁸⁰ This qualification therefore closes nationality by birth to any undocumented children who are born in the territory who cannot establish a link to a citizen. It

⁴⁷⁵ African Union ‘Status List’ op cit note 276.

⁴⁷⁶ IOM UN Migration op cit note 51 at 89-91.

⁴⁷⁷ United Nations Treaty Collection ‘Convention on the Reduction of Statelessness’ op cit note 257.

⁴⁷⁸ UNHCR ‘Declarations and Reservations to the 1954 Convention relating to the Status of Stateless Persons’ (2006) at 10, available at <https://www.unhcr.org/uk/416114164.pdf>, accessed on 22 August 2021.

⁴⁷⁹ The Constitution of the Republic of Zambia of 2016, art 33.

⁴⁸⁰ National Legislative Bodies & National Authorities op cit note 406 at 30-2.

also appears that there are certain migrants in the territory that are under the mistaken belief that they can attain nationality by simply being born on the territory,⁴⁸¹ and are at great risk of becoming stateless as a result.

In Zambia there is no provision in its domestic law for nationality acquisition to children born on the territory who would otherwise be stateless.⁴⁸² If Zambia ratified the 1961 Convention, this gap would be closed. However, since Zambia is a dualist nation,⁴⁸³ the provisions of the convention would need to be incorporated into domestic law first, which may increase the duration of vulnerability. Furthermore, since Zambia is a party to the CRC and the ACRWC, it must accept that children born on the territory have a right to nationality as provided for under those conventions.

5.9.2. Access to naturalisation

Article 37 allows for naturalisation via application to Zambia's citizenship board. The requirement of this application is that the person has reached age 18.⁴⁸⁴ This has previously been mentioned as a long time for a child to have no access to nationality as it results in a legal limbo during that time. There are different rules which apply depending on the place of birth of the applicant, as the residence requirement is at least five years when born in Zambia,⁴⁸⁵ and ten years if born elsewhere,⁴⁸⁶ unless it can be shown that they had had an ancestor who was or is a citizen - in which case it would be five years.⁴⁸⁷ Article 20(1) of the Citizenship Act of Zambia provides that the application for registration can also be subject to a fee.⁴⁸⁸ The precise amount for this fee is not provided, however it is submitted that any fee may result in exclusion. There is a closed list of

⁴⁸¹ Ibid at 15.

⁴⁸² 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: Zambia' (2012) at 7, available at <https://www.refworld.org/publisher,UNHCR,,ZMB,4f9660982,0.html>, accessed on 3 July 2021.

⁴⁸³ National Legislative Bodies & National Authorities op cit note 406 at 26-7.

⁴⁸⁴ The Citizenship of Zambia Act 33 of 2016, art 37.

⁴⁸⁵ Ibid, art 37(1)(a).

⁴⁸⁶ Ibid, art 37(1)(c)

⁴⁸⁷ Ibid, art 37(1)(b)

⁴⁸⁸ Ibid, art 20(1).

grounds for the rejection of an application, such as fraud, falsification of documentation, previous offences, bankruptcy, or that such an application would be against public interest.⁴⁸⁹ This means that the scope of such discretion is not unlimited. The formulation of this article could also suggest that the citizenship board must provide for naturalisation if none of the listed grounds are attributable to the applicant.⁴⁹⁰

Article 37 also requires that one is “ordinarily resident.”⁴⁹¹ This introduces two related questions. The first being the meaning of “ordinarily resident”, and the second being whether this qualification equates with “lawful residence”, which as discussed in chapter 2 becomes problematic as it excludes undocumented migrants. The Constitution is not particularly helpful in this regard, as it states that ordinarily resident means “*residing in a place for a prescribed period of time.*”⁴⁹² The Citizenship Act on the other hand provides a little more detail, stating that it means one “*has been a resident in Zambia and is a holder of a **residence permit** issued under the Immigration and Deportation Act, 2010.*”⁴⁹³ The Ministry of Foreign Affairs website provides information required for an application for a residence permit, such as: a completed application form, two passport photos, a certified birth certificate, a certified copy of a passport, and documentary proof supporting residence in Zambia.⁴⁹⁴ Needless to say, these are documents that are out of reach to many undocumented migrants. However, this does not fully answer whether *lawful* residence is required. In this respect, the application guidelines states that “*this permit confers permanent residence to the holder and is issued to: Persons who have been ordinarily and **lawfully residents** in Zambia.*”⁴⁹⁵ The language used here requires the cumulative fulfilment of ordinary *and* lawful residence. This means that an application for naturalisation ultimately requires lawful residence in Zambia, which makes naturalisation impossible for undocumented migrants even if they fulfilled the 10-year residence as provided for in the Constitution.⁴⁹⁶ For naturalisation

⁴⁸⁹ Ibid, art 21(1), (2), (3).

⁴⁹⁰ Kelly Kapianga ‘Report on Citizenship Law: Zambia’ (2020) at 17, available at <https://cadmus.eui.eu/handle/1814/69240>, accessed on 1 August 2021.

⁴⁹¹ The Constitution, art 37.

⁴⁹² The Constitution, art 266.

⁴⁹³ The Citizenship of Zambia Act, art 1.

⁴⁹⁴ Ministry of Foreign Affairs ‘Resident Permits’, available at <https://www.mofa.gov.zm/resident-permits/>, accessed on 2 July 2021.

⁴⁹⁵ Ibid.

⁴⁹⁶ Kelly Kapianga op cit note 490 at 23; Compilation Report Universal Periodic Review: Zambia op cit note 482 at 4.

to be a viable option for nationality access for undocumented migrants, Zambia should remove this lawfulness requirement, as well as ratify the 1961 convention to fill this gap.

5.9.3. General prohibition on entry for undocumented migrants

Zambian laws prohibit the entry of undocumented migrants into the country simply on the basis that they have this status. Under article 35 of the Immigration and Deportation Act, prohibited immigrants are not allowed to have a visa, a temporary or permanent residence permit, or access into the country for any reasons.⁴⁹⁷ The second schedule of the act defines a prohibited immigrant as “*persons entering without any travel documents.*” More specifically, it is any person that is over 16 and does not have a valid passport.⁴⁹⁸ A hard-line barrier to access into the territory would leave many people in vulnerable positions, as well as amount to barring nationality access if their purpose was to seek such nationality within Zambia.

5.9.4. Uneven procedural guarantees

In regard to deprivation of nationality, Zambian laws provide the right to make representations before the Citizenship Board, as provided for in article 41 of the Constitution. The right to make representations is bolstered by the right to appeal to a High Court as provided for in Article 30 of the Citizenship act. The right to appeal, as stated in chapter 2, is essential in ensuring that the right to nationality is preserved. These procedural rights do not translate to other areas such as naturalisation, as the Citizenship Act under articles 21-24 do not provide for a right to reasons, or a right to review or appeal.⁴⁹⁹ The lack of these rights makes the process largely a discretionary one (barring the above-mentioned limits), and therefore applicants have few avenues available if their application is rejected.

⁴⁹⁷ The Immigration and Deportation Act 18 of 2010, art 35.

⁴⁹⁸ African Centre for Migration of Society ‘Free & Safe Movement in Southern Africa: Report to Inform Advocacy Promoting Safe and Unencumbered Movement of People Across Southern Africa’s International Borders’ (2018) at 102, available at https://osisa.org/wp-content/uploads/2019/04/REPORT_Free-and-Safe-Movement-in-Southern-Africa.pdf, accessed on 12 July 2021; Immigration Act, Second Schedule.

⁴⁹⁹ The Citizenship Act, arts 21, 22, 23, 24; Citizenship and Statelessness op cit note 228 at 42.

5.10. Zambia's organisational structure

The organisational structure of Zambia's birth registration system is centralised.⁵⁰⁰ Geographical issues play a major role in whether birth registration is accessible, and centralised systems tend to concentrate registration posts in certain areas, which increases costs for applicants to reach them, as well as introduces safety concerns.⁵⁰¹ In a practical example, a mother of two living in Kabwe, a city in central Zambia, stated that a decentralisation programme introduced in the area made registration easier for her as she would have previously needed to travel to the Department of National Registration in Lusaka.⁵⁰² Statistics show that on average, registration facilities may be as far as 5 to 10 kilometres away for urban populations, and more than 10 kilometres for rural populations.⁵⁰³ Travel times on foot may be as long as one hour in urban areas, to 4 - 8 hours or more in rural areas.⁵⁰⁴ This shows that accessibility can rest on geographical factors, which makes the reachability of registration points exceedingly important. For refugees specifically, there is the problem that they have restrictions on their movement, which makes travelling to registration points difficult or impractical.⁵⁰⁵ Therefore a directed and migrant-inclusive approach that is used alongside a decentralised system would be required.

5.11. Birth registration and undocumented migrants

Birth registration is compulsory in Zambia,⁵⁰⁶ as this is stated in the Births and Deaths Registrations Act. The periods for registration are one month for early registration, and between

⁵⁰⁰ National Legislative Bodies & National Authorities op cit note 406 at 17.

⁵⁰¹ Plan 'Count Every Child: The Right to Birth Registration' (2009) at 44, available at <https://reliefweb.int/sites/reliefweb.int/files/resources/56D4BFF27FE425B249257671001C075C-Count%2520Every%2520Child%2520report%25202009.pdf>, accessed on 5 June 2021.

⁵⁰² Citizenship Rights in Africa Initiative 'Zambia: Birth Registration, Right of Every Child' (2018), available at <https://citizenshiprightsafrika.org/zambia-birth-registration-right-of-every-child/>, accessed on 10 June 2021.

⁵⁰³ Centre of Excellence for CRVS Systems 'Snapshot of Civil Registration and Vital Statistics Systems of Zambia' (2020) at 5, available at <https://crvssystems.ca/country-profile/zambia>, accessed on 10 June 2021.

⁵⁰⁴ Ibid at 5.

⁵⁰⁵ National Legislative Bodies & National Authorities op cit note 406 at 17.

⁵⁰⁶ Zambia Statistics Agency op cit note 261 at 4.

two and 12 months for late registration.⁵⁰⁷ There is technically a penalty for late registration in the form of a fee, however this is not enforced in order to help incentivize people to register.⁵⁰⁸

5.11.1. *Public sensitisation*

As stated above, birth registration in Zambia is low. In rural areas, this is partially attributed to lack of awareness of the importance of birth registration.⁵⁰⁹ Furthermore, many people do not have the requisite information on how to effect birth registration.⁵¹⁰ Reluctance to provide birth registration can also be linked to traditional beliefs that are rooted in suspicion of colonial structures and systems.⁵¹¹ Zambia, for example, was one of the post-colonial countries that used colonial era laws within its national legislation, which includes laws on birth registration.⁵¹² Public sensitisation should be done in local languages, and be conducted in such a way that any concerns that people may have for birth registration are cleared.⁵¹³ Undocumented migrants that live in these rural areas should also be made aware of the importance of birth registration.

5.11.2. *Women, girls, education, and birth registration*

Addressing education for women and girls is important in ensuring birth registration. In Zambia there appears to be a direct link between the educational level of a woman and the rate at which her child's birth is registered.⁵¹⁴ In 2005, the overall level of birth registrations stood at 10 percent, but increased alongside the level of education of the mother, with an increase to 9 percent for

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ndhlovu Jacob K 'Design and Development for Web Based Zambia Electronic Perinatal Record System: A Case Study of Kasenengwa District Health Centre Clinic in Chipata, Zambia' (2020) *IJMR* at 4.

⁵¹⁰ Ibid.

⁵¹¹ The African Child Policy Forum & Plan 'Universal Birth Registration: The Challenge in Africa' (2005) at 3, available at <https://unstats.un.org/unsd/vitalstatkb/Knowledgebase/Article50665.aspx>, accessed on 27 July 2021.

⁵¹² Ibid.

⁵¹³ Ndhlovu Jacob K op cit note 509 at 4.

⁵¹⁴ UNICEF 'The 'Rights' Start to Life: A Statistical Analysis of Birth Registration' (2005) at 11, available at <http://www.albacteria.ma/xmlui/bitstream/handle/123456789/30710/0467The%20%27Rights%27%20Start%20%20to%20Life%20%20A%20statistical%20analysis%20of%20birth%20registration.pdf?sequence=1>, accessed on 29 July 2021.

women with primary school education, and 16 percent for women with secondary or tertiary education.⁵¹⁵ There are indicators to show imbalances male and female schooling, such as lower rates of enrolment for girls (150 000 boys vs 250 000 girls), and unequal grade 12 completion (17 017 boys vs 10 773 girls).⁵¹⁶ There is also a disproportionate illiteracy rate between men and women, with men at 19% and women at 40%.⁵¹⁷ Given this link between education and birth registration, focus should be placed in ensuring that all women and girls are given the same educational opportunities as men to increase birth registration rates.

Linked to this issue is educational access for undocumented migrants, and migrant women and girls in particular. The right to education is provided for in both the ACRWC and the CRC under articles 11 and 28 respectively.⁵¹⁸ The right, however, has not been expressly provided for in the Zambian Constitution.⁵¹⁹ It has been included in Zambia's Education Act, which under articles 14 and 15 secures a child's right to education from primary to high school, as well as provides a right to free basic education.⁵²⁰ Importantly, article 19 of the act protects against discrimination "*in any matter.*"⁵²¹ Despite this, migrant women in Zambia have less education attendance compared to male migrants, as well as a reduction in secondary school involvement compared to males.⁵²² COVID-19 regulations further reduced access to education, with the Zambian government taking measures such as closing schools, which has interrupted schooling for an estimated 4.4 million children.⁵²³ Given these lopsided statistics, migrant women should be afforded equal access to education - as this is their right, and any structures which impede such access should be addressed. While it would be a gross oversimplification to suggest that the provision of education can alone increase birth registrations, the fact that the lack thereof is linked to decreased registration rates nevertheless indicates that it is a barrier.

⁵¹⁵ Ibid.

⁵¹⁶ Christine Phiri Mushibwe *What are the Effects of Cultural Traditions on the Education of Women?* 1 ed (2014) at 38.

⁵¹⁷ Ibid at 36.

⁵¹⁸ CRC, art 28; ACRWC, art 11.

⁵¹⁹ Right to Education Project 'Right to Education Country Factsheet Zambia' (2021) at 1, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Country_Factsheet_Zambia_2012.pdf, accessed on 29 July 2021.

⁵²⁰ The Education Act 23 of 2011, arts 14 & 15.

⁵²¹ Ibid, art 19.

⁵²² IOM UN Migration op cit note 51 at 64.

⁵²³ OCHA 'Zambia Situation Report', available at <https://reports.unocha.org/en/country/zambia>, accessed on 19 July 2021.

5.11.3. *Supply-side difficulties*

Supply-side difficulties are issues that face the Zambian government in the provisioning of birth registration services. Problems such as this apply generally to any person resident in Zambia, and therefore it is a migrant problem. In Zambia, there is a lack of infrastructure, human resources, and infrequent service availability.⁵²⁴ A particularly pressing issue is weak coordination between the Ministry of Health, the Ministry of Home Affairs, and various grassroots or village registration archives.⁵²⁵ It is even likely that recourse to a decentralised system is not guaranteed to mend this issue,⁵²⁶ therefore, priority should be placed on ensuring that vital registration systems are strengthened and improved across the board.

5.11.4. *Restrictions on movement*

Restrictions on movement can hamper birth registration access for refugees in Zambia. Refugees do not readily have freedom of movement due the reservation to article 26 of the 1954 convention,⁵²⁷ which states that:

“Each Contracting State shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory.”

The reservation itself states that the Zambian government has the sole discretion to decide where stateless people are domiciled.⁵²⁸ For refugees that are resident in areas outside of the Meheba or Mayukwayukwa settlements (which are the main settlements they are intended to reside in), there are risks of abuse or arrest due to their unlawful status.⁵²⁹ They would effectively be

⁵²⁴ Eustarckio Kazonga & Doris Katai K Mwinga ‘Strengthening of Civil Registration and Vital Statistics System for Enhanced Public Health Information in Zambia’ (2020) 9 *IOSR-JNHS* 2 at 12.

⁵²⁵ Count Every Child op cit note 501 at 69.

⁵²⁶ Ibid.

⁵²⁷ UNHCR Declarations and Reservations to the 1954 Convention op cit note 478.

⁵²⁸ Compilation Report Universal Periodic Review: Zambia op cit note 482 at 5.

⁵²⁹ Ibid.

“undocumented” refugees due to their lack of a permit to remain in urban areas.⁵³⁰ These restrictions place them in a precarious situation. By living in urban areas, they could easily access the facilities they need (such as the centralised birth registration system), but deal with the risks associated therewith. Or they could live in the allotted settlements, but struggle with access to registration due to distance.⁵³¹

5.11.5. *Documentation requirements*

Registration gatekeeping through documentation requirements also occurs. It is also commonly coupled with an extensive and complicated administrative process.⁵³² One example of this barrier can be seen with the refugees residing in urban areas, who are required to have a refugee identity document to be eligible for a birth certificate.⁵³³ Provisioning of a birth certificate can also be reliant on whether the applicant has a birth record from a health centre.⁵³⁴

5.12. Conclusion

There are multidimensional challenges in Zambia for both birth registration and nationality. For birth registration, Zambia needs to address its usage of a centralised system, as this has the effect of reducing access for people who live in rural areas due to costs of travel and safety. Other barriers include public reluctance to register, shortfalls in the education of women and girls, restrictions on movement, and problems concerning the supply of birth registration. Turning to nationality, naturalisation is impeded by cost requirements, as well as the fact that someone would need to be a lawful resident before they are eligible to apply. There are no provisions on nationality access for children who would otherwise be stateless. There are also insufficient procedural protections in place for appeals surrounding naturalisation.

⁵³⁰ Ibid.

⁵³¹ National Legislative Bodies & National Authorities op cit note 406 at 17.

⁵³² Compilation Report Universal Periodic Review: Zambia op cit note 482 at 4.

⁵³³ Ibid.

⁵³⁴ Ibid.

CHAPTER 6: RECOMMENDATIONS AND CONCLUSION

6.1. Introduction

The following points will list solutions which - if applied - would help address these problems. These recommendations will be split into two categories. Namely, law reform and civil and institutional reform. Thereafter the thesis question will be answered.

6.2. Law Reform

6.2.1. *Addressing nationality*

From the non-Malagasy children in Madagascar facing statelessness and exclusion, to the women and children in Eswatini confronted with patrilineal nationality laws; systems that discriminate directly or indirectly on the basis of gender, status, age, ethnicity, and race (among others) need to be removed.⁵³⁵ Old or outdated laws should be reviewed and updated especially where they are unable to give effect to human rights such as access to nationality and birth registration, and generally nationality law and practice should be harmonised.

⁵³⁵ Citizenship and statelessness op cit note 228 at 118.

The legislative silence in many SADC states regarding foundlings must be addressed to confront the “invisible” nature of children in this category. SADC states also need to ensure that there are sufficient avenues available for nationality access for children who would otherwise be stateless, as this is an essential protection for undocumented migrants. This can be achieved by more ratifications of the 1961 Convention on the Reduction of Statelessness, and/or via focused implementation of article 7 of the CRC and article 6 of the ACRWC. While the right is available to children in South Africa, priority needs to be placed on ensuring that there is no arbitrary differentiation between biological children and other categories of children, such as migrant children, if they would otherwise be stateless. Therefore, it is suggested that section 2(4)(b)(ii) of the BDRA be changed to remove birth registration as a requirement.⁵³⁶ Zambia is silent on the ‘otherwise be stateless’ protection and should therefore include this in its Citizenship Act to give effect to its CRC and ACRWC commitments. Generally, an application for nationality for children who would otherwise be stateless should be implemented to give effect to this right.

Naturalisation is an important area where SADC states need to improve, as in certain cases the avoidance of statelessness can bear on the efficacy and availability of this mechanism. While it is seen as “exceptional”, it should at the very least be made more affordable, less subject to high or unchecked levels of discretion, and without as much bureaucratic and administrative rigours.⁵³⁷ Any ethnic discrimination should be abolished, such as with the Malagasy requirement in Madagascar. Zambia ought to ensure that its exclusionary naturalisation laws, such as its “lawful residence” requirement, and its accompanying fee requirements, are removed as they can retard access to nationality for migrants. South Africa, while allowing naturalisation in principle, does not provide for early naturalisation before the age of 18. In this respect, it is recommended that South Africa implements the African Committee of Experts on the Rights and Welfare of the Child’s recommendations on providing early nationality to avoid a situation of legal limbo.⁵³⁸ This should equally apply to all SADC states that do not allow for early naturalisation.

Additional review and appeal mechanisms should be put in place to ensure that undocumented migrants can appeal decisions made regarding their nationality or birth registration status, as this

⁵³⁶ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 9.

⁵³⁷ Citizenship and statelessness op cit note 228 at 118.

⁵³⁸ General Comment on Article 6 of the African Charter op cit note 63 at 31.

would be in alignment with their procedural rights and the principle of the best interests of the child.⁵³⁹

Stateless populations require additional mapping in key areas. In Zambia this applies due to the insufficient population of child migrants available.⁵⁴⁰ South Africa should increase its efforts to designate stateless populations.⁵⁴¹

The ratification of additional treaties should be made across the board, as there are significant deficiencies in the acceptance of the ICRMW, the 1961 Convention, and the 1954 Convention. SADC states should implement the SADC parliamentary forum's resolution that implored members to address nationality matters, children who would otherwise be stateless, and deficient registration systems.⁵⁴²

6.2.2. Breaking barriers to birth registration

Providing proper birth registration that is accessible must be prioritised. Therefore, the recommendations made by the African Committee that affordable, decentralised, and properly managed birth registration, should be implemented.⁵⁴³ Furthermore, document free birth registration must be provided, or where this is impracticable, at least the allowance of alternate forms of identification that do not rely on one providing national IDs or documents of the like. These alternate forms could include oral attestations, birth notifications, or evidence from witnesses.⁵⁴⁴ Additionally, any laws or regulations which frustrate or preclude the integration of migrants needs to be removed, updated, or harmonised.

⁵³⁹ Citizenship and statelessness op cit note 228 at 118.

⁵⁴⁰ IOM UN Migration op cit note 51 at 43.

⁵⁴¹ Joint Submission to the Committee on the Rights of the Child op cit note 400 at 8.

⁵⁴² SADC Parliamentary forum '40th plenary assembly session, November 2016, Harare, Zimbabwe,' (2016), available at http://citizenshiprightsfrica.org/wpcontent/uploads/2017/01/Resolution-Statelessness_SA, accessed on 15 August 2021.

⁵⁴³ General Comment on Article 6 of the African Charter op cit note 63 at 2.

⁵⁴⁴ Ibid at 11.

Late registration is an area that requires urgent reform. The majority of SADC states administer punitive measures for late registration, such as fines, imprisonment, or the requirement of a court order. These alienate migrants due to their vulnerable position. South Africa has many documentary requirements for birth registration, these should be reduced to ease the process. Even though fees for late registration have been removed, this development must be reflected within South Africa's regulations and practice. The SADC at large should remove or reduce fee requirements.⁵⁴⁵ Furthermore, a specialised pathway to registration that is inclusive for undocumented migrants who could not register in time due to being giving birth in transit or for other reasons could be implemented to address these issues.

Centralised systems are underperforming in supply of accessible service for people from rural backgrounds. In this sense, either decentralised systems should be implemented, or existing systems need to be strengthened and made more reachable.⁵⁴⁶ In the case of Zambia in particular, a decentralised system may not be enough to address structural problems such as low resources and coordination, therefore in addition to using a decentralised system, Zambia should ensure proper functioning of its civil registration system.

Capacity structures must be improved. This means addressing human resource shortages,⁵⁴⁷ digitalising registration databases and CRVS systems, or introducing alternate ways to undertake birth registrations, such as using mobile phone registration through dedicated applications.

All instances of legally mandated gender discrimination for birth registration ought to be abolished. This equally applies to laws that appear gender-neutral on the surface but can disproportionately affect women (such as Mozambique's requirement that both the mother and the father be present for birth registration.) South Africa should ensure that the *Naki* decision's judgment is enforced, and that the child of a foreign spouse without a visa or passport can qualify for birth registration.

COVID-19 has introduced novel challenges to birth registration. Registration services in the wider SADC should therefore be considered an essential service that is not liable to closure during a

⁵⁴⁵ Ibid at 28.

⁵⁴⁶ Ibid at 38.

⁵⁴⁷ Ibid at 41-2.

lockdown. In South Africa, while the measures taken by the DHA were compliant with social distancing, these measures should be properly balanced and weighted with the right to birth registration. Zambia must ensure that the right to education for women is not disproportionately impeded by the pandemic, as there is a demonstrable link between female illiteracy and lower birth registration.

6.3. Civil and Structural Reform

Additional resources should be allocated to advocacy efforts to raise awareness of the importance of registration.⁵⁴⁸ It is essential that these efforts are migrant inclusive in that they are both made aware of their right to registration, as well as how it would benefit them in both the short and long term. These may be via mediums such as workshops, advertisement campaigns, hashtags, or newspapers. Community figures such as chiefs, village headmen, and religious leaders can play a particularly useful role in disseminating information at grassroots levels, as well as help reduce customary beliefs that deter registrations.

Registration officials should be properly trained and made aware of any implicit biases they may have for foreign nationals, statelessness people, and undocumented migrants. Ensuring that they are not frustrating birth registration or nationality access is important as they are often the first point of contact between the state and the individual. Having registration officials that are friendly and understanding may decrease the effect of migrants avoiding official institutions in fear of deportation.

Finally, the important role women play in birth registration must be strengthened. In Zambia, midwives and birth attendants are specially situated to provide birth registration due to their close contact with mothers.⁵⁴⁹ NGO efforts have worked to strengthen these systems, which had worked to great effect on the ground.⁵⁵⁰ It is recommended that other SADC members reinforce the role

⁵⁴⁸ The African Child Policy Forum & Plan op cit note 511 at 3.

⁵⁴⁹ Count Every Child op cit note 501 at 42.

⁵⁵⁰ Ibid.

of women in the registration process and implement similar systems to increase birth registrations. Furthermore, patriarchal structures that reduce the agency and independence of women must be acknowledged, addressed, and dismantled.

6.4. Conclusion

Even though children do not have a right to the nationality of the host state, host states must still ensure that the right to nationality is made available to them. SADC states have had uneven implementation of the right however, and these gaps have resulted in widespread marginalisation and human rights abuses. Birth registration - which is supposed to be the main protection against statelessness - had many multifaceted challenges, some affecting migrants specifically, and others applying more generally. Barriers such as fee or documentary penalties for late registration, widespread use of centralised organisational structures, COVID-19 challenges, gender discrimination, and deficiencies in public sensitisation are key problem areas in many SADC member states. The prevalence of these issues has resulted in very low registration counts on the ground, which has not yet fully been addressed.

Taken together, these problems severely violate the rights to birth registration and nationality, which disproportionately impacts migrant children and increases their risks of statelessness. For the undocumented and invisible to be given their due justice, swift, proactive, and decisive action is necessary.

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