IS SOUTH AFRICAN REFUGEE LAW CREATING A STATELESS GENERATION?

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LLM (Human Rights Law)

By

Megan Catherine Lee

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Prepared under the supervision of Professor Amanda Barratt

Faculty of Law, University of Cape Town

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DEDICATION

To all the refugees and stateless persons living in South Africa.

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LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
AU	African Union
BDRA	Births and Deaths Registration Act
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs
EU	European Union
ICCRP	International Covenant on Civil and Political Rights
ILC	International Law Commission
LHR	Lawyers for Human Rights
OAU	Organisation of African Unity
PAJA	Promotion of Administrative Justice Act
RAB	Refugee Appeal Board
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SCA	Supreme Court of Appeal
SCRA	Standing Committee for Refugee Affairs
UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	UN International Children's Emergency Fund
UNGA	UN General Assembly
UNHCR	United Nations High Commissioner for Refugees

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CHAPTER ONE: INTRODUCTION

1.1. Background to the Study

According to its annual Global Report, the total 'population of concern' to the United Nations High Commissioner for Refugees (UNHCR), which includes refugees, asylum seekers, internally displaced persons (IDPs) and stateless persons, amounted to 71.4 million people by the end of 2017.[1] While this number only includes 3.9 million reported stateless persons, the UNHCR in fact estimates the total number of stateless persons to be more than 10 million worldwide.[2] Statelessness, which arises when a person is not considered a national by any State under the operation of its laws[3], is considered to be problem manufactured by the conduct of humans, which may result from a variety of different causes, including discrimination, State succession, conflicting nationality laws and burdensome administrative procedures.[4] Not possessing a nationality carries devastating consequences and, according to the UNHCR, stateless persons are often 'excluded from cradle to grave – being denied a legal identity when they are born, access to education, health care and marriage opportunities during their lifetime and even the dignity of an official burial and a death certificate when they die.'[5]

As part of the international legal regime addressing statelessness, both the Convention Relating to the Status of Stateless Persons[6] (1954 Statelessness Convention) and the Convention on the Reduction of Statelessness[7] (1961 Statelessness Convention) aim to regulate the status of stateless persons, delineate the rights afforded to those who are stateless, and prevent statelessness from birth. However, both Statelessness Conventions have experienced low rates of accession, with the 1954 Statelessness Convention having 91 State parties and 23 signatories, and the 1961 Statelessness Convention having 73 State parties and 5 signatories as of February

[1] UNHCR 'Global Report 2017' (2017) 3.
[2] UNHCR 'Global Action Plan to End Statelessness: 2014-2024' (2014) 6. The UNHCR only classifies a person as stateless if they do not have another 'reportable classification', such as 'refugee'. Thus, the 3.2 million excludes stateless persons who are also refugees, asylum seekers or IDPs.
[3] Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 art 1(1).
[4] UNHCR 'A Special Report: Ending Statelessness Within 10 Years' (2014) 2.
[5] Ibid.
[6] Convention Relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (1954 Statelessness Convention).
[7] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 12 December 1975) 989 UNTS 175 (1961 Statelessness Convention).

2019.[8] Complimentary to the Statelessness Conventions are a number of international and regional instruments protecting the right to a nationality and birth registration, as well as prohibiting discrimination in nationality matters, where this may result in statelessness.

Despite their historical connections, the protection of stateless persons has, for many decades, taken a back seat to the protection of refugees and asylum seekers, with international attention therefore only being focused on stateless persons who were also refugees.[9] However, in recent years, there has been a call by the UNHCR for renewed attention to statelessness, with the development of a Global Action Plan to end statelessness within 10 years (by 2024) by 'resolving existing situations and preventing the emergence of new cases of statelessness.'[10]

1.2. Statement of the Problem

Despite being party to a wide range of international treaties, including the Convention Relating to the Status of Refugees[11] (1951 Refugee Convention), South Africa is not a State party to either of the Statelessness Conventions and has not enacted any domestic legislation dealing with the recognition and protection of stateless persons. However, a number of legal instruments 'protect the right to nationality generally.'[12] As a result of not having any procedures to formally recognise statelessness in South Africa, the scope of the problem is difficult to determine. However, in 2016, the UNHCR estimated that there were up to 10 000 stateless persons in South Africa.[13] In 2011, Lawyers for Human Rights (LHR), a national non-profit organisation, launched its Statelessness Project and, with the support of the UNHCR, has identified numerous categories of stateless persons in South Africa, as well as those at risk of statelessness.[14] These categories include migrants, children of migrants, unaccompanied foreign children, orphans, children of single fathers, communities in border areas, and victims of Identity Document (ID)

[8] United Nations Treaty Collection 'Status of Treaties: Chapter V(3) Convention relating to the Status of Stateless Persons' (2019); United Nations Treaty Collection 'Status of Treaties: Chapter V(4) Convention on the Reduction of Statelessness' (2019).
[9] M Foster & H Lambert 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 *International Journal of Refugee Law* 564, 564.
[10] UNHCR (note 2 above) 4.
[11] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).
[12] JP George, R Elphick, K Ramjathan-Keogh & J van Garderen *Statelessness and Nationality in South Africa* (2013) 8.
[13] UNHCR 'South Africa: Operation Context' <https://www.unhcr.org/ibelong/south-africa-joint-strategy/>.
[14] George et al (note 12 above) 41.

fraud. From these categories, it is evident that migrants, which include refugees and asylum seekers, and the children of migrants, face particular risk of statelessness in South Africa. While it is a common public perception that South Africa is being flooded with migrants, a lack of credible data makes this difficult to substantiate. According to the 2011 Census, South Africa was home to 2.1 million migrants, representing 4.2 per cent of the total population.[15] However, since a Census has not been concluded since 2011, it is difficult to determine the number of migrants currently living in South Africa.

According to the UNHCR, by the end of 2017, South Africa hosted 88 694 refugees and 191 333 asylum seekers, whose applications for refugee status were still pending.[16] However, these numbers are not supported by the South African government, who claim that just over 1 million asylum applications have been registered between 2006 and 2015, and that, by the end of 2015, only 78 339 of these remained active.[17] The Department of Home Affairs (DHA), the government institution charged with the implementation and oversight of the refugee protection regime in South Africa, further claims that over 90 per cent of all asylum applications are made by economic migrants, thereby resulting in rejections.[18] This belief, along with the increasing view of asylum as a national security issue, has resulted 'in a kind of bureaucratic autonomy in which certain departments are actively working to shape the implementation and understanding of policies in ways that are not formally recorded and may violate both domestic and international legislation.'[19]

Despite South Africa's refugee legislation being one of the most progressive in the world, numerous policies and decisions made by the DHA are increasingly resulting in refugees and asylum seekers being denied their substantive and procedural rights, including the right to documentation and legal recognition.[20] This forced state of irregularity is often passed onto the

[15] P Lehohla *Census 2011: Migration Dynamics in South Africa* (2015) vi.
[16] UNHCR 'Global Trends: Forced Displacement in 2017' (2018) 66.
[17] Parliamentary Monitoring Group 'Asylum statistics: Department Home Affairs briefing; Immigration Amendment Bill 2016 deliberations' <https://pmg.org.za/committee-meeting/22163/>. See also The White Paper on International Migration for South Africa (GN 750 in GG 41009 of 28 July 2017). Neither of these documents defines the meaning of 'active' in this context and it is therefore assumed that it refers to the number of asylum applications that have yet to be finalised.
[18] The White Paper on International Migration for South Africa (GN 750 in GG 41009 of 28 July 2017).
[19] LB Landau & R Amit 'Wither Policy? Southern African Perspectives on Understanding Law, 'Refugee' Policy and Protection' (2014) 27 *Journal of Refugee Studies* 534, 539.
[20] Ibid 540.

children of refugees and asylum seekers, whose births cannot be registered and who are denied birth certificates.[21] While not all undocumented migrants, or children whose births are not registered, will automatically be rendered stateless, they are placed in a precarious situation and are at greater risk for losing, or being unable to claim, a nationality.[22] Furthermore, the implementation of the refugee protection framework is also relevant to the protection of stateless person since, without a domestic legislative framework identifying and protecting stateless persons, these persons often have no other choice but to rely on the laws protecting refugees in South Africa.

1.3. Research Aims and Objectives

The central aim of this study is to determine whether South African refugee law, and the implementation thereof, is creating a generation of stateless persons in South Africa. In order to address this question, the study will analyse the international and regional legal regimes designed to protect both refugees and stateless persons, and examine the general causes of statelessness. The study will investigate the South African domestic legal framework relevant to the protection of refugees and stateless persons. Importantly, the study will assess the implementation of South African refugee law by the DHA, and other government actors, in order to assess whether their specific conduct is leading to situations of statelessness. The study will also assess possible solutions to statelessness in South Africa, with specific regard to those situations caused by the implementation of the refugee protection regime.

1.4. Literature Review

The UNHCR has been instrumental in fuelling a renewed focus on the resolution and prevention of statelessness and, in that regard, has commissioned numerous studies on statelessness worldwide, often in collaboration with non-profit organisations, such as Refugees International[23] and LHR[24]. Further studies have been carried out, or funded, by various other institutions such as

[21] L van Waas 'The Children of Irregular Migrants: A Stateless Generation?' (2007) 25 *Netherlands Quarterly of Human Rights* 437, 446.
[22] Ibid 457.
[23] K Southwick & M Lynch *Nationality Rights for All: A Progress Report and Global Survey on Statelessness* (2009).
[24] George et al (note 12 above).

the Institute on Statelessness and Inclusion[25], the Pretoria University Law Press[26] (PULP) and the Open Society Foundations.[27] These studies have all focused on placing the problem of statelessness within the international human rights framework and aim to provide a set of guidelines to understanding and preventing statelessness.

One of the most comprehensive studies done on statelessness, to date, is the 2017 report titled *The World's Stateless Children*, published by the Institute on Statelessness and Inclusion. The study provides a worldwide overview of statelessness per region, and highlights the particular causes of statelessness within each region. The report then gives an in-depth discussion on childhood statelessness, and highlights the particular risk that the children of migrants and refugees face of becoming stateless. According to the report, children in a migratory context are 'more prone to falling victim to a conflict of nationality laws, at greater risk of having their birth go unregistered, and [are] often surprisingly beyond reach of the very safeguards designed to protect children in their situation from statelessness.'[28]

Bronwyn Manby has written extensively on statelessness in Africa and has identified discrimination as one of the major causes of statelessness within African States.[29] According to Manby, half a dozen African countries continue to limit nationality acquisition to specific ethnic groups and around a dozen States still contain some form of gender discrimination in their nationality laws, often in the form of mothers being unable to transfer their nationality to their children on an equal basis as fathers.[30] In addition, Manby conducts a comparative analysis of the nationality laws in 54 States in Africa and discusses how the conflict of these laws may result in statelessness in certain instances.

Within the South Africa context, most of the research on statelessness has been carried out by LHR, one of the legal implementing partners of the UNHCR in South Africa. In addition to the publication of numerous reports[31] on statelessness in South Africa, LHR also regularly provides

[25] L van Waas & A de Chickera (eds) *The World's Stateless Children* (2017).
[26] JP George, R Elphick, K Ramjathan-Keogh & L Muller *Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide* (2014).
[27] B Manby *Citizenship Law in Africa: A Comparative Study* (2016).
[28] van Waas & de Chickera (note 25 above) 205-206.
[29] Manby (note 27 above).
[30] Ibid 60-64.
[31] George et al (note 12 above). See also George et al (note 26 above).

submissions to governmental departments, such as the Department of International Relations and Cooperation[32] (DIRCO), and international treaty bodies, such as the Human Rights Council,[33] in an effort to support the ratification of the two Statelessness Conventions and the domestication of a legal framework protecting stateless persons. The research carried out by LHR aims to identify the specific causes of statelessness in South Africa and provides recommendations on how to resolve the current instances of stateless and prevent future statelessness.

1.5. Significance of the Study

As a phenomenon which carries such dire consequences, the study of statelessness is essential to the eradication and prevention thereof. From the estimated number of stateless persons in South Africa, it is evident that the State lacks the mechanisms to identify and prevent statelessness and, without adequate research, these challenges will be difficult to address. One of the aims of this study is to investigate the causes of statelessness in South Africa as it relates to refugees and asylum seekers. More specifically, the study will analyse the implementation of refugee law in South Africa in order to determine whether the conduct of the DHA and other government bodies is causing statelessness. The South African situation will be analysed in light of the international and regional legal framework designed to protect refugees and stateless persons and recommendations will be provided on ways to address statelessness in South Africa, as it relates to this study.

1.6. Limitations of the Study

This study is limited by the fact that it is based purely on the analysis of international, regional and domestic legal instruments and various secondary sources. Thus all information and statistics are based on the research of other scholars and organisations. This study, therefore, does not benefit from any primary research, such as physical interviews or surveys. As discussed above, no official statistical data representing the situation of refugees and stateless persons in South Africa is provided by the DHA and thus the study is based on the information provided by international and national organisations.

[32] R Elphick, JP George & K Ramjathan-Keogh *Towards Ratification of the Statelessness Treaties: Prepared for Meeting with DIRCO, 11 August 2011* (2011).
[33] LHR & ISI *Joint Submission to the Human Rights Council at the 27th Session of the Universal Periodic Review: The Republic of South Africa* (2016).

1.7. Research Methodology

The research methodology used by this study is qualitative desk top research, focusing on an analysis of primary sources, including the two Statelessness Conventions and other international, regional and domestic legal instruments protecting refugees and stateless persons. In addition, the study uses a variety of secondary sources based on the research of academics and organisations focusing on statelessness. Case law from international treaty bodies, regional human rights bodies and domestic courts will be reviewed in order to assess and compare the protection of stateless persons worldwide. The study also utilises the knowledge gained by the writer while working as a refugee attorney for three years at the University of Cape Town (UCT) Refugee Rights Clinic.

1.8. Structure of the Study

Following on from this introductory Chapter, Chapter Two of this study will outline the international and regional legal framework dedicated to statelessness. Furthermore, it will discuss the general causes and consequences of statelessness. Chapter Three of the study will focus on the international and regional legal framework on the protection of refugees, as well as give an overview of the domestic refugee law in South Africa. Chapter Three will conclude by discussing the intersection of refugee law and the protection regime relating to statelessness. Chapter Four of the study will discuss the manner in which refugee law is implemented in South Africa and how this may be leading to situations of statelessness or placing certain groups at risk of statelessness. Chapter Five will provide recommendations as well as an overall conclusion.

CHAPTER TWO: STATELESSNESS

2.1. Introduction

The problem of statelessness has posed a challenge to the international community since before the Second World War, a time when States were generally entrusted to delineate their own laws and ensure the protection of human rights.[34] However, since the atrocities of the Second World War, it became clear that such a model allowed States the opportunity to manipulate national laws into 'a weapon of persecution'[35] and thus, the United Nations (UN) committed itself to establishing a set of universal human rights that were to apply to all human beings irrespective of nationality and that would be respected by all States alike. This exercise resulted in the adoption, in 1948, of the Universal Declaration of Human Rights[36] (UDHR), which 'houses rights to which we are *all* entitled on the grounds of our membership of the 'human family'.'[37] In addition, due to the mass number of refugees and stateless persons created by the Nazi regime, a 1949 resolution of the UN Economic and Social Council (ECOSOC) established an Ad Hoc Committee to consider the drafting of a convention relating to the international protection of stateless persons and refugees.[38] However, at the time of the 1951 Conference of Plenipotentiaries, which was convened to consider both these issues, time had not allowed the issue of statelessness to be adequately investigated and thus, only the 1951 Refugee Convention was adopted. However, only a few years later, the 1954 Statelessness Convention, which was initially drafted as an addendum to the 1951 Refugee Convention, was adopted as a Convention in its own right, followed by the adoption of the 1961 Statelessness Convention.[39]

Despite the introduction of a universal human rights framework protecting, inter alia, the right to a nationality, as well as the adoption of two international Conventions seeking to address the issue, statelessness continues to affect an estimated 10 million persons worldwide, with progress

[34] L van Waas 'Nationality and Rights' in BK Blitz & M Lynch (eds) *Statelessness and the Benefits of Citizenship: A Comparative Study* (2009) 20, 20.
[35] Ibid 21.
[36] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[37] van Waas (note 34 above) 21.
[38] M Achiron, C Batchelor & P Leclerc *Nationality and Statelessness: A Handbook for Parliamentarians* (2005) 9. See also Foster & Lambert (note 9 above) 564.
[39] Achiron et al (note 38 above) 10-12.

towards eradication being 'limited and slow.'[40] For decades, statelessness has taken a back seat to the protection of refugees and the Statelessness Conventions have experienced an incredibly low rate of 'accession and concomitant lack of implementation and enforcement.'[41] However, since the launch of the UNHCR's Global Action Plan in 2014, 20 more States have acceded to the Statelessness Conventions, dozens of nationality laws have been reformed and nationality has been granted to hundreds of thousands of stateless persons, thereby indicating a positive step towards the eradication of statelessness.[42]

2.2. The Right to a Nationality and the Prevention of Statelessness

2.2.1. *International Framework*

In spite of the fact that the universal human rights framework is designed to protect everyone within the 'human family', nationality, which constitutes the legal relationship between an individual and a State, is often an 'essential prerequisite to the effective enjoyment and protection of the full range of human rights.'[43] Since the denial of a nationality leads to statelessness, it is necessary to investigate both the international instruments which protect the right to a nationality generally as well as those which specifically aim to prevent statelessness. The concept of 'the right to a nationality' is one that has developed substantially over the years, with a notable starting point contained in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws[44] (1930 Hague Convention), which provides that:

> It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.[45]

[40] Southwick & Lynch (note 23 above) i.
[41] Foster & Lambert (note 9 above) 567.
[42] MO Rosenblat, M Khanna et al *Good practices in nationality laws for the prevention and reduction of statelessness: Handbook for Parliamentarians No. 29* (2018).
[43] M Adjami & J Harrington 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights' (2008) 27 *Refugee Survey Quarterly* 93, 94.
[44] Convention on Certain Questions relating to the Conflict of Nationality Laws (adopted 13 April 1930, entered into force 1 July 1937) 179 League of Nations Treaty Series 89 (1930 Hague Convention).
[45] 1930 Hague Convention art 1.

Thus, while the ability of a State to determine who its citizens are remains a sovereign responsibility, this must be exercised in accordance with the general principles of international law. A special category of persons afforded protection under the 1930 Hague Convention are children without parents or of unknown parentage, also referred to as 'foundlings'. According to the Convention, a foundling shall be granted the nationality of the country of birth and it shall be presumed that the country of birth is the territory in which it was found.[46] The preamble to the 1930 Hague Convention also included the first pronunciation that 'it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality.'[47] This sentiment foreshadowed Article 15 of the UDHR which enshrined for the first time, an individual right to nationality[48], in that '[e]veryone has the right to a nationality' and that '[n]o one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.' Other international instruments protecting the right to a nationality include the 1966 International Covenant on Civil and Political Rights[49] (ICCPR), which provides, in Articles 24(2) and (3) that every child has the right to a nationality and a name, and the right to be registered immediately after birth. The 1989 Convention on the Rights of the Child[50] (CRC) reaffirms the position that every child has the right to be registered immediately after birth, and has the right to a name and nationality[51]. Article 7(2) of the CRC takes this right further and explicitly provides that States must ensure the implementation of these rights, 'in particular where the child would otherwise be stateless'. Furthermore, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[52] (Convention on Migrant Workers) prohibits the exploitation of workers on the basis of immigration status and guarantees the right to a nationality to the children of migrant workers.[53]

[46] 1930 Hague Convention art 14.
[47] 1930 Hague Convention preamble.
[48] Adjami & Harrington (note 43 above) 95.
[49] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[50] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
[51] CRC art 7(1).
[52] 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 (Convention on Migrant Workers).
[53] Convention on Migrant Workers art 11 & 29.

Since statelessness often results from discrimination, which will be discussed in greater detail below, international instruments prohibiting all forms of discrimination are also vital in preventing instances of statelessness. In this regard, the ICCPR prohibits any form of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[54]. Furthermore, the ICCPR enshrines minority rights[55], which includes protection against arbitrary expulsion[56], and 'binds states to guarantee rights to all persons subjected to their jurisdiction, irrespective of national origin or citizenship status.'[57] The Convention on the Nationality of Married Women[58], in recognising Article 15 of the UDHR, guards against the loss of nationality based specifically on gender discrimination and provides that neither the celebration nor the dissolution of a marriage between a national and a non-national shall automatically affect the nationality of the wife.[59] Furthermore, Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women[60] (CEDAW) provides that States shall grant women equal rights to men to acquire, retain or change their nationality, and ensure that marriage does not automatically lead to a change of nationality, render her stateless or force her to take her husband's nationality. In addition, women must be granted equal rights as men with regards to the transfer of their nationality to their children[61]. With regards to racial discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination[62] (CERD) directs States to 'prohibit racial discrimination and guarantee racial equality in the enjoyment of the right to nationality, among other fundamental human rights.'[63]

As previously mentioned, the two international treaties drafted specifically for the protection of stateless persons are the 1954 Statelessness Convention, which reaffirms and regulates the rights of stateless persons, and the 1961 Statelessness Convention, which creates a framework through

[54] ICCPR art 26.
[55] ICCPR art27.
[56] ICCPR art 13.
[57] BK Blitz *Statelessness, protection and equality* (2009) 17.
[58] Convention on the Nationality of Married Women (adopted 29 January 1957, entered into force 11 August 1958) 4468 UNTS 66.
[59] Convention on the Nationality of Married Women art 1.
[60] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).
[61] CEDAW art 9(2).
[62] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 12 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD).
[63] Adjami & Harrington (note 43 above) 98.

which statelessness can be prevented from birth.[64] The UNHCR, which was originally only mandated to be the supervisory authority of the 1951 Refugee Convention, was tasked with the implementation and oversight of the 1961 Statelessness Convention in the mid-1970s, which mandate was extended in 1995 to cover 'stateless persons *generally*'.[65] In extending the UNHCR's mandate, the UN General Assembly (UNGA) expressed concern on the possibility of statelessness leading to internal displacement and refugee situations and thus requested the UNHCR to ''actively... promote accession to' the 1954 Convention and the 1961 Convention, and 'to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States.''[66]

The 1954 Statelessness Convention defines a stateless person as 'a person who is not considered a national by any State under the operation if its law'[67] and, according to the International Law Commission (ILC), this definition forms part of international customary law.[68] In providing clarity on the definition, the UNHCR Guidelines on Statelessness[69] provide that the reference to 'law' in the definition, should be interpreted to include not only legislation, but 'ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.'[70] It should be noted at this point that persons can either be *de jure* stateless or *de facto* stateless, the former of which denotes the legal definition contained in the 1954 Statelessness Convention and to which the above international legal regime applies. A person who is *de facto* stateless 'is normally regarded as a person who does posses a nationality, but does not possess the protection of his State of nationality and who resides outside the territory of that State'[71] and thus, whose nationality is ineffective. In other words, those who are *de facto* stateless are essentially in the same position as *de jure* stateless persons as they have no State to turn to for protection and, while legally they have a nationality,

[64] Ibid 96.
[65] Foster & Lambert (note 9 above) 569.
[66] Ibid.
[67] 1954 Refugee Convention art 1(1).
[68] E Fokala & L Chenwi 'Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children's Committee' (2013) 6 *African Journal of Legal Studies* 357, 359.
[69] UNHCR 'Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons' (2012) HCR/GS/12/01 (Guidelines on Statelessness No 1).
[70] Guidelines on Statelessness No 1 s 15.
[71] P Weis 'The United Nations Convention on the Reduction of Statelessness, 1961' (1962) 11 *The International and Comparative Law Quarterly* 1073, 1086.

they do not derive any benefits from such nationality.[72] While the international legal framework only extends to *de jure* stateless persons, the Final Act of the 1954 Statelessness Convention addresses the issue of *de facto* statelessness with a non-binding recommendation which provides that:

> each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons.

The Final Act of the 1961 Statelessness Convention echoes this sentiment by recommending that *de facto* stateless persons should be treated, as far as possible, as *de jure* stateless persons so that they may acquire an effective nationality.[73]

In addition to defining a stateless person, the 1954 Statelessness Convention sets out the rights and freedoms to which a stateless person is entitled. In delineating these rights, the Convention sets out 'five different 'levels of attachment' that a stateless person may attain, ... [namely]: subject to the state's jurisdiction, physical presence, lawful presence, lawful stay and durable residence.'[74] The stronger the level of attachment, the more rights and freedoms guaranteed to a stateless person. Furthermore, the Convention guarantees three different standards of protection to stateless persons, namely: treatment as least as favourable as that accorded to non-nationals in general, such as the right to engage in wage-earning employment[75], treatment on par with nationals, such as the right to practice their religion[76], and absolute rights, such as the right to legal personhood and the right to be issued identity papers.[77] The Convention also makes provision for the granting of a Convention Travel Document (CTD) to stateless persons, which provides proof of identity and status, and acts *in lieu* of a passport.[78]

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[72] N Robinson *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (1995) para 3.
[73] CA Batchelor 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *International Journal of Refugee Law* 156, 173.
[74] van Waas (note 34 above) 24-25.
[75] 1954 Statelessness Convention art 17.
[76] 1954 Statelessness Convention art 4.
[77] van Waas (note 34 above) 25.
[78] Ibid.

The 1961 Statelessness Convention does not require States to provide nationality to any stateless person unconditionally, but rather seeks to 'balance factors of birth and descent in an effort to avoid the creation of statelessness by reflecting an individual's genuine and effective *existing* connection with... [a] State.'[79] Thus, Article 1 of the 1961 Stateless Convention places a positive obligation on States to 'grant its nationality to a person born in its territory who would otherwise be stateless'. Furthermore, in keeping with the 1930 Hague Convention, the 1961 Statelessness Convention provides that a 'foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.'[80] The Convention further prohibits the deprivation of nationality, if such deprivation would result in statelessness, except in limited circumstances, such as when nationality was obtained by means of fraud or misrepresentation, or when the person in question has conducted himself in a manner that is 'seriously prejudicial to the vital interests of the State.'[81]

2.2.2. *Regional Framework*

In addition to the international Conventions, various regional instruments have been enacted which contain provisions on the right to a nationality and which can be interpreted in such a way as to create a regional legal framework that protects persons against statelessness. Article 20 of the American Convention on Human Rights[82] provides that '[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.' In the case of *Dilcea Yean and Violeta Bosico v Dominican Republic*[83], the Inter-American Court of Human Rights confirmed that, although States retain the sovereign right to regulate nationality matters, they are 'responsible for abiding by international human rights standards... [and] are particularly limited in their discretion to grant nationality by their

[79] Batchelor (note 73 above) 161-162.
[80] 1961 Statelessness Convention art 2.
[81] 1961 Statelessness Convention art 8.
[82] American Convention on Human Rights, "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.
[83] *Case of the Yean and Bosico Children v The Dominican Republic*, Judgment, Inter-American Court of Human Rights Series C No 130 (8 September 2005).

obligations to guarantee equal protection before the law and to prevent, avoid and reduce statelessness.'[84]

The 1997 European Convention on Nationality[85] refers to the 1954 Statelessness Convention for its definition of a stateless person and contains numerous provisions that aim to prevent statelessness, covering 'questions of the acquisition, retention, loss, and recovery of nationality, procedural rights, nationality in the context of State succession, military obligations, and cooperation among State Parties.'[86] With specific regard to statelessness resulting from State succession, the European Convention on the Avoidance of Statelessness in relation to State Succession[87] was adopted in 2006 and entered into force in May 2009.[88]

In Africa, where statelessness is of particular concern and where very few countries have ratified either of the Statelessness Conventions[89], the African Charter on Human and Peoples' Rights[90] (African Charter) does not echo its regional counterparts and only makes reference to the right to the 'recognition of one's legal status'[91] rather than an explicit right to nationality. However, the Protocol to the African Charter on the Rights of Women[92] (Protocol on the Rights of Women) 'guarantees both men and women's rights to acquire the nationality of their partner and transmit it to their children.'[93] Furthermore, Article 6 of the African Charter on the Rights and Welfare of the Child[94] (African Children's Charter) provides that every child has the right to a nationality and the right to be registered immediately after birth, and that States have an obligation to ensure that children born within their territory, who are not granted the nationality of another State,

[84] CA Batchelor 'Transforming International Legal Principles into National Law: The Right to a Nationality and the Avoidance of Statelessness' (2006) 25 *Refugee Survey Quarterly* 8, 10.
[85] European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS 166.
[86] Achiron et al (note 38 above) 16.
[87] Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession (adopted 15 March 2006, entered into force 1 May 2009) CETS 200.
[88] Blitz (note 57 above) 24.
[89] HS Adjolohoun 'Introductory Note to African Commission on Human and Peoples' Rights Resolution 234 on the Right to Nationality (2014) 52 *International Legal Materials* 413, 413.
[90] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter).
[91] African Charter art 5.
[92] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (entered into force 11 July 2003).
[93] Adjolohoun (note 89 above) 413.
[94] 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 (African Children's Charter).

acquire nationality. In the *Children of Nubian Decent in Kenya*[95] case, brought before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the Kenyan government's decision to deny nationality to children of Nubian decent was challenged on the grounds that it violated the rights set out in the African Children's Charter, including Article 6. In finding that Kenya had violated the rights in Article 6, the ACERWC remarked that the specific obligation placed on States 'is not one of conduct but of result'[96] and that a State's discretion in the laws and conduct applicable to nationality acquisition is limited by general international human rights principles and standards.[97]

2.2.3. *South African Framework*

Despite its 2011 pledge to accede in the near future, South Africa remains a non-party to both the Statelessness Conventions but is steadfast in the belief that its domestic legal framework, with the South African Constitution[98] (Constitution) as its cornerstone, is sufficient to reduce and prevent statelessness.[99] South Africa is, however, a State party to various other international and regional instruments protecting the right to a nationality, and other rights that benefit stateless persons, such as non-discrimination and equality before the law. These include the ICCPR, the CERD, the CEDAW, the Convention on the Nationality of Married Women, the CRC, the African Charter, the Protocol on the Rights of Women, and the African Children's Charter. Thus, any domestic law relating to the right to a nationality and the protection against statelessness must be consistent with South Africa's binding international obligations and must be interpreted in a manner consistent with international law in general.[100]

The Constitution provides that 'no citizen shall be deprived of citizenship'[101] and that every child 'has the right to a name and a nationality from birth.'[102] From the South African Citizenship

[95] *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Decent in Kenya v The Government of Kenya*, African Committee of Experts on the Rights and Welfare of the Child Decision No 002/Com/002/2009 (22 March 2011).
[96] Fokala & Chenwi (note 68 above) 366.
[97] Ibid.
[98] The Constitution of the Republic of South Africa, 1996.
[99] George et al (note 12 above) 8.
[100] The Constitution s 231-233.
[101] The Constitution s 20.
[102] The Constitution s 28(1)(a).

Act[103] (Citizenship Act), which was enacted in 1995 and amended in 2010, to govern the acquisition, loss and resumption of South African citizenship, it is evident that the *jus sanguinis* principle, or citizenship by descent, forms the basis of South African nationality laws. According to section 2 of the Citizenship Act, a person 'who is born in or outside of the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.' Citizenship by descent is also provided to all children adopted by a South African citizen in terms of the Children's Act[104]. However, the Citizenship Act does make provision for the acquisition of citizenship based on the principle of *jus soli*, or citizenship by place of birth, in three instances: first, in terms of section 2(2), a person born in South Africa to non-South African parents who does not have the nationality of another country, and has no right to such nationality, shall be granted South African citizenship by birth. Secondly, section 2(3) provides that a person born in South Africa to parents who have been granted permanent residence in South Africa qualifies for citizenship at birth if such person has lived in South Africa from the time of their birth up until becoming a major. Lastly, in terms of section 4(3), a person born in South Africa to parents who are not South African and who have not been granted permanent residence qualifies for citizenship upon majority, if such person has lived in South Africa from the time of their birth up until the time of majority. However, all three of these modes of acquisition of citizenship are contingent on whether the birth was registered in accordance with the provisions of the Births and Deaths Registration Act[105] (BDRA).

In the case of *Minister of Home Affairs v Ali*[106], the Supreme Court of Appeal (SCA) confirmed the right, as set out in section 4(3) of the Citizenship Act, 'to obtain citizenship by naturalisation of a child born in the Republic of South Africa, whose parents are not South African and have not been admitted to the Republic of South Africa for permanent residence.'[107] In this case, all of the respondent's births had been registered in terms of the BDRA and they were all in possession of a birth certificate issued by the DHA. From this case, it is evident that birth registration is critical in South Africa as, without it, a person will not be issued with a birth certificate and, in

[103] Citizenship Act 88 of 1995.
[104] Children's Act 38 of 2005 & Citizenship Act s 3.
[105] Births and Deaths Registration Act 51 of 1992 (BDRA).
[106] *Minister of Home Affairs v Ali* [2018] ZASCA 169.
[107] Ibid para 1.

turn, will not be able to access an ID or a passport.[108] Section 9 of the BDRA requires a child's birth to be registered by any one of the child's parents within 30 days of the birth. The procedural requirements for such registration depend on the nationality or legal status of the parents but, in each case, valid documentation of the 'mother or father, or both parents, of the child, as the case may be' must be provided.[109] Therefore, if a child is born to undocumented parents, or parents whose documentation has expired, their births cannot be registered. This requirement is hugely problematic and, as will be discussed below, has the potential to place a large number of persons at risk of statelessness.

If a child's birth is not registered within 30 days of the birth, provision is made for a 'late registration of birth' process, which carries an administrative fee and more onerous evidentiary requirements.[110] Additionally, the BDRA only makes provision for the late registration of birth of children born to South Africa citizens, permanent residents and refugees.[111] Therefore, children born to all other foreign parents, for example asylum seekers, have no means to register their child's birth after 30 days.[112]

The BDRA also distinguishes between children born in and out of wedlock and provides that a child born out of wedlock must be registered by the mother.[113] This is contradictory to section 9 of the BDRA which provides that any child born alive must be registered by any one of his or her parents. A father may only register a child born out of wedlock if consent is given by the mother, if he is physically present and if he provides written acknowledgment of paternity.[114] Thus, in terms of South African law, paternal orphans can never access their father's citizenship.[115] Furthermore, non-South African fathers of children born out of wedlock, who wish to have their particulars added to the child's birth certificate, must pay to have a paternity test done, which can cost anywhere from R1800.[116]

[108] BDRA s 5, 9 & 10.
[109] Births and Deaths Registration Regulations in GN 128 GG 37373 of 26 February 2014 reg 4 & 8.
[110] BDRA s 9(1) & (3A).
[111] Births and Deaths Registration Regulations reg 4, 5, 6, & 7.
[112] Births and Deaths Registration Regulations reg 8.
[113] BDRA s 10.
[114] BDRA s 10.
[115] LHR & ISI 'Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC' (2015) 8.
[116] Ibid.

The South African Immigration Act[117], which regulates the admission of foreign nationals to South Africa, read with the Citizenship Act, provides means through which citizenship can be acquired through naturalisation. Generally, a foreign national will be eligible to apply for a permanent residence permit after having legally resided in South Africa for five years and, once they have been in possession of a permanent residence permit for five years, they are qualified to apply for naturalisation.[118] In addition, section 31(2)(b) of the Immigration Act contains a provision, colloquially referred to as an 'exemption application', which provides for the granting of permanent residence to a foreigner or category of foreigners, upon application to the Minister, 'when special circumstances exists which would justify such a decision.'[119] This exemption application procedure has been successfully used to grant permanent residence to over 1 000 former Angolan refugees, whose status as refugees ceased once the Angolan civil war ended.[120]

The South African Refugees Act[121], which protects stateless persons who are also refugees, will be discussed in greater detail below.

2.3. Causes of Statelessness

Generally, statelessness arises as a result of 'intentional or unintentional specific state action'[122], including State succession, the introduction of discriminatory laws, the implementation of conflicting nationality laws, and 'the introduction of onerous provisions that make it virtually impossible for certain groups and individuals to access their rights to citizenship.'[123] Whatever the actual cause of statelessness, elements of inequality and discrimination are most often present, with race, gender and ethnic origin being the most common. Despite the major causes of statelessness in South Africa being attributed to discrimination and procedural elements, for the sake of completeness, all the common causes of statelessness will be discussed below.

[117] Immigration Act 13 of 2002.
[118] Immigration Act s 26 & 27 & Citizenship Act s 5.
[119] Immigration Act s 31(2).
[120] Scalabrini Centre of Cape Town *A Mixture of Relief and Fear as Angolan Former Refugees are Issued New Permits* (2018).
[121] Refugees Act 130 of 1998.
[122] Blitz (note 57 above) 1.
[123] Ibid 9.

2.3.1. *State Succession*

Article 10 of the 1961 Statelessness Convention provides for protection against statelessness in instances of 'transfer of territory' or State succession, and obligate the State, to which the territory has been transferred, to provide nationality where a person would become stateless as a result of such transfer. In an effort to expand on statelessness resulting from State succession, the ILC adopted, in 1999, the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States[124] (Draft Articles on State Succession), which provide that:

> Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned.[125]

However, since the Draft Articles on State Succession have not been adopted by the UNGA and are thus non-binding, and due to the fact that State succession often results as a consequence of war, history has shown that statelessness remains a common occurrence following State succession.[126] For example, during the border war between Ethiopia and Eritrea, from 1998 to 2000, the Ethiopian government expelled an estimated 75 000 'Eritreans', including not only Eritrean passport holders but 'individuals who voted in the 1993 referendum on Eritrean independence; alleged 'political activists' or supporters of the Eritrean government; individuals born in Eritrea (but who grew up in Ethiopia); individuals born in Ethiopia but who had at least one parent or one grandparent born in Eritrea; persons alleged to have visited Eritrea'[127] and more. With many of the persons expelled having no legitimate links to Eritrea, or having no means to prove a legitimate link, thousands were effectively denationalized and rendered stateless.[128]

State succession can also be problematic to individuals residing outside of either the predecessor State or the successor State, especially those claiming nationality on the basis of

[124] ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, 1999 (Annex to UNGA Res. 55/153, 12 Dec. 2000) (Draft Articles on State Succession).
[125] Draft Articles on State Succession art 1.
[126] Manby (note 27 above) 29. See also Blitz (note 57 above) 13.
[127] JR Campbell 'The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Court (Re)define Nationality' (2011) 23 *International Journal of Refugee Law* 656, 659.
[128] Ibid 660.

descent. For example, many of those who fled the Ethiopian/ Eritrean war were subsequently rendered stateless in the country of refuge, due to a later law providing that 'any Ethiopian with a foreign parent who did not declare their option to retain Ethiopian nationality at age of majority automatically lost it as a matter of law. This impacted many ethnic Eritreans born in Ethiopia who... [subsequently went] abroad[129].

2.3.2. *Conflict of Laws*

As mentioned briefly above, in general, nationality laws are based on some sort of combination of the two basic principles of *jus soli*, where someone is granted nationality based on their birth in a territory, and *jus sanguinis*, where nationality is granted on the basis of descent.[130] Contemporary nationality laws favour the *jus sanguinis* approach, with only 32 countries, out of the 177 included in the GLOBALCIT project, transferring nationality based on the *jus soli* principle.[131] While the principles of *jus soli* and *jus sanguinis* describe the acquisition of nationality 'from birth', nationality laws also make provision for the acquisition of citizenship via marriage and long-term residence in a State.[132] Statelessness can often result when the nationality laws of two States conflict, specifically in the context of migration. For example, despite Zimbabwean law prohibiting dual nationality since 1984, this was never strictly enforced and, in 2001, the nationality laws were amended which required anyone with a claim to foreign citizenship to renounce that claim and reapply for Zimbabwean citizenship within a six month period.[133] Failure to comply with the amendments resulted in an automatic loss of Zimbabwean citizenship by January 2002.[134] However, this requirement was not widely advertised and thus, thousands of Zimbabwean emigrants, who could not claim, or had not yet claimed, citizenship in their country of residence and who did not 'reclaim' their Zimbabwean citizenship, were rendered stateless.[135] A further example is that of Cuba, which, in an effort to discourage emigration, assigns 'permanent immigration status' to anyone who has left the country for more than 11 months, thus resulting in the inability of parents to pass their Cuban nationality to their

[129] George et al (note 12 above) 22.
[130] Manby (note 27 above) 43.
[131] I Honohan & N Rougier 'Global Birthright Citizenship Laws: How Inclusive?' (2018) 65 *Netherlands International Law Review* 337, 340.
[132] Manby (note 27 above) 43.
[133] George et al (note 12 above) 19.
[134] Ibid.
[135] Ibid.

children. For a child born in a State whose nationality laws are based on the principle of *jus sanguinis*, statelessness in likely to occur.[136]

2.3.3. *Discrimination*

As was seen with the Nuremburg Laws which stripped Jewish people of their nationality in Germany and Austria, discrimination is one of the leading causes of statelessness.[137] The most common forms of discrimination are based on race, gender and ethnic origin. In Africa, where colonialism often led to forced migration and the splitting of communities which previously formed a political unit, 'unprecedented numbers of people [moved] away from their place of birth.'[138] This has ultimately led to situations of stateless where, post-colonialism, African States have limited 'citizenship from birth to members of ethnic groups whose ancestral origins are within the particular state'.[139] This type of discrimination was evident in the case of the Nubian population in Kenya, discussed above, who originated from Sudan and who were brought to Kenya as conscripts for the British colonial military.[140] Furthermore, in the late 1980s, Mauritania destroyed the citizenship documents of, and expelled, tens of thousands of Mauritania's of sub-Saharan descent on the basis that they 'were not true citizens due to their skin color.'[141] Thousands were thus forced to live as stateless refugees in Senegal and, despite the African Commission on Human and Peoples' Rights ordering that these people be returned to Mauritania and issued with citizenship documents, little progress had been made by 2008.[142]

Gender discrimination is a major cause of statelessness in States where mothers are prohibited from transferring their nationality to their children or, when marriage affects a women's nationality. Linked to gender discrimination are provisions providing for the acquisition of nationality based on whether a child is born in or out of wedlock. Despite over 20 countries in Africa prohibiting gender discrimination in their nationality laws since the 1980s, it continues to be one of leading causes of statelessness due to both laws and practices.[143] For example, the

[136] Ibid 33.
[137] Blitz (note 57 above) 10.
[138] B Manby *Statelessness in Southern Africa* (2011) 5.
[139] Ibid 7.
[140] van Waas (note 34 above) 41.
[141] Southwick & Lynch (note 23 above) 31.
[142] Ibid 31.
[143] Manby (note 27 above) 6-7.

nationality laws of Somalia prohibit mothers from transferring their nationality to their children, regardless of whether the child is born in or out of wedlock.[144] This leaves maternal orphans, or children conceived by rape, in a particularly vulnerable position which is likely to result in statelessness. In other countries, such as Swaziland, mothers can pass their nationality to children born out of wedlock, only if the father is unknown or stateless, or if an administrative process is followed.[145]

2.3.4. *Procedural Factors*

As discussed above, the determination of whether a person is stateless includes an investigation into how nationality laws are actually implemented in practice and thus, if the requirements to prove nationality are too onerous, or are implemented in a discriminatory manner, the fact that a person technically fulfils the requirements for nationality acquisition may be irrelevant.[146] One of the most important procedural steps in accessing nationality is birth registration, as it is critical in establishing a child's place of birth and parental affiliations, 'which in turn serves as documentary proof underpinning acquisition of the parents' nationality or the nationality of the state where the child is born.'[147] According to the UN International Children's Emergency Fund (UNICEF), approximately 36% of births, amounting to 48 million births a year, are not registered.[148] In Africa, where birth registration is not even compulsory in many countries, about 55% of children under the age of five have not been registered.[149] In South Africa, due to the large portion of the population that was not properly registered during Apartheid, a 'late registration of birth' procedure was adopted.[150] However, as seen above, this process is extremely onerous, requires even more documentary evidence than normal registration, and is often applied with strict scrutiny, due to the fear that foreign nationals are fraudulently trying to use the process to access South African citizenship.[151]

[144] Ibid 56.
[145] Ibid.
[146] Manby (note 138 above) 11.
[147] Manby (note 27 above) 116.
[148] Blitz (note 57 above) 14.
[149] Manby (note 138 above) 12.
[150] George et al (note12 above) 38.
[151] Ibid.

2.4. Consequences of Statelessness

Hanna Arendt, who was a refugee from Nazi Germany and stateless for many years, first described nationality as 'the right to have rights' and wrote that to 'be stripped of citizenship is to be stripped of worldliness; it is like returning to a wilderness as cavemen or savages... they could live or die without leaving any trace.'[152] Stateless persons are amongst the most vulnerable in the world as, without a nationality, they lack the protection of a specific, or any, State. Without any legal identity, stateless persons cannot access many civil and political rights, such as the right to vote or to stand for public office.[153] Furthermore, stateless persons also struggle to access socio-economic rights, such as education, employment, health care and more.[154] In 2015, the UNHCR interviewed over 250 persons on the experience of childhood statelessness, highlighting 'how statelessness can create insurmountable barriers that prevent access to education and adequate health care and stifles job prospects.'[155] The report further discusses the psychological toll that statelessness takes on children and how their ability to 'learn, grow, play and lead productive and fulfilling lives'[156] is stunted. Stateless persons are also more susceptible to exploitation, abuse and human trafficking.[157]

2.5. Conclusion

From this Chapter it is evident that statelessness remains a major concern for the international community, despite the introduction of a comprehensive international legal framework aiming to eliminate and prevent statelessness. While strides have been made in renewing the focus on statelessness, it is a phenomenon which continues to result worldwide. Of the various causes of statelessness, discrimination based on race, ethnicity and gender remains one of the leading sources of statelessness, especially in Africa. In addition to direct discrimination, nationality laws and procedures can also be implemented on a discriminatory basis, thus resulting in statelessness as well. In South Africa, while no domestic legislation regulating statelessness has been enacted, a number of existing laws are available to protect people from statelessness.

[152] B Berkeley 'Stateless People, Violent States' (2009) 26 *World Policy Journal* 3, 6.
[153] Southwick & Lynch (note 23 above) 3.
[154] Ibid.
[155] UNHCR 'I am Here, I Belong: The Urgent Need to End Childhood Statelessness' (2015).
[156] Ibid 4.
[157] Ibid 18. See also Southwick & Lynch (note 23 above) 3.

However, as will be discussed in more detail below, the implementation of these laws is problematic and may in fact be causing statelessness rather than preventing it.

CHAPTER THREE: REFUGEE PROTECTION

3.1. Introduction

Article 14 of the UDHR provides that everyone has 'the right to seek and to enjoy in other countries asylum from persecution'. As mentioned above, the recognition of this principle followed on from the failure of the international community to adequately assist and protect the masses fleeing from Nazi Germany as refugees.[158] Succeeding from the International Refugee Organisation (IRO), the UNHCR was established in 1949 for an initial period of three years and, in 1950, the Statute of the UNHCR was adopted by the UNGA, with the aim to 'provide international protection for refugees and to seek permanent solutions to their problems by assisting governments to facilitate their voluntary repatriation or their assimilation within new national communities.'[159] Following its adoption, the UNHCR became the supervisory authority for the 1951 Refugee Convention and later, the Protocol Relating to the Status of Refugees[160] (1967 Refugee Protocol), which expanded the temporal and geographic scope of the 1951 Refugee Convention. According to the 1951 Refugee Convention's Introductory Note by the Office of the UNHCR:

> Grounded in Article 14 of the Universal Declaration of Human Rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees, adopted in 1951, is the centrepiece of international refugee protection today... The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage. It has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.

[158] S Martin 'Forced Migration, the Refugee Regime and the Responsibility to Protect' (2010) 2 *Global Responsibility to Protect* 38, 44-45.
[159] E Feller 'The Evolution of the International Refugee Protection Regime' (2001) 5 *Washington University Journal of Law & Politics* 129, 130-131.
[160] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Refugee Protocol).

Today, the 1951 Refugee Convention and the 1967 Protocol enjoy considerable ratification, with the former having 146 State parties and 19 signatories, and the latter having 147 State parties.[161] However, in spite of this, widespread global conflict continues to cause mass displacement, with the UNHCR reporting that the number of displaced persons is currently the highest it has ever been since the aftermath of the Second World War.[162]

While the protection of refugees and stateless persons are governed by separate international legal frameworks, a close link remains between them. Since the 1951 Refugee Convention has been ratified by almost double the number of States that have ratified both Statelessness Conventions, reliance is often placed on refugee protection mechanisms to protect those who are stateless. This reliance is exacerbated by the fact that, even in instances where the Statelessness Conventions have been ratified, numerous State parties have failed to implement determination procedures which adequately identify stateless persons.[163] It therefore also becomes necessary to analyse a State's refugee protection regime and how its implementation relates to the protection of stateless persons. However, even in cases where the refugee protection framework may afford stateless persons a certain degree of protection, it will never be successful in affording a nationality to someone who is stateless.

3.2. Refugee Protection Framework

3.2.1. *International Framework*

The 1951 Refugee Convention is based on the principles of non-penalisation (for illegal entry), non-discrimination and *non-refoulement*, where Article 33 provides that:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

[161] United Nations Treaty Collection 'Status of Treaties: Chapter V(2) Convention relating to the Status of Refugees' (2019) & United Nations Treaty Collection 'Status of Treaties: Chapter V(5) Protocol relating to the Status of Refugees' (2019).
[162] UNHCR 'Global Trends: Forced Displacement in 2015' (2016) 5.
[163] International Justice Resource Center 'Citizenship and Nationality' <*https://ijrcenter.org/thematic-research-guides/nationality-citizenship/#Enforcement_at_the_National_Level*>.

The 1951 Refugee Convention aims to ensure that surrogate or temporary protection is provided to persons whose fundamental human rights are no longer being protected by their own State.[164] Furthermore, the Convention requires States to implement status determination procedures in order to establish whether a person is entitled to refugee protection[165], where a refugee is defined as a person who:

> Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[166]

In addition to defining a refugee, the 1951 Refugee Convention sets out the rights to which refugees are entitled and, as with the 1954 Statelessness Convention, these rights are granted according to various standards. For example, with respect to primary education, refugees must be afforded the same treatment granted to nationals, whereas, with regards to housing rights, refugees must granted treatment as least as favourable as that accorded to 'aliens generally in the same circumstances.'[167]

In recognising that refugee protection is intended to be temporary, the UNHCR is also tasked with finding durable solutions for those in refugee situations, most commonly 'in the form of voluntary repatriation when conditions... [permit], integration into a country of asylum, or resettlement to a third country.'[168] While voluntary repatriation and resettlement are facilitated by the UNHCR, Article 34 of the 1951 Refugee Convention specifically provides that States should, as far as possible, 'facilitate the assimilation and naturalization of refugees' by expediting naturalization procedures and reducing costs where possible.

[164] CW Wouters *International Legal Standards for the Protection from Refoulement* (2009) 35.
[165] Martin (note 158 above) 48.
[166] 1951 Refugee Convention art 1(A)(2).
[167] 1951 Refugee Convention art 21 & 22.
[168] Martin (note 158 above) 48.

3.2.2. *Regional Framework*

In addition to the international legal framework, a number of regional instruments also protect the right to seek and enjoy asylum. According to Article 7 of the American Convention on Human Rights, everyone has the right to 'seek and be granted asylum in a foreign territory' and, in this regard, the Cartagena Declaration on Refugees[169] (Cartagena Declaration) was adopted. Despite not being legally binding, the Cartagena Declaration 'established normative guidelines to regulate how states within the Latin American region should engage with refugee crises.'[170]

In Europe, all members of the European Union (EU) are party to the 1951 Refugee Convention and, in addition to many member States creating their own national asylum systems, the Common European Asylum System (CEAS) was established by the EU to set 'common standards in the field of international protection with a view to developing common concepts and criteria, and harmonising the interpretation and application of asylum law among EU Member States.'[171]

In terms of Article 12 of the African Charter, everyone has the 'right, when persecuted, to seek and obtain asylum in other countries'. In light of this, the Convention Governing the Specific Aspects of Refugee Problems in Africa[172] (1969 OAU Convention) was adopted by the Organisation of African Unity (OAU) on 10 September 1969 to address the aspects of refugee protection specific to Africa that were 'not adequately catered for under the 1951 Convention.'[173] To date, the 1969 OAU Convention has been ratified by 45 Member States of the African Union (AU), the organisation which succeeded the OAU.[174]At the time of its adoption, most refugees in Africa resulted from 'independence struggles and wars of national liberation'[175] and thus the Convention established a liberal protection regime, strongly influenced by the principles of 'pan-

[169] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 22 November 1984) (Cartagena Declaration).
[170] G McFadyen 'The Contemporary Refugee: Persecution, Semantics and Universality' 2012 *eSharp* 9, 21.
[171] J Barnes, MT Gil-Bazo & C Bauloz *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis* (2016) 13.
[172] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (1969 OAU Convention).
[173] M Sharpe 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 *McGill Law Journal* 95, 101-102.
[174] Ibid 100.
[175] J Crisp 'Forced Displacement in Africa: Dimensions, Difficulties, and Policy Directions' (2010) 29 *Refugee Survey Quarterly* 1, 4.

Africanism and anti-colonialism'.[176] In this light, one of the most celebrated features of the 1969 OAU Convention is the expansion of the 1951 Refugee Convention definition to include those fleeing from generalised violence and conflict, rather than just those fleeing individualised persecution. Thus, Article 1(2) provides that:

> The term "Refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

In addition to its revolutionary expansion of the 'refugee' definition, the 1969 OAU Convention is also often applauded for its reinforcement of the principle of *non-refoulement* and its attempt to depoliticize refugee protection, by providing that the granting of asylum to refugees 'is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.'[177] Furthermore, in light of its efforts towards African solidarity, the Convention explicitly provides for the possibility of 'burden sharing' between Member States, whereby one Member State may appeal directly to another Member State for assistance with 'lightening the burden' of granting asylum.[178]

3.2.3. *South African Framework*

Before signing and ratifying the 1951 Refugee Convention and the 1969 OAU Convention in 1996 and 1995 respectively[179], South Africa dealt with refugees on an ad-hoc basis through the use of the antiquated and highly-criticized Aliens Control Act[180]. However, since being a State both 'generating and receiving substantial numbers of forcibly displaced persons'[181], the South African government entered into a basic agreement with the UNHCR in 1991, allowing them a presence in South Africa to assist with the repatriation of South African exiles. In 1993, the UNHCR's mandate was extended to find durable solutions for the thousands of refugees who fled from the Mozambican civil war but who were never 'formally recognized by the South

[176] Ibid.
[177] 1969 OAU Convention art 2(2).
[178] 1969 OAU Convention art 2(4).
[179] F Khan & T Schreier 'Introduction' in F Khan & T Schreier (eds) *Refugee Law in South Africa* (2014) xxxv.
[180] Aliens Control Act 96 of 1991.
[181] J Handmaker 'No Easy Walk: Advancing Refugee Protection in South Africa' (2001) 48 *Africa Today* 91, 92.

African government.'[182] Following the adoption of its new international obligations, South Africa undertook to develop its own domestic legislation to recognise and protect refugees, which culminated in the enactment of the Refugees Act in 1998, which came into force in April 2000 with the issuance of the Regulations to the Refugees Act.[183]

With its foundation based on the constitutional principles of equality, freedom and human dignity, the South African Refugees Act, and the protection regime which it sets out, has been commended by the UNHCR as one of the 'most advanced and progressive systems of protection today.'[184] Unlike many other Africa States, South Africa ratified both the 1951 Refugee Convention and the 1969 OAU Convention without any reservations, thus adopting a non-encampment policy, focused on the free movement and self-sufficiency of refugees.[185] The Refugees Act affords refugees a wide range of rights in South Africa, including all the rights set out in Chapter 2 of the Constitution, such as the right to health care, basic education, and the right to seek employment.[186] Refugees are also entitled to IDs and travel documents issued by the DHA, and may, provided certain requirements are met, apply for permanent residence after five years continuous residence.[187] While the Refugees Act is silent on the rights to be afforded to asylum seekers specifically, numerous court cases have been successful in confirming that all the rights set out in Chapter 2 of the Constitution apply equally to asylum seekers by virtue of section 7(1) of the Constitution, which provides that the Bill of Rights enshrines the rights of *all people* (my emphasis) within South Africa.[188]

The Refugees Act strongly reflects both the 1951 Refugee Convention and the 1969 OAU Convention and, in addition to upholding the principles of *non-refoulement*[189] and non-

[182] Ibid 93. See also F Khan and M Lee 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' (2018) 4 *African Human Mobility Review* 1205-1225.
[183] Refugee Regulations (Forms and Procedure) in GN 366 GG 6779 of 6 April 2000.
[184] P Rulashe 'UNHCR chief commends Pretoria's refugee policy, pledges cooperation' *UNHCR* <*https://www.unhcr.org/news/latest/2007/8/46cf10634/unhcr-chief-commends-pretorias-refugee-policy-pledges-cooperation.html*>.
[185] Khan & Schreier (note 179 above) xxxv. See also Landau & Amit (note 19 above) 536.
[186] Refugees Act s 27.
[187] Ibid.
[188] In the case of *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T), the court held at para 64 that the 'Bill of Rights is applicable equally to foreigners (and hence asylum seekers) as it is to citizens'. See also *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA). See also D Daas, K Ramjathan-Keogh & Fatima Khan 'The socio-economic rights of refugees and asylum seekers in South Africa' in F Khan and T Schreier (eds) *Refugee Law in South Africa* (2014) 220-233.
[189] Refugees Act s 2.

penalisation for illegal entry[190], the Act includes the 'refugee' definitions contained in both of the Conventions, therefore recognising refugee claims based on individualised persecution and on 'objective, disruptive conditions in the country of origin'[191] in sections 3(a) and (b) respectively. In addition, the Refugees Act expands on the possible grounds of persecution by adding 'tribe' and 'gender'[192] to those already included by virtue of the 1951 Refugee Convention, namely race, religion, nationality, political opinion or membership of a particular social group. The Refugees Act, in section 3(c), also grants derivative refugee status to the dependents of those recognised as refugees in terms of section 3(a) or (b), where a dependent is defined to include 'the spouse, any unmarried dependent child or any destitute, aged or infirmed member of the family'.

In addition to setting out the relevant definitions and rights afforded to refugees, the Refugees Act delineates the procedures to be followed for an asylum application in South Africa. Upon entering South Africa, an asylum seeker must lodge an application for asylum, in person, at a Refugee Reception Office (RRO) 'without delay'.[193] In facilitation of this, the asylum seeker, once having expressed an intention to apply for asylum at the border, must be provided with an appropriate permit, valid for fourteen days, which will allow them to reach an RRO (also referred to as a section 23 permit or an asylum transit visa).[194] The asylum seeker must be received by a Refugee Reception Officer, who must ensure that the application is properly completed, providing assistance where necessary, and who must then submit such application to a Refugee Status Determination Officer (RSDO) for adjudication.[195] Pending the determination of the application, the Refugee Reception Officer must furnish the asylum seeker with a temporary asylum seeker permit (also referred to as a section 22 permit), which allows the asylum seeker to legally sojourn in South Africa until the finalisation of the application. Not later

[190] Refugees Act s 21(4).
[191] T Schreier 'The expanded refugee definition' in F Khan and T Schreier (eds) *Refugee Law in South Africa* (2014) 74-90.
[192] The ground of 'gender' was added to section 3(a) of the Refugees Act by the Refugees Amendment Act 33 of 2008, which has yet to come into force. However, the Refugees Act recognises 'gender' as part of the definition of a 'social group', thereby recognising as refugees those persecuted on grounds of gender.
[193] Refugees Act s 21; Refugee Regulations reg 2.
[194] Immigration Act s 23; Refugee Regulation reg 2(2). Note that section 23 of the Immigration Act has been amended, thereby providing for the provision of an asylum transit visa, valid for a period of 5 days. However, since the Refugees Amendment Act 33 of 2008, the Refugees Amendment Act 12 of 2011, the Refugees Amendment Act 10 of 2015, and the Refugees Amendment Act 11 of 2017, have yet to come into operation, bringing it in line with section 23 of the Immigration Act, a conflict exists between the refugee and immigration laws.
[195] Refugees Act s 21(2).

than 30 days after the lodging of the application, the asylum seeker must be interviewed by an RSDO, who must, at the conclusion of the hearing, either grant asylum, reject the application as unfounded or reject the application as manifestly unfounded, abusive or fraudulent.[196] During the interview, the RSDO must have due regard to the rights set out in section 33 of the Constitution, must ensure that the applicant understands the procedures, his rights and responsibilities, including the right to legal representation, and must provide an interpreter where necessary.[197]

If the RSDO grants asylum, the applicant must be issued with formal recognition of refugee status in writing (also referred to as a refugee permit or a section 24 permit).[198] If the RSDO rejects the application as unfounded, the applicant must be given written reasons for such decision as well as 30 days in which to lodge an appeal to the Refugee Appeal Board (RAB).[199] The RAB must consist of a chairperson and at least two other members, and at least one member of the RAB must be legally qualified.[200] Following an appeal hearing, in which the applicant is entitled to all the same rights as those guaranteed during the interview with the RSDO, the RAB may confirm, set aside, or substitute the decision of the RSDO.[201] If the RSDO rejects the application as manifestly unfounded, abusive or fraudulent, the application automatically goes on review to the Standing Committee for Refugee Affairs (SCRA), which is empowered by the Refugees Act to monitor and review the decisions of RSDOs.[202] Upon review, the SCRA may either confirm or set aside the decision of the RSDO and, if the decision is set aside, the application must be referred back to the RSDO for rehearing.[203] Thus, an application for asylum can only be approved by the RSDOs and the RAB, since the SCRA does not have the power to substitute a decision. In cases where the rejection decision has been confirmed by either the RAB or the SCRA, the applicant must be notified of such decision in writing. Since the decisions of the RAB and the SCRA constitute administrative action, they may be judicially reviewed in terms of the Promotion of Administrative Justice Act[204] (PAJA), failing which, the applicant will be classified as an illegal foreigner and dealt with in terms of the Immigration Act. According to

[196] Refugees Act s 24; Refugee Regulations reg 4.
[197] Refugee Regulations reg 5 & 10.
[198] Refugees Act s 24; Refugee Regulations reg 12.
[199] Refugees Act s 26; Refugee Regulations reg 14.
[200] Refugees Act s 13.
[201] Refugees Act s 26.
[202] Refugees Act s 11 & 25.
[203] Refugees Act s 25; Refugee Regulation reg 13.
[204] Promotion of Administrative Justice Act 3 of 2000.

the Regulations to the Refugees Act, an asylum application should generally be adjudicated within 180 days of the application being lodged at the RRO.[205]

3.3. The Intersection between Statelessness and Refugee Protection

As mentioned above, stateless persons and refugees have always shared a close connection throughout history, despite the fact that international attention has been focused on the protection of refugees for the last few decades. Due to the low accession rates of the Statelessness Conventions and the concomitant lack of domestic determination procedures adequately identifying and protecting stateless persons, it is common for stateless persons to have no other recourse but to the legal regime protecting refugees and other domestic laws which are not specifically designed for them. For example, Canada, despite having acceded to the 1961 Statelessness Convention, has not implemented any determination procedures for statelessness and relies on its refugee protection regime and other domestic remedies, such as residence applications on humanitarian grounds, to protect those who are stateless.[206]

Due to this often necessary reliance on refugee law to protect stateless persons, some academics and lawyers have begun arguing for a reinterpretation of the refugee protection regime to protect all those that are stateless. As seen above, the definition of a 'refugee' contained in the 1951 Refugee Convention already extends to stateless refugees by providing that those 'not having a nationality and being outside the country of his former habitual residence', who are subject to persecution, are also to be recognised under the Convention. However, for stateless persons who have not been subject to the type of persecution required by the 1951 Refugee Convention, this protection is unavailable. In this regard, '[i]n the second decade of the twenty-first century, tribunals in Canada, the United Kingdom and the United States'[207] have been asked to examine asylum applications of stateless individuals who claim statelessness as a form of persecution.[208] In four different judicial decisions, while no definitive rulings on 'statelessness as persecution generally' were made, the courts all supported the fact that denationalisation, when based on

[205] Refugee Regulations reg 3.
[206] K Darling 'Protection of Stateless Persons in International Asylum and Refugee Law' (2009) 21 *International Journal of Refugee Law* 742, 748.
[207] M Fullerton 'Comparative Perspectives of Statelessness and Persecution' (2015) 63 *Kansas Law Review* 863, 876.
[208] Ibid.

religious, ethnic or other 1951 Refugee Convention grounds, which results in statelessness, is presumptively persecutory.[209] In one of these cases however, the court went further and held that the actions of the Ethiopian embassy in the United Kingdom (UK), in refusing the applicant a passport and rendering him stateless, constituted persecution.[210] In this case, the applicant was an Ethiopian national, born to an Ethiopian father and Ethiopian mother of Eritrean descent. The applicant's father passed away when he was a child and, during the war, the applicant's mother, who owned a bar frequented by Eritreans, was arrested and deported to Eritrea. The applicant himself was detained for a month and 'interrogated about his mother's activities in support of Eritrea.'[211] Upon being released, the applicant fled to the UK where he applied for asylum. The applicant was denied asylum on the grounds that the war between Ethiopia and Eritrea had ended and that, even though he had faced persecution in the past, he was unlikely to face any future persecution upon return to Ethiopia.[212] While his case was on appeal, the applicant approached the Ethiopian embassy to apply for a passport in order to return to Ethiopia; however, since the applicant did not possess a birth certificate or any other identity documents, his application was denied on the grounds of insufficient proof of Ethiopian nationality. In coming to a decision, the UK Upper Tribunal focused on the current treatment of the applicant by the Ethiopian embassy and held that, by refusing to issue him with a means to return to Ethiopia, the 'government's action constituted persecution because it made the applicant *de facto* stateless: alone in the world of nation states with no state to protect him.'[213]

While these cases show positive legal development in the expansion of refugee protection to stateless persons, it is important to note that such expansion will not be successful in curing the fundamental consequence of statelessness – i.e. not having any nationality. Until a stateless person is granted a specific nationality, they will remain at risk of exploitation and abuse, will not have the right to vote, and may struggle in accessing other fundamental rights, such as the right to education and health care. While some of these consequences may be alleviated if a stateless person is granted protection under the refugee protection framework, it will not be an absolute remedy to statelessness.

[209] Ibid 899.
[210] *S.T. v Secretary of State for the Home Department* (2011) UKUT 00252 (IAC). See also Fullerton (note 207 above) 883.
[211] Fullerton (note 207 above) 881.
[212] Ibid 882.
[213] Ibid 884.

3.4. Conclusion

From this Chapter, it is clear that the legal framework protecting refugees and asylum seekers is vast, and includes international, regional and domestic mechanisms. Due to the continuance of persecution and generalised violence resulting in mass worldwide displacement, the legal regime relating to refugees remains relevant and vital. In honouring its international and regional obligations, South Africa shaped one of the most liberal and progressive refugee protection regimes in the world. However, despite the substantive and procedural rights of refugees being comprehensively outlined in the Refugees Act, Chapter Four will show that, in reality, the processing and adjudication of asylum applications in South Africa is often conducted well outside of the legislative framework. In addition to violating its protection obligations, this bureaucratic autonomy by the DHA is resulting in large groups of people being placed at risk of statelessness.

CHAPTER FOUR: REFUGEE LAW AS A CAUSE OF STATELESSNESS IN SOUTH AFRICA

4.1. Introduction

Thirty years after the adoption of the 1969 OAU Convention, the former Secretary-General of the OAU and the former United Nations High Commissioner for Refugees issued a joint statement expressing concern over the waning commitment by African States to protect those in need of asylum, citing 'compassion fatigue' as one of the reasons behind the undermining of the refugee protection regime.[214] This increasingly restrictive view on asylum is, however, not particular to Africa, with States worldwide attempting to close their borders and to 'prevent or dissuade the arrival of refugees.'[215] As mentioned above, South Africa is no exception.

This Chapter will look at the ways in which refugee law is being implemented in South Africa and will show how these policy decisions are leading to instances of both *de jure* and *de facto* statelessness, as well as placing large groups at risk of statelessness. Furthermore, this Chapter will show that the group most vulnerable to becoming stateless in South Africa is the children of refugees and asylum seekers.

4.2. The Implementation of Refugee Law in South Africa

Despite having one of the most progressive refugee systems in the world, South Africa also has one of the lowest recognition rates worldwide – somewhere between five and fifteen per cent, compared to the global recognition rate of 37 per cent.[216] However, research has shown that these figures do not accurately reflect the number of persons deserving of refugee protection in South Africa, but rather show how the DHA's 'implementation of the country's asylum system has moved away from fulfilment of the legislative duty to provide protection... [to instead focusing] specifically on the identification of economic migrants'[217] who can be deported. Numerous policy decisions by the DHA have forced refugees and asylum seekers to remain

[214] G Okoth-Obbo 'Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 79, 82.
[215] Crisp (note 175 above) 5.
[216] Landau & Amit (note 19 above) 540.
[217] Ibid 542.

undocumented and without protection, and, while a lack of documentation does not automatically lead to statelessness, coupled with other factors, certain individuals may be rendered stateless or be placed at risk of statelessness.

4.2.1. *Denial of Access to the Asylum System*

(a) Asylum Transit Visas (Section 23 Permits)

As mentioned above, when an asylum seeker arrives at the border of South Africa and expresses an intention to apply for asylum, they must be issued with an asylum transit visa, which allows them time to travel to an RRO to submit an application for asylum. However, since the section 23 permit is 'intended to be an enabling and not a constraining measure'[218], those who do not enter South Africa through an official border post, and thus are not in possession of an asylum transit visa, cannot be barred from making an asylum application once they reach an RRO.[219] In other words, a section 23 permit is not a pre-requisite for lodging an application for asylum. However, despite this, research has shown that officials at the RROs will often turn away new asylum applicants if they are not in possession of a section 23 permit.[220] When this practice was challenged in the Western Cape High Court, the DHA insisted that no such policy existed and that asylum seekers were not denied access to the asylum system in the absence of a section 23 permit.[221] However, despite these assurances by the DHA, this practice continues to be reported by asylum seekers who are unable to lodge applications without asylum transit visas.[222]

In addition, research has show that border officials often deny asylum seekers section 23 permits based on their country of origin, for example Zimbabwe, despite them having expressed an intention to apply for asylum in South Africa.[223] This often forces an asylum seeker to then enter South Africa clandestinely and approach an RRO without an asylum transit visa, where they may face the issues discussed above.

[218] TP Ngwato *Policy Shifts in the South African Asylum System: Evidence and Implications* (2013) 30.
[219] Ibid.
[220] Ibid.
[221] Ibid 31.
[222] Ibid.
[223] Ibid 30-31.

(b) Access to RROs

Within the first few years of the refugee system coming into operation, the DHA established seven RROs in the major metropolitan areas across South Africa, namely Johannesburg, Pretoria, Tshwane, Cape Town, Durban, Port Elizabeth, and Musina.[224] However, since mid-2011, the DHA has ordered the closure of the RROs in Johannesburg, Tshwane, Port Elizabeth, and Cape Town, leaving only three fully functional RROs to deal with the thousands of new asylum application registered each year.[225] In addition, the applications that had been lodged at the RROs in Johannesburg and Tshwane were transferred to Pretoria to be finalised, thereby increasing the already existing backlog at the Pretoria RRO. The RROs in Cape Town and Port Elizabeth were treated as 'wind-down' centres, which would finalise existing applications but not accept any new ones. Legal challenges were brought against the DHA in respect of the closures of the RROs in Johannesburg, Port Elizabeth and Cape Town.[226] In all three of these cases, the DHA's conduct was found to be procedurally unfair and in conflict with the provisions of the Refugees Act, due to a lack of consultation with the SCRA.[227] Furthermore, in the Port Elizabeth and Cape Town cases, the SCA ordered that the RROs be reopened by 1 July 2015 and 31 March 2018 respectively.[228] However, despite these court orders, the Port Elizabeth RRO was only re-opened on 19 October 2018, and, to date, the RRO in Cape Town remains closed.[229]

When refugees and asylum seekers flee their country of origin, the route to safety has rarely been mapped out and, more commonly, reliance is placed on friends, family members, smugglers, or even others travelling in the same direction, to reach an asylum destination.[230] For asylum seekers who, upon arrival in South Africa, find themselves in the Western Cape, or other regions not hosting an RRO, these office closures are especially detrimental.

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[224] Ibid 39.
[225] The DHA registered 265 600 new asylum applications between 2012 and 2015. See DHA '2015 Asylum Statistics: Analysis and Trends for the Period January to December: Presentation to the Portfolio Committee of Home Affairs' (2015).
[226] *Consortium for Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others* (NGHC) unreported case no 53756/11 (2011); *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape and Another (SASA EC)* 2015 (3) SA 545 (SCA); *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 4 SA 125 (SCA).
[227] Ngwato (note 218 above) 40.
[228] Lawyers for Human Rights 'Home Affairs Reopens Refugee Office in Port Elizabeth After Years of Litigation' <*http://www.lhr.org.za/news/2018/home-affairs-reopens-refugee-office-port-elizabeth-after-years-litigation*>.
[229] Ibid.
[230] R Amit *No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 32.

The closure of these RROs is part of a broader policy decision by the DHA to move the processing of asylum applications closer to the borders of South Africa.[231] In this regard, the DHA has proposed the development of 'Asylum Seeker Processing Centres', the first of which is to be constructed in Lebombo, a town near the border of South Africa and Mozambique.[232] While the DHA continues to assert that these Centres are not tantamount to refugee camps, they have indicated the possibility that asylum seekers who pose a 'high risk' will be 'accommodated in a secure facility, until their status has been determined.'[233]

In addition to the closures of various RROs, the DHA has also implemented a policy whereby asylum applications must be finalised at the RRO where the application was first lodged, including all procedures incidental to the application, such as interviews, the lodging of appeals and the renewal of asylum seeker permits.[234] Despite numerous successful court challenges, the DHA continues to implement this policy.[235] While the Refugees Act stipulates that an application for asylum should be finalised within 180 days, the reality is that most applications take more than a few years to be adjudicated. According to a survey conducted by LHR and the African Centre for Migration & Society (ACMS) in 2015, the average time taken to finalise an application was reported to be 2, 8 years, with the longest reported time being almost 19 years.[236] Coupled with the fact that asylum seeker permits are required to be renewed every three to six months, this places an extremely heavy burden on asylum seekers who, 'for each renewal, ... must take off time from work, find childcare where necessary, and pay for transport, a cost that has increased significantly for those applicants whose closest RRO has closed.'[237] In an earlier survey conducted by ACMS, almost one quarter of the respondents reported that they had at some point had an expired permit due to the fact that they could not make it to their RRO.[238] This

[231] Ibid 42-43.
[232] F Khan and M Lee 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' (2018) 4 *African Human Mobility Review* 1209.
[233] Ngwato (note 218 above) 43.
[234] Amit (note 230 above) 54.
[235] *Aden and Others v Minister of Home Affairs and Another* (WCHC), unreported case no 9179/00; *Hirsi and Others v Minister of Home Affairs and Others* (WCHC), unreported case no 16863/08; *Thomasso and Others v The Minister of Home Affairs and Others* (WCHC), unreported case no 10598/09; *Zihalirwa and Others v The Minister of Home Affairs and Others* (WCHC), unreported case no 20988/12; *Abdulaahi and 205 Others v The Director General of the Department of Home Affairs and Others* (WCHC), unreported case no 2205/13; *Nbaya and Others v The Director General of Home Affairs and Others* (WCHC), unreported case no 6534/15.
[236] R Amit Queue *Here for Corruption: Measuring Irregularities in South Africa's Asylum System* (2015) 31.
[237] Amit (note 230 above) 50.
[238] Ibid 52.

can lead to further difficulties in that, asylum seekers with expired permits are charged with an offence in terms of the Refugees Act and must pay a fine, anywhere between R2 500 and R3 000, before it can be renewed again.[239] Despite the fact that the Refugees Act allows this offence to waived where 'just cause' exists, the DHA rarely invokes this discretion and legal intervention is often required in this regard.

For those asylum seekers who do manage to make it to the RRO to renew their permits in time, they face additional challenges of long queues, corruption, physical and verbal abuse by security officials, and a lack of sanitation facilities.[240] According to the 2012 survey conducted by ACMS, over 50 per cent of the respondents reported having to spend one or more nights in the queue in order to gain access to the RRO, many of them accompanied by small children.[241]

(c) Quality of Asylum Decisions

In addition to being physically unable to access the asylum system, many asylum seekers are also being denied the protection afforded by the Refugees Act due to the DHA's policy of systematic rejection of applications. In furthering its view that all asylum seekers are economic migrants abusing the system, the DHA measures the performance of RSDOs according to whether they have reached the targeted number of rejection decision.[242] In fact, '[p]ositive decisions granting refugee status are automatically reviewed for corruption, creating a system bias in favour of rejections.'[243] Furthermore, the DHA does not require any minimum education standards for RSDOs, 'does not provide extensive training on refugee law, and fails to provide adequate resources to enable officers to conduct country research or investigate the details of an individual's claim.'[244] This system of default rejections results in huge strain being placed on the appeal and review systems of the RAB and the SCRA respectively, and is one of the major causes of the asylum 'backlog'. According to the asylum statistics provided by the DHA, there was a backlog of 12 361 appeal cases and 23 233 review cases in 2015 alone.[245] However, these figures do not represent the total backlog since the figures for previous years were not given.

[239] Ibid. 55. See also Refugees Act s 37(b).
[240] Ibid 41.
[241] Ibid.
[242] Landau & Amit (note 19 above) 542-543.
[243] Ibid 543.
[244] Ibid 542.
[245] Parliamentary Monitoring Group (note 17 above) 29-30.

Coupled with the fact that the RAB and the SCRA often just 'rubber-stamp' the decisions of the RSDOs[246], these decision making tactics result in a large number of failed asylum seekers remaining in South Africa undocumented, but unable to return home due to fear of persecution or generalised violence. For example, in the case of *Mwamba Armand*[247], the RAB confirmed the decision of the RSDO to reject the applicant, who fled from civil war in the eastern Democratic Republic of Congo (DRC). In the decision, the RSDO stated that:

> You have decided to leave your country because you were arrested by the rebels for six months... You again mentioned that after fleeing the rebels you were than accused of working for the rebels by the secret service. After considering all the relevant fact into your application I have come into conclusion that you claim does not call to question any material fact and country of information is not consistent on this matter... eveven though it is fact that the political instability and insecurity in Goma... Inlight of the above well founded fear does not apply.[248] (sic)

It is evident from above that various policies carried out by the DHA are increasingly resulting in refugees and asylum seekers remaining undocumented in South Africa. However, since most refugees and asylum seekers legally possess a nationality when arriving in South Africa, the DHA's policies, causing them to remain undocumented, are unlikely to result in situations of *de jure* statelessness, since the recognition of refugee status does not affect a person's nationality. In situations where a refugee or asylum seeker is rendered *de jure* stateless, this is more likely to have resulted from a conflict of laws or discrimination by the country of nationality, rather than a documentation status imposed by the DHA. For example, many members of the Banyamulenge ethnic community, who settled in the eastern parts of the DRC centuries ago, have fled to South Africa as refugees due to persecution by the State.[249] In addition to being refugees, many of the Banyamulenge may be stateless due to the war, and ongoing persecution against them, prohibiting them from accessing nationality, despite the 2004 law granting citizenship to the Banyamulenge.[250] However, as will be discussed in more detail below, a lack of DHA issued

[246] N Rehbock & T Pampalone *Asylum at a Price: How corruption impacts those seeking legal protection in South Africa: Project Lokisa* (2016).
[247] *Mwamba v Refugee Appeal Board* (2017) ZAWCHC 16.
[248] Supra para 38.
[249] Southwick and Lynch (note 23 above) 29.
[250] Ibid.

documentation does result in refugee and asylum seeker parents being unable to register the births of their children, which may have serious consequences for the acquisition of nationality.

Despite not leading to situations of *de jure* statelessness, all refugees and asylum seekers in South Africa will be rendered *de facto* stateless, since they no longer possess the protection of their country of nationality. If South Africa fails to adequately protect refugees and asylum seekers within its borders, they will effectively be placed in the same position as those who are *de jure* stateless – not enjoying the protection of any State.

4.2.2. *Denial of Birth Registration*

As was discussed above, the Regulations to the BDRA do not allow birth certificates to be issued to children of undocumented parents, including those whose documentation, such as an asylum seeker permit, has expired. Despite the fact that the Constitution provides that every child has the right to a name and nationality from birth, the DHA enforces this requirement emphatically, especially in the case of undocumented mothers. Thus, even if the father of the child is documented, or is a South Africa citizen, the DHA will not issue the child with a birth certificate if the mother is undocumented.[251] In a case brought before the Grahamstown High Court, by the Legal Resources Centre (LRC) and the Centre for Child Law, the court declared several portions of the Births and Deaths Registration Regulations to be unconstitutional, to the extent that it does not allow father's to register the birth of their child in the absence of the mother, or when the mother is undocumented.[252] By reading-in several words, the court cured these defects to require valid documentation only 'when available' and to allow *either* (my emphasis) a mother or a father to register the birth of the child.

Despite the progress made in the case above, the DHA, in October 2018, published the proposed Draft Regulations on the Registration of Births and Deaths[253] (Draft Registration Regulations) which remove the possibility of foreign children being issued birth certificates at all. Instead, the Draft Registration Regulations provide that children of permanent residents, refugees, and all

[251] Ibid 35.
[252] *Naki and Others v Director General: Department of Home Affairs and Another* (ECG), unreported case no 4996/2016 (9 July 2018).
[253] Draft Regulations on the Registration of Births and Deaths in GN 1085 GG 41970 of 12 October 2018.

other documented foreign nationals, including asylum seekers, must be issued with a 'confirmation of birth certificate', which is defined as a certificate:

> Issued to a non-South African citizen confirming that the birth of his or her child occurred within the Republic... [which] enables the holder thereof to approach the relevant authorities of his or her country of citizenship or nationality in order to register the birth of his or her child in his or her country of citizenship or nationality's population register.[254]

In addition to once again excluding the registration of children born to undocumented parents, these regulations fail to understand the very nature of refugee protection. Refugees and asylum seekers often flee their countries due to State persecution, or the failure of the State to provide effective protection, and thus they are not able to approach their embassies. Furthermore, if a refugee or asylum seeker approaches their embassy in South Africa, the DHA may withdraw their status based on the fact that they have voluntarily re-availed themselves to the protection of their country of origin.[255] Thus, refugees will be forced, either, to not register the birth of their child or risk facing *refoulement* to a country where they may face persecution or their lives, physical safety or freedom may be at risk.

Furthermore, under the current Regulations to the BDRA, even if refugees and asylum seekers do manage to regularise their documentation after the birth of their child, the 'late registration of birth' process is only available to citizens, permanent residents and refugees, thus excluding the possibility of asylum seekers registering their child's birth after 30 days, regardless of documentation. The evidentiary requirements for the 'late registration of birth' process are also onerous to the point of being exclusionary – often requiring 'maternity certificates or clinic cards, school records, [and] baptism certificates'[256] to be provided.

In addition to birth registration being denied to undocumented foreign nationals, the same is often true for documented refugees and asylum seekers. Due to a combination of lack of training, xenophobia and 'the misperception that a birth certificate entitles a child to South African

[254] Draft Registration Regulations, regulations 1, 7 and 8.
[255] Refugees Act, section 5.
[256] George et all (note 12 above) 38.

citizenship', children born to documented refugees and asylum seekers are also often denied birth registration by the DHA's officials.[257]

Since birth registration provides official proof of a child's place of birth and parental affiliations, a lack of birth registration places a child at serious risk of statelessness. In South Africa, where the acquisition of citizenship is based predominantly on the principle of *jus sanguinis*, birth registration will be essential, for children born in South Africa to foreign parents, for claiming the nationality of their parents. Where a child is not in possession of a birth certificate, the State, of which the parents are nationals, may refuse to recognise the child as a citizen, therefore rendering them stateless. For example, according to the nationality laws of Libya, if a child with a claim to Libyan citizenship is born abroad, the birth must be registered within ten days and an original birth certificate issued by the country of residence must be provided.[258] Therefore, for a Libyan child born in South Africa, not being issued with a birth certificate is likely to affect their ability to claim their Libyan citizenship, potentially rendering them stateless.

In addition to affecting a child's claim to their parent's nationality, a lack of birth registration will also bar access to the South African legislative provisions providing citizenship acquisition by means of the *jus soli* principle. As was discussed above, children born in South Africa, who would otherwise be stateless, are entitled to South African citizenship by birth, provided that their birth was properly registered. Additionally, children born in South Africa to foreign parents, who have attained majority and resided in South Africa since the time of their birth, may access South African citizenship, once again, provided that their birth was registered.

The refusal of birth registration is also of particular concern to foreign children who are later orphaned or abandoned by their parents in South Africa. In absence of a birth certificate, a child may be able to rely on the testimony of, or evidence provided by, their parents when attempting to access their nationality. However, this is not a possibility for orphaned and abandoned children, thus rendering them particularly vulnerable to becoming stateless. According to the

[257] Ibid 32.
[258] Manby (note 27 above) 55. See also Office of the Commissioner General for Refugees and Stateless Persons 'Libya: Nationality, Registration and Documents' (2014) 15.

UCT Children's Institute, there were 2.8 million orphaned children in South Africa in 2017[259] and, according to Child Welfare, 2000 children are abandoned in South Africa each year.[260] While orphaned and abandoned children, regardless of their nationality, are automatically considered to be 'in need of care and protection' in terms of the Children's Act, social workers and Children's Courts are often only concerned with the temporary protection needs of such children, rather than the status of their documentation.[261] Even if an attempt is made to document these children, limited legal remedies are available to them. For example, orphaned or abandoned children born in South Africa are unlikely to qualify for protection under the Refugees Act since it would be almost impossible to show that they have a 'well-founded fear of persecution' or that that they were forced to flee their country of nationality due to generalised violence and, without being able to meet this definition, they will not be recognised as refugees. Furthermore, without parents, the possibility of derivative refugee status, which will be discussed in more detail below, will be unavailable to them. Thus, even if a stateless child is afforded protection by the Children's Act, this protection will not resolve their lack of citizenship and will, furthermore, cease once they attain majority. For example, according to a case study by LHR:

> Sarah was born at home (i.e. not in a hospital) to a foreign mother. Her mother passed away before her birth was registered and Sarah was left undocumented. Sarah was placed in a children's home, but the social workers cannot register her birth... [and she] does not have any provable link the country of her mother's birth.... She is therefore stateless. Sarah cannot go to school because of her lack of legal status. Once she turns 18, she will no longer be considered a child and will be at risk of arrest, detention and deportation to a country she has no citizenship in.[262]

4.2.3. *Treatment of Minors in the Asylum System*

While neither the Refugees Act, nor any other South African law, places an age restriction on applying for asylum, the DHA does not allow minors to make independent applications for

[259] K Hall, L Richter, Z Mokomane & L Lake *South African Child Gauge 2018: Children, Families and the State: Collaboration and contestation* (2018) 134. The South African Child Gauge defines an orphan as a 'child under the age of 18 whose mother, father or both biological parents have died'.
[260] George et al (note 12 above) 14.
[261] N Willie & P Mfubu 'No Future for our Children: Challenges faced by foreign minors living in South Africa' (2016) 2 *African Human Mobility Review* 423, 431.
[262] LHR 'Childhood Statelessness in South Africa' (2016) 7.

asylum, unless ordered by a Children's Court to do so.[263] This is despite the fact that international refugee law recognises certain acts of persecution as being specifically applicable to minors, such as 'forced conscription as child soldiers or forced marriage as child brides'[264]. Therefore, under the South Africa asylum system, minors are either treated as dependents of adult asylum applicants or as 'unaccompanied minors', which the UNHCR defines as a child who has been separated from both parents and other relatives and is not being cared for by an adult who has the duty to do so.[265]

As was discussed above, section 3(c) of the Refugees Act grants derivative refugee status to the dependents of those recognised as refugees in terms of sections 3(a) and/or (b). This process, colloquially referred to as 'family joining', means that the documentation status of the child is dependent and equal to that of the parent. Documenting the children of refugees and asylum seekers in this manner is often vital, since most children of refugees and asylum seekers arrive in South Africa without birth certificates, either due to it having been lost during flight or their births having never being registered in their country of origin. However, in practice, the DHA limits family joining to those families formed before arrival in South Africa and only in those instances where the primary applicant declared the names of the family members.[266] Furthermore, the DHA officials rarely explain these requirements to applicants and thus, it is common that only those family members physically present at the time when the application was made, will be joined and issued with documentation. In addition, the definition of 'dependent' only includes a child under the age of 18 and thus, when a child attains majority, the DHA summarily removes them from their parent's file, leaving them undocumented and at risk of arrest, detention and deportation.[267] While the Refugees Act does allow those who have ceased to be dependents to make their own asylum application, persons in these circumstances rarely remember the reasons for fleeing their countries of origin, having arrived in South Africa at such a young age. It is thus common for these applications to be unsuccessful due to the burden of proof not being discharged by the applicant. Furthermore, where the primary applicant dies, returns to his country of origin or disappears, the DHA also treats this as an instance of ceased

[263] Willie & Mfubu (note 261 above) 430.
[264] Ibid.
[265] Ibid 425.
[266] Khan & Lee (note 232 above) 1216.
[267] Ibid 1217-1218.

dependency, thus placing orphans or abandoned children in the same circumstances as those who have attained majority.

As was the case with undocumented refugees and asylum seekers, the refusal to issue documentation to the children of refugees and asylum seekers alone is not likely to result in situations of *de jure* statelessness. However, where these children are not in possession of a birth certificate, issued by their country of origin, the risk of statelessness increases due to the fact that they may face difficulties in proving their right to such citizenship. This risk is even higher for those children who have been orphaned or abandoned as, once again, 'without guardians and documents to prove their origin, ... [these children are often rendered stateless in South Africa] with no immigration status or path to naturalisation.'[268] For example, according to a case study by LHR:

> LM was born in Ethiopia and came to South Africa at the age of two with her parents. Her parents applied for asylum but within a year she was taken from their care due to extreme neglect. Her parents then abandoned her and left the Republic. She entered court ordered foster care and her asylum application fell away because she was considered a dependent of her parents who left. However, no immigration status was given to her as part of the children's court proceedings. Having grown up in South Africa, she does not speak her parents' language, does not have a birth certificate and has no family or home to return to.[269]

However, as was the case with undocumented refugees and asylum seekers above, the refusal to issue documentation to the children of refugees and asylum seekers places them in a *de facto* stateless situation, since they are often unable to access social services such as health care and education without documentation.[270] In a study conducted by the Scalabrini Centre of Cape Town (Scalabrini) in the Western Cape, 40 per cent of the applicants, who were all minors, reported that they were not attending school, 50 per cent of which attributed their non-attendance to a lack of documentation.[271] Children who are not granted their fundamental rights and

[268] George et all (note 12 above) 14.
[269] Ibid 15.
[270] Willie & Mfubu (note 261 above) 437.
[271] M Ackermann *Unaccompanied and Separated Foreign Children in the Western Cape, South Africa: Exploring (the lack of) durable solutions for children in informal relations of care* (2017) 26.

freedoms by any State are therefore, essentially in the same position as those who are *de jure* stateless.

The Refugees Act makes specific provision for the treatment of unaccompanied minors and provides that any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Children's Act, must be brought before the Children's Court which may order that such child be assisted in applying for asylum.[272] However, with no dedicated referral mechanisms for this type of situation, many unaccompanied children are never brought to the attention of a social worker or the Children's Court.[273] Furthermore, even if an unaccompanied child is brought before a Children's Court, they will not necessarily be found to be in need of care and protection (if, for example, they are being adequately cared for by another adult) and, under these circumstances, the matter is often concluded without an order being made as to the documentation for the child.[274] For example, according to a case study by Scalabrini:

> Marie fled her country of origin at age 15 in the context of conflict. Travelling with a group of strangers... she entered South Africa alone. She eventually took shelter at a church... and the priest asked one of the members of the church to take her in.... Sonia took Marie to the RRO in Durban in order for her to claim asylum. Here, they were issued the following letter: "The abovenamed person is seeking asylum in SA. She is under age therefore an appropriate court order is required in order for Home Affairs to proceed with Asylum Application..." [At the Child Protection Agency they were] issued a handwritten note stating: "This office is unable to assist this client." [They were not referred elsewhere and thus] Marie remains in Sonia's care without an assessment of her situation, and without documentation.[275]

4.3. Conclusion

From this Chapter it is evident that, in addition to failing to meet its protection obligations under international, regional and domestic refugee law, the DHA is implementing the asylum system in a manner which is leading to instances of both *de jure* and *de facto* statelessness, as well as

[272] Refugees Act s 32.
[273] Ackermann (note 271 above) 20.
[274] Ibid.
[275] Ibid 21.

placing large groups at risk of becoming stateless in South Africa. This is particularly so for the children of refugees and asylum seekers, both for those born in South Africa and those born in their parent's country of origin. Through its underlying policy of shrinking the asylum protection space, the DHA is forcing thousands of refugees and asylum seekers to remain undocumented in South Africa, which in turn results in their children being unable to access birth registration and their own documentation. While not automatically leading to statelessness, lack of birth registration is one of the greatest risk factors for statelessness since a birth certificate acts as proof of a child's link with a particular State, both in terms of place of birth and parental affiliations. Orphaned and abandoned children are also particularly vulnerable to statelessness in South Africa, since very few legal mechanisms exist to guard them against it. While orphaned and abandoned children may access the child protection system in South Africa, this is often insufficient to resolve their documentation status and, once they age out of the protection system, will become vulnerable to arrest and detention for the purposes of deportation.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSIONS

5.1. Introduction

According to the UNHCR, 'the problem of statelessness remains a glaring anomaly with devastating impacts on the lives of at least 10 million people around the world who live without any nationality.'[276] Despite an international legal framework protecting the right to a nationality, statelessness continues to occur as a result of, inter alia, State succession, conflicting nationality laws, procedural barriers and various forms of discrimination. In South Africa, where no domestic legal framework has been implemented to recognise and protect stateless persons, reliance is often placed on the refugee protection framework and other domestic laws which were not designed specifically for stateless persons. Furthermore, it is evident that in South Africa, the refugee laws and procedures are being implemented in such a manner as to exclude those whom the system was designed to protect as well as those who are forced to turn to the system for protection. Due to various underlying policy decisions, lack of training and xenophobia, the DHA is implementing the refugee protection regime in a way that attempts to shrink the asylum space and dissuade refugees and asylum seekers from coming to South Africa. In carrying out these policy decisions, the DHA's implementation of the refugee protection regime is also leading to situations of both *de jure* and *de facto* statelessness as well as placing large categories of persons at risk of statelessness.

5.2. Recommendations

In its 2014 Global Action Plan to end statelessness, the UNHCR identified ten specific actions which can be carried out by States in an effort to end statelessness within 10 years. These actions include the resolution of existing instances of statelessness, the removal of all forms of discrimination from nationality laws, universal birth registration, accession to the Statelessness Conventions and the development of domestic determination procedures.[277] A number of these, specifically those relevant to the South African context, will be discussed below.

[276] UNHCR (note 2 above) 4.
[277] Ibid.

5.2.1. *Ratification and Domestication of the Statelessness Conventions*

The 1954 Statelessness Convention and the 1961 Statelessness Convention represent the key international instruments designed to prevent statelessness and ensure that those who are stateless have access to their fundamental human rights. Despite pledging to accede to both Statelessness Conventions, South Africa has failed to do so. Furthermore, as seen above, the only existing legislative framework that can be used to protect stateless persons in South Africa is often wholly inadequate. In addition to these laws not being designed specifically for the protection of stateless persons, they are also implemented in a manner which appears to be aimed at denying protection to those most vulnerable. It is therefore recommended that South Africa accedes to both the Statelessness Convention and enacts domestic legislation which gives effect to the international obligations contained therein.

In addition to ensuring a minimum standard of protection for stateless persons in South Africa, the domestication of the Statelessness Conventions will allow for a determination procedure to be developed, thereby improving the ability of the DHA to recognise statelessness and removing stateless persons' reliance on the asylum system for protection. This envisaged statelessness protection regime should include mechanisms to identify future statelessness as well as those who are currently stateless, and include measures to facilitate the expedited naturalisation of stateless persons.

Accession and domestication of the Statelessness Conventions will also improve the quantitative and qualitative data on stateless persons – something which is severely lacking worldwide.[278] According to the UNHCR, reliable data on statelessness is necessary to determine the scale and geographical spread of the problem, the profile of the affected population, the causes and consequences of statelessness and the potential obstacles to the solution thereof.[279]

5.2.2. *Unconditional Birth Registration*

As mentioned above, a lack of birth registration is one of the largest risk factors for statelessness since 'birth registration documents where a person was born and who their parents are – key

[278] Ibid 24.
[279] Ibid 24-25.

pieces of information needed to establish which country's nationality a child can acquire.'[280] Despite the constitutional framework protecting a child's right to birth registration and a nationality in South Africa, as well as the obligations under international law, it is evident that the DHA does not comply with these principles and routinely denies birth registration to the children of refugees, asylum seekers and other undocumented migrants. It is therefore recommended that South Africa cease the enactment of the Draft Registration Regulations and instead adopt a policy of universal birth registration which is not dependent on the documentation of the parents. The rights to a nationality and birth registration are ones which are afforded to the child and thus, the documentation status of the parent should have no effect thereon. Implementing a policy of unconditional birth registration will recognise the specific vulnerability faced by children, especially those that are orphaned or abandoned, and will ensure that every child has a legal mechanism to prove their nationality.[281]

5.2.3. *Improvements to the Asylum System*

As demonstrated above, the asylum system in South Africa, which is often the only mechanism to which stateless persons can turn for protection, is being implemented in a manner which excludes those whom it was designed to protect and is, in some instances, causing statelessness, or placing large groups at risk of statelessness. In this regard, South Africa can make a number of improvements to ensure that the implementation of refugee law does not lead to instances of statelessness.

It is therefore recommended that the DHA take the necessary steps to ensure that all refugees and asylum seekers remain documented while in South Africa. This could be achieved by improving and facilitating access to the RROs, including re-opening the RROs in Johannesburg, Tshwane, and Cape Town, creating a national asylum system so that applicants are not bound to one RRO, and improving processing times so that applicants are not required to attend the RROs every three to six months for a number of years. Furthermore, the DHA should provide adequate resources and training in order to ensure that the adjudication of asylum applications is carried out in accordance with both the Refugees Act, the PAJA, and the general principles contained within the Constitution. This should be accompanied by a policy focused on the granting of

[280] Ibid 18.
[281] R Elphick *Towards Universal Birth Registration in South Africa* (2011) 7.

protection to those who are deserving, rather than one which contains a bias towards the rejection of asylum applications.

In addition, in order to deal specifically with the backlog currently existent in the asylum system, it is recommended that South Africa invoke the provisions on mass influx contained in section 35 of the Refugees Act which provides that:

> The Minister may, if he or she considers that any group or category of persons qualify for refugee status as is contemplated in section 3, by notice in the Gazette, declare such group o category of persons to be refugees either unconditionally or subject to such conditions as the Minister may impose in conformity with the Constitution and international law and may revoke any such declaration by notice in the Gazette.

By automatically recognising certain groups as refugees, such as those fleeing from specific war-torn countries, some of the strain placed on the asylum system may be alleviated and, as an interim measure, may be successful in reducing the existing backlog.

5.3. Conclusion

Despite an international framework guaranteeing fundamental rights to all who belong to the human family, nationality is often an essential element to accessing these rights. Furthermore, regardless of international, regional and domestic laws protecting the right to a nationality, millions of people worldwide are denied this right and rendered stateless, a phenomenon which carries dire consequences for those affected. In addition to not being able to vote or run for public office, stateless persons are often unable to access other fundamental rights, such as the right to education, housing or health care. Stateless persons are also vulnerable to abuse, exploitation and human trafficking. Furthermore, despite the creation of an international legal framework focusing specifically on statelessness, these instruments, including the 1954 Statelessness Convention and the 1961 Statelessness Convention, have experienced low rates of accession and concomitant domestication and implementation. As a result, stateless persons are often forced to rely on the safeguards provided by the mechanisms designed to protect refugees and asylum seekers and, while these may be able to alleviate some of the consequences of statelessness, they will never be able to provide an absolute solution to statelessness – i.e. the

granting of nationality. This reliance on the asylum system is evident in South Africa, where neither of the Statelessness Conventions have been ratified and no domestic determination procedures have been implemented to identify or prevent statelessness. In examining the refugee law in South Africa, the manner in which these laws are implemented, as well as other legislation relevant to the protection of stateless persons, it is evident that the South African government's policy decisions relating to the asylum system are aiming to shrink the asylum protection space in South Africa and are inadvertently leading to situations of both *de jure* and *de facto* statelessness. In addition, the conduct of the DHA is placing large groups at risk of statelessness and leaving vulnerable groups with little to no legal remedies. In a State which hosts an estimated 10 000 stateless persons, these policy decisions and implementation practices urgently need to be addressed in order to resolve existing situations of statelessness as well as to prevent future statelessness.

Word count: 20 644

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