

The Impact of Climate Change on Statelessness in the Southern African Region

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There are three ways by which nationality can be acquired: by descent, birth on the territory, or naturalisation. However, the determination of nationality remains ambiguous, and statelessness is becoming a major concern in the Southern African region. Statelessness often occurs due to the lacunae found in the laws, policies, and practices of states that deny individuals their right to nationality, at birth or later in life. Stateless persons become unfairly marginalised and denied their basic human rights and access to services, legal protection, and recognition. Statelessness is not only harmful to stateless persons themselves but can destabilise the society in which such persons live. Cross-border and permanent displacement due to the impacts of climate change is among the factors that can cause statelessness. Persons who are unable to prove their nationality often can be regarded as stateless. This article investigates how statelessness can be associated with cross-border and permanent displacement due to the impacts of climate change. It uses case studies of South Africa, Mozambique, and Tanzania. It evaluates the likelihood that such circumstances may lead to uncertain rights and legal statuses of stateless persons, issues that have the potential to be passed on to subsequent generations. The article concludes that climate change has far-reaching stateless implications. It recommends the law and policy review as among the possible solutions for effectively preventing statelessness and protecting and promoting stateless persons' rights in the Southern African region.

Keywords: statelessness, cross-border and permanent displacement, impact of climate change, Southern African region

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I. INTRODUCTION

The 1954 Convention Relating to the Status of Stateless Persons defines a stateless person as a person who is not considered a national by any state under the operation of law.¹ International law contains various rights and instruments aimed at preventing and reducing statelessness. A failure by States Parties to comply with international obligations to address statelessness and grant nationality often leads to irregular citizenship laws, which in turn contribute to statelessness.² Khan refers to childhood statelessness and rightly points out that statelessness is not something that is caused or deserved by the individuals affected.³ For example, children do not have a choice when it comes to their place of birth, the actions of their parents, the identity of their parents, or the actions of the states.⁴ In Africa, the nationality status of a significant number of Africans is questionable because their nationalities are doubtful or in dispute.⁵ Without an official connection between an individual and a state, such an individual has neither protection from, nor responsibilities to, the state in which they live.⁶ Without an official connection of a bond between the state and individuals, individuals are not recognised by any state as their nationals, rendering them stateless.

The 1948 Universal Declaration of Human Rights (UDHR) affirms that all individuals are born equal in dignity and human rights.⁷ Article 15 of the UDHR provides that the right to a nationality includes the right not to be arbitrarily deprived of one's nationality. Other international human rights instruments such as the 1966 International Covenant on Civil and Political Rights (ICCPR)⁸ and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) refer to the realisation of human rights that includes the right to a nationality.⁸

A topic receiving increasing attention is the relationship between climate change and statelessness. In the words of McAdam, climate change and its effects on human beings are both legally and conceptually inconsistent.¹⁰ This article examines the extent to which stateless persons who are permanently displaced across borders due to the impacts of climate change in Southern Africa are protected by the current international and national regional frameworks addressing statelessness

¹ UN General Assembly, Convention Relating to the Status of Stateless Persons 28 September 1954, Art 1(1).

² See Maria José Recalde Vela *How Far Has the Protection of the Right to Nationality under International Human Rights Law Progressed from 1923 until the Present Day?* (unpublished LLM thesis, Tilburg University, 2014) at 10.

³ Fatima Khan 'Exploring childhood statelessness in South Africa' (2020) 23 *PELJ* at 5.

⁴ *Ibid.*

⁵ Aimée-Noël Mbiyozo 'Statelessness: An old problem with new threats' Institute for Security Studies (ISS), 13 November 2019, available at <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats>, accessed on 09 February 2022.

⁶ Hugh Massey 'UNHCR and de facto statelessness' UNHCR Legal and Protection Policy Research Series LPPR/2010/01 April 2010 at 3.

⁷ Universal Declaration of Human Rights, 1948, Art 1.

⁸ International Covenant on Civil and Political Rights, 1966, Arts 12(4) and 24.

⁹ International Covenant on Economic, Social and Cultural Rights, Art 1. See also the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, adopted by UN General Assembly Resolution 40/144 of 13 December 1985.

¹⁰ Jane McAdam 'Climate change displacement and international law: Complementary protection standards' UNHCR Legal and Protection Policy Research Series at 8–9.

and displacement. This article uses a contextual analysis by using case studies of South Africa, Mozambique, and Tanzania. These countries were chosen because they are located along the Indian Ocean and have been prone to rapid-onset disasters, and slow-onset disasters as explained below. Also, these countries form part of the Southern African region, which is currently faced with the problems of cross-border migration, displacements, and the impact of climate change, which all lead to statelessness situations in the region.¹¹

This article uses a desktop review of current law and literature in the region to assess the normative frameworks for responding to the needs of those individuals who are forced to move from their original places of habitation on account of environmental or climate change. It examines the extent to which existing laws and policies protect forcibly displaced persons who cross international borders in the Southern African region due to climate change. It assesses the degree to which a progressive interpretation of the laws and policies is required to expand the protection of stateless persons whose statelessness is caused by the impact of climate change. Lastly, the article concludes with recommendations on how statelessness caused by climate change in the Southern African region can be dealt with and ultimately eradicated.

Before addressing the issue of statelessness as a result of climate change and how this problem presents itself in the various jurisdictions selected for this article, it is necessary to briefly set out the global legal framework on statelessness and attempts to eradicate it.

II. REGIONAL, CONTINENTAL AND GLOBAL INITIATIVES TO ERADICATE STATELESSNESS

There have been multiple regional initiatives to reform nationality laws. Some examples of these initiatives are the 2015 Abidjan Declaration of Ministers of Member States of the Economic Community of West African States (ECOWAS) on the eradication of statelessness,¹² and the Southern African Development Community (SADC) Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC region adopted by the SADC Parliamentary Forum on 13 November 2016.¹³ Other initiatives include the Resolution on Legal Identity for Children, adopted in 2016 in Lusaka by the 134th Inter-Parliamentary Union Assembly,¹⁴ which was in line with the First Conclusions on Statelessness, as adopted by the Council of

¹¹ Bronwen Manby 'Citizenship and statelessness in the Member States of the Southern African Development Community' (December 2020) at 1. See also Aimée-Noël Mbiyozo 'Statelessness in Southern Africa: Time to end it, not promote it' (2019) Institute for Security Studies: Southern Africa Report 32 at 2.

¹² The Declaration was adopted on 25 February 2015 by the Member States of the Economic Community of West African States (ECOWAS) on the occasion of a ministerial conference organised by the United Nations High Commissioner and ECOWAS. It underlines, among other things, the need to end statelessness in the ECOWAS.

¹³ SADC Parliamentary Forum, 40th Plenary Assembly.

¹⁴ See the address by MP Godfrey Farrugia to the 134th IPU Assembly held in Lusaka, Zambia, between 19 and 23 March 2016, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://archive.ipu.org/conf-e/134/sr.pdf>, accessed on 19 May 2022.

the European Union (EU) in 2015. The existence of these initiatives is evidence of the seriousness of the problem and the determination to combat statelessness globally.

At a continental level, treaties such as the European Convention on Human Rights (ECHR) of 1950,¹⁵ the American Convention on Human Rights (ACHR) of 1969,¹⁶ the African Charter on Human and People's Rights (ACHPR) of 1981¹⁷ and the Arab Charter on Human Rights of 1994 were all adopted to promote and protect human rights. The ACHR, for example, lists five elements on how the right to a nationality should be recognised: the acknowledgement of a general right to a nationality; a provision that requires the state to grant nationality to a child born on its territory by virtue of *jus soli*¹⁸ who would otherwise be stateless; the prohibition of arbitrary deprivation of nationality; the prohibition of discriminatory practices in nationality matters; and allowing the right to change one's nationality.¹⁹

The provisions under the ACHR prohibit all forms of discriminatory practices and recognise nationality as an essential right. A combination of the above-stated elements makes Article 20 of the ACHR unique and comprehensive in ensuring the protection of an individual's right to a nationality. Article 1 of the Draft Protocol to the ACHPR refers to the right to a nationality and the eradication of statelessness in Africa.²⁰ The Draft Protocol to the ACHPR on the Right to Nationality in Africa of 2015 and the Draft Protocol to the ACHPR of 2017 on the specific aspects of the right to a nationality and the eradication of statelessness in Africa, among other things, have expanded the definition of stateless persons to include persons who are unable to establish a nationality. This accounts for the specific situations of statelessness that arise in Africa such as the cases of undocumented, unaccompanied, and separated refugee children on the continent.

At the international level, the United Nations High Commissioner for Refugees (UNHCR) #IBelong Campaign and the United Nations High Commissioner for Refugees Global Action Plan 2014 to 2024 all aim to end statelessness and the UNHCR has the mandate to assist stateless refugees.²¹ The Declaration of the International Conference on the Great Lakes Region (ICGLR) on Statelessness,²² which was carried out in line with the UNHCR's #IBelong Campaign to End Statelessness by 2024 (hereafter, the #IBelong Campaign), for example, obliges the Member States to end statelessness in the Great Lakes region of Africa. This can be viewed as a collective responsibility that hopes to yield positive results. The Member States recalled that the right to nationality is fundamental and highlighted how vast the problem of

¹⁵ It was opened for signature in Rome on 04 November 1950 and came into force on 03 September 1953.

¹⁶ It was adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

¹⁷ Referred to as the Banjul Charter, it was adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and entered into force on 21 October 1986.

¹⁸ It allows a person to become a national as long as they were born on the territory of a given state.

¹⁹ ACHR op cit note 16 Art 20.

²⁰ ACHPR op cit note 17 Draft Protocol of September 2015.

²¹ Since the UNHCR was established on 1 January 1951.

²² The Declaration of the International Conference on the Great Lakes Region (ICGLR) on Statelessness 27–28 June 2017.

²³ Ibid.

statelessness is in the region.²³

Though global, continental, regional, and national appeals and measures have been put in place to promote the right to nationality and to end statelessness, it remains a persistent issue, especially in Africa and in the Southern African region. At the end of 2015, the UNHCR reported that more than 1,021,418 persons were stateless in Africa due to armed conflicts and cross-border migration.²⁴ Although the UNHCR indicators refer to persons who fall under its statelessness mandate as those who are stateless according to this international definition, some countries include people with undetermined nationality and undocumented children in the statelessness definition.²⁵ The total number is therefore likely significantly higher.

We acknowledge in this article that there have been initiatives to end statelessness in Africa. Through the #IBelong Campaign and the Abidjan Declaration on Eradication of Statelessness,²⁶ the Heads of State of the ECOWAS have also shown that there is a political will to eradicate statelessness. Undeniably, there is an indication of a commitment to end statelessness and promote the right to nationality in Africa. The African Union (AU), for example, adopted a Draft Protocol on the right to a nationality in the African continent. The seven-point plan of action that resulted from the meeting of parliamentarians held on 26 and 27 November 2015 in Cape Town, focused on the role of parliaments in preventing and ending statelessness.²⁷ This underscores the importance of regional and international cooperation. Yet, statelessness in Africa remains critical because a large number of stateless persons are not documented.²⁸ The number of stateless persons tends to overlap with undocumented persons whose nationality statuses are unclear.²⁹ Given the gravity and uncertainties that can be associated with statelessness, the protection and promotion of the right to nationality in Africa, and in the Southern African region, in particular, statelessness-related issues and protection of stateless persons, cannot be ignored.

The 1954 Convention ensures minimum standards of treatment of stateless persons in respect of several economic, social, and cultural rights. These include the right to education, employment, housing, social security, healthcare services and other rights.³⁰ Importantly, the Convention also guarantees stateless persons a right to identity and travel documents and to administrative assistance. Furthermore, the 1961 Convention on the Reduction of Statelessness establishes an international framework to ensure the right to nationality of every person is protected by adopting

²⁴ UNHCR 'Global trends: Forced displacement in 2015' 2015 available at <http://www.worldsstateless.org/continents/africa/stateless-persons-in-africa>, accessed on 25 February 2022.

²⁶ *Ibid.*

²⁷ It was adopted in February 2015 by the ECOWAS to support the UNHCR's global campaign to end statelessness by 2024.

²⁸ 'The Conference on Ensuring Everyone's Right to Nationality: The Role of Parliaments in Preventing and Ending Statelessness, 26–27 November 2015' available at <http://archive.ipu.org/splz-e/captown15.htm>, accessed on 26 March 2022.

²⁹ Institute on Statelessness and Inclusion 'Stateless persons in Africa' available at <http://www.worldsstateless.org/continents/africa/stateless-persons-in-africa>, accessed on 31 January 2022.

³⁰ *Ibid.*

measures that safeguard and prevent statelessness at birth and later in life. This Convention is therefore complementary to standards contained in other international and regional human rights treaties.

Using the African Committee of Experts on the Rights and Welfare of the Child (the African Children's Committee) decision in the case of *Institute for Human Rights and Development and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya v the Government of Kenya (The Nubian Children case)*,³¹ the case has raised an important issue of the need to protect the right to nationality in Africa. In the *Nubian Children* case, an application was brought as an *actio popularis* on behalf of Nubians in Kenya who, despite having lived in the country for more than a century, were denied Kenyan nationality. The applicants argued that such denial of the Nubian children their right to nationality amounted to the violation of the provisions of the African Charter on the Rights and Welfare of the Child of 1990 (ACRWC), specifically the rights of Nubian children to non-discrimination, nationality, and protection against statelessness, as well as other socio-economic rights like their rights to healthcare and education.³² The African Children's Committee emphasised taking cognisance of nationality and statelessness issues. It pointed out that there are negative effects of denying undocumented children's rights, and of children being vulnerable to unlawful arrests and deportation from their home country.³³ Additionally, the African Children's Committee noted the impact of the denial of nationality to the Nubian children on the realisation of socio-economic rights, such as access to healthcare and education, and ordered the Kenyan government to report on the implementation measures taken within a period of six months from the date of notification to comply with the African Children's Committee's decision.³⁴

The Nubian Children case underscores the need for states' obligation to promote the right to nationality and prevent statelessness to be honoured. Despite constitutional guarantees, the fulfilment of basic human needs and giving effect to the fundamental rights of stateless persons face extreme challenges in the Southern African region. This is largely due to the failure to realize even the socio-economic needs of a majority of citizens.³⁵ Therefore, stateless persons are not likely to benefit from the realization of their basic rights accorded to them under international and regional human rights laws. However, the Supreme Court of Appeal of South Africa (SCA), while referring to the fundamental human rights in the case of *Watchenuka v Minister of Home Affairs*,³⁶ has reminded us that human dignity has no nationality because it is inherent in all human beings. This includes all stateless persons,

³¹ 1954 Convention Relating to the Status of Stateless Persons, Arts 17, 18, 21, 22, 23, and 24.

³² *Institute for Human Rights and Development and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya v the Government of Kenya (The Nubian Children case)* Decision No 002/Com/002/2009.

³³ The 1990 African Charter on the Rights and Welfare of the Child, Arts 2, 4, and 6.

³⁴ *Nubian Children* op cit note 31 para 46.

³⁵ *Nubian Children* op cit note 31 para 69.

³⁶ International Labour Organization (ILO) 'Inequality in Southern Africa: Options for redress' (2013) ILO Policy Brief at 2, available at https://www.ilo.org/actrav/WCMS_230181/lang-en/index.htm, accessed on 10 October 2022. See also Ebenezer Durojaye & Gladys Mirugi-Mukundi 'General introduction to poverty and human rights in Africa' in Ebenezer Durojaye & Gladys Mirugi-Mukundi (eds) *Exploring the Link between Poverty and Human Rights in Africa* (2020) at 2.

including those who are displaced due to climate change, which this article will now turn to discuss.

III. STATELESSNESS ASSOCIATED WITH PERMANENT CROSS-BORDER DISPLACEMENT DUE TO THE IMPACTS OF CLIMATE CHANGE

For the last three decades, since the 1980s, global pollution, and the need to protect the environment have been raised as significant concerns.³⁷ For that reason, the international community has resolved that concerted efforts are needed to regulate how states may use the resources in their territories. In light of this, there are global calls for environmental protection to mitigate the impacts of climate change.³⁸

Climate change can lead to displacement in one of several ways — through the total inundation of low-lying island states; through designation by the relevant government of an area as a high-risk zone, unfit for human habitation; and through rapid- or slow-onset disasters or weather events.³⁹ Furthermore, while displacement is often thought of as being linked to conflict, there are times when that conflict is itself a result of climate change.⁴⁰ In each of these scenarios, displacement may be internal or across borders, temporary or permanent, and in the end, can lead to statelessness. Strauss et al. state that future carbon emissions will determine which areas we can continue to occupy or may have to abandon.⁴¹ Even with climate change mitigation and more stable global temperatures, the land area and population exposed to additional sea-level rise are likely to continue increasing for centuries.⁴² Therefore, climate change adaptation is still required, since population mobility is inevitable and is among the factors through which statelessness can be created. For

³⁷ See, for example, the Montreal Protocol of 1987 that binds the Member States of the United Nations to act in the interests of human safety even in the face of scientific uncertainty. Also, the Rio Conventions — the Convention on Biological Diversity (CBD) of 1992, the United Nations Convention to Combat Desertification (UNCCD) of 1994 (a legally binding treaty that was adopted to address desertification and the effects of drought, it focuses on the protection and restoration of land to ensure a safer, just and sustainable future), and the United Nations Framework Convention on Climate Change (UNFCCC) of 1992. The Rio Conventions were all adopted to address the need for adaptation to climate change. For example, the UNFCCC has been considered as an important international environmental treaty that aims to combat dangerous human activities or interference with the climate system. This includes the recognition of enhanced action and international cooperation on adaptation that is required. In view of this, States Parties to the UNFCCC established the Cancun Adaptation Framework in 2010 to guide the implementation of, and support for such adaptation. Subsequently, at the 2011 Durban Summit, States Parties advanced the implementation of the Cancun Adaptation Framework by operationalising various components and reinforcing a long-term commitment to adaptation action in line with the objectives of the UNFCCC. The Kyoto Protocol of 1997 extended the commitment of the States Parties to the UNFCCC to reduce greenhouse gas emissions that contribute to global warming.

³⁸ In legal terms, there were no limitations placed under customary international law to determine and control the effects of pollution. Globally, declarations, conventions and treaties were adopted to combat global warming, as stated under the United Nations Summit on Sustainable Development Goals of 2015, as well as the 2015 Paris Agreement to Combat Climate Change.

³⁹ Walter Kälin 'Conceptualising climate-induced displacement' in Jane McAdam (ed) *Climate Change and Displacement* (2012) at 85.

⁴⁰ Ibid. at 86.

⁴¹ Benjamin H Strauss, Scott Kulp & Anders Levermann 'Carbon choices determine US cities committed to futures below sea level' (2015) 112 PNAS 13508–13.

⁴² Celia McMichael, Shouro Dasgupta, Sonja Ayeb-Karlsson & Ilan Kelman 'A review of estimating population exposure to sea-level rise and the relevance for migration' (2020) 15 *Environmental Research Letters* at 21.

that reason, addressing the effects of climate change remains imperative.

(a) Low-lying island states (the sinking state problem)

The sinking state problem has in the past been regarded as the quintessential example of displacement and statelessness due to the impacts of climate change. The rise in global temperatures has resulted in rising sea levels, which are predicted to rise as much as 1.7 to 2 metres by 2100 and 2 to 3 metres by 2300. More pessimistic estimates predict that a rise of over 2 metres may be possible by 2100.⁴³ For certain low-lying island states, this means the entire state territory may be inundated with water, rendering the land uninhabitable and forcing the displacement of the state's population.⁴⁴ Scholars, such as Rouleau-Dick and Farron, opine that these persons may be rendered stateless as their state of origin will cease to exist.⁴⁵ This opinion is based on the application of the Montevideo Criteria, as laid out in the Montevideo Convention.⁴⁶ According to these criteria, for a state to exist, it must bear the following characteristics: a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.⁴⁷ Should a low-lying island state be inundated with water, it will no longer bear all these characteristics, and will therefore cease to be a state. For the previous populations of these island states, once the state itself no longer exists, these persons will be made stateless. However, not all scholars agree that this is the case.

It may not be correct to assume that these island states will certainly cease to exist, since they may adopt various adaptation strategies that allow the state to continue. For example, they may construct mechanisms to prevent seawater from overwhelming the island land or may purchase land from an existing state for their population to migrate to, should the island become uninhabitable.⁴⁸ Even if these states do lose their territory, this does not necessarily mean that they will cease to exist or be recognised as states. First, as McAdam points out, while fulfilment of the Montevideo Criteria is necessary for a state to come into existence, subsequently failing to meet one or more of these criteria does not automatically mean that status is lost.⁴⁹ In fact, there is a general presumption of continuity that supports the continued existence of these states, even where they lose their physical territory.⁵⁰ Therefore, we argue that even where the physical territory of these island states is lost, the state itself continues to exist, and the population thereof is not stateless.

⁴³ Etienne Piguet 'Climatic statelessness: Risk assessment and policy options' (2019) 45 *Population and Development Review* at 869.

⁴⁴ Antonio Joseph DelGrande 'Statelessness in the context of climate change: The applicability of the Montevideo criteria to "Sinking States"' (2021) 53 *NYUJILP* at 153.

⁴⁵ Michel Rouleau-Dick 'Sea level rise and climate statelessness: From 'too little, too late' to context-based relevance' (2021) 3 *Statelessness & Citizenship Review* 287-308; Sue Farron 'The significance of sea-level rise for the continuation of states and the identity of their people' (2021) 24 *PELJ*.

⁴⁶ Convention on Rights and Duties of States (Montevideo Convention), Art. 1, Dec. 16, 1934, 165 L.N.T.S. 19.

⁴⁷ *Ibid*.

⁴⁸ DelGrande op cit note 44 at 159.

⁴⁹ Jane McAdam 'Building international approaches to climate change, disasters and displacement' (2011) 33 *Windsor Yearbook of Access to Justice* at 8.

⁵⁰ DelGrande op cit note 44 at 155.

Another argument against the use of the legal framework of statelessness in the scenario of the sinking state is that it is not well suited to the sinking state scenario. Assuming that these states would lose their statehood on inundation, rendering their population stateless, this is unlikely to occur contemporaneously with the actual displacement of these persons. The land is likely to become uninhabitable long before the territory is completely inundated. The population will therefore be forced to migrate but will not yet be stateless as the state continues to exist.

A good example is Bangladesh; although the country is not a sinking island state, it is losing significant land on its shoreline due to its high population density and there is nowhere for displaced persons to move internally. Therefore, persons displaced from Bangladesh are a large asylum-seeking population in the Southern African region. There have been Bangladesh nationals who come to South Africa and other countries in the Southern African region intending to seek asylum and settle permanently.⁵¹ This is a problem that may not be ignored.

There is thus confusion about whether persons displaced in these scenarios would be stateless or not, and whether or not the international statelessness regime is appropriate to protect them. As Southern Africa is likely to be affected by this problem in future, states in the region will need to rely on their own legal regimes to provide protections to such persons.

(b) High-risk zones

The impacts of climate change can result in land being unsafe for human habitation.⁵² There may, therefore, be instances where the government of a state officially designates a certain area of that state as high-risk and unsuitable for human habitation.⁵³ Of course, generally in this scenario, the relevant government would be responsible for relocating the affected population.⁵⁴ Affected persons are, therefore, likely to be displaced internally and to be protected primarily by the state's legal system. However, the situation is far less certain where members of the affected population are already at risk of statelessness. For example, there may be members of the affected population who migrated from another state but do not have an asylum-seeker permit or refugee-status documentation. There may also be persons who were given asylum-seeker or refugee status but who have lost their documentation. Persons located in high-risk areas who do not have identity or registration documents may be unable to prove their nationality. While this does not render such persons automatically stateless, it does increase their risk of statelessness. Should this happen in South Africa, for

⁵¹ The Government of South Africa 'High Court dismisses case of Bangladeshi illegal immigrants against Home Affairs' available at <https://www.gov.za/high-court-dismisses-case-bangladeshi-illegal-immigrants-against-home-affairs>, accessed on 20 April 2022.

⁵² Walter Kälin op cit note 39 at 85 and 91.

⁵³ Walter Kälin op cit note 39 at 91.

⁵⁴ See World Bank 'Operational policy 4.12: Involuntary resettlement' World Bank Operational Manual (Washington DC, World Bank, 2001); Organization for Economic Cooperation and Development (OECD) 'Guidelines on aid and environment: No 3: Guidelines for aid agencies on involuntary displacement and resettlement in development projects (Paris, OECD, 1992).

example, under section 32 of the Immigration Act 13 of 2002, such persons could be considered illegal foreigners and will be subject to detention and deportation. These individuals, therefore, may be displaced across borders by the operation of the laws of South Africa. For such persons to be deported, their nationality must be determined. The lack of documentation makes this process more difficult. Should a person in such a scenario in South Africa claim to be a citizen of Bangladesh, the Bangladesh embassy will be called on to conduct a verification process to confirm the person's nationality. Should the embassy declare such a person to not be their citizen, the person would become stateless. The question then becomes, where these persons would be deported to.

(c) Rapid-onset disasters

A rapid-onset disaster or weather event can take many forms, such as flooding and tropical cyclones. The Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) has shown that due to climate change, rapid onset disasters have increased in both frequency and severity and that this trend is likely to continue.⁵⁵ A recent study prepared for the Centre for Environmental Rights found that Southern Africa is particularly vulnerable to these disasters.⁵⁶

For instance, during one weekend in April 2022, some areas of KwaZulu-Natal in South Africa received months' worth of rainfall in only one day. This severe rainfall caused mudslides and flooding that destroyed homes and infrastructure. This has been dubbed one of the worst weather storms in South Africa's history. Over three hundred persons lost their lives and thousands more lost their homes as a result of extreme rainfall and flooding.⁵⁷

Similarly, Mozambique has borne the brunt of multiple rapid-onset disasters, such as heavy rainfalls and flooding. In 2019, Tropical Cyclones Idai and Kenneth made landfall in Mozambique, resulting in hundreds of deaths and displacing over two million people. Likewise, the impacts of Tropical Cyclones Idai and Kenneth were felt in Tanzania while other tropical cyclones of 1872 and 1952, Tropical Cyclones Fantala and Jobo of 2016 and 2021 respectively, were recorded in both Zanzibar and mainland Tanzania.⁵⁸ Due to these tropical cyclones, people became homeless while

⁵⁵ Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report 'Regional Fact Sheet – Africa' 2021, available at https://www.ipcc.ch/report/ar6/wg1/downloads/factsheets/IPCC_AR6_WGI_Regional_Fact_Sheet_Africa.pdf, accessed on 17 May 2022.

⁵⁶ Robert Scholes & Francois Engelbrecht 'Climate impacts in southern Africa during the 21st century, Report for the Centre for Environmental Rights' September 2021 at 4, Global Change Institute at the University of Witwatersrand, available at https://cer.org.za/wp-content/uploads/2021/09/Climate-impacts-in-South-Africa_Final_September_2021_FINAL.pdf, accessed on 27 September 2022. See also Lere Amusan & Oluwole Olutola 'Addressing climate change in Southern Africa' (2016) 72 *Indian Quarterly* at 395.

⁵⁷ BBC 'Durban floods: South Africa floods kill more than 300' available at <https://www.bbc.com/news/world-africa-61092334>, accessed on 14 April 2022.

⁵⁸ Kombi Hamad Kai, Mohammed Khamis Ngwali & Masoud Makame 'Assessment of the impacts of Tropical Cyclone Fantala to Tanzania coastal line: Case study of Zanzibar' (2021) 11 *Atmospheric and Climate Sciences* at 245.

others lost their lives.⁵⁹ In January 2022, Tropical Cyclone Ana hit northern and central Mozambique, affecting 180,869 people. Less than two months later, Tropical Cyclone Gombe devastated Mozambique's Nampula province with heavy flooding, displacing tens of thousands of people.⁶⁰

Generally, this displacement happens internally. However, displacement across borders due to rapid onset disasters does, and will likely continue to occur, especially in scenarios where the government of the state in which the disaster occurs is unable or unwilling to provide humanitarian assistance to those affected by it.⁶¹ It is generally believed that this displacement will be temporary, as affected persons will be able to return once the disaster or extreme weather event subsides, but this is not always the case. As stated, the government may not be able or willing to address the damage caused by the disaster, or the nature of the damage may be such that it renders the land permanently unsafe for return. In these scenarios, persons may find themselves permanently displaced across borders. When this displacement is combined with other factors, such as poor birth registration, loss of identity documentation, or protracted periods of displacement, such persons are at serious risk of statelessness.

(d) Slow-onset disasters

Like rapid-onset disasters, slow-onset disasters or weather events are scientifically proven to have increased as a result of climate change and will likely continue to increase in both frequency and severity.⁶² Examples include rising sea levels and desertification. Like rapid-onset disasters, displacement due to slow-onset disasters is likely to be internal. As stated above, the primary responsibility for providing aid and security for internally displaced persons (IDPs) falls on the relevant state. IDPs are often also assisted by humanitarian organisations, such as the UNHCR. An unfortunate reality is that governments may be unable or unwilling to help, and the UNHCR is limited in what it can do by the funding it receives. External migration

⁵⁹ Hellen E Msemu, Declan L Finney & Samwel I Mbuya 'Forgotten accounts of tropical cyclones making landfall in Tanzania' (2022) 77 *Weather* at 127; and Pedram Javaheri 'A rare tropical cyclone is approaching one of Africa's most populated cities' CNN 22 April 2021, available at <https://edition.cnn.com/2021/04/22/weather/jobo-forecast-tanzania-tropical-cyclone/index.html>, accessed on 21 April 2022.

⁶⁰ UNHCR 'UNHCR and partners rush aid to thousands in Mozambique after Tropical Cyclone Gombe' 22 March 2022, available at <https://www.unhcr.org/news/briefing/2022/3/623992774/unhcr-partners-rush-aid-thousands-mozambique-tropical-cyclone-gombe.html>, accessed on 30 March 2022.

⁶¹ UNHCR 'Climate change and statelessness: An overview' 15 May 2009, available at <https://www.unhcr.org/protection/environment/4a1e50082/climate-change-statelessness-overview.html>, accessed on 15 February 2022. See also CEDAW General recommendation No. 37 on gender-related dimensions of disaster risk reduction in the context of climate change Pursuant to Article 21(1) of the Convention dated 7 February 2018.

⁶² IPCC 'Special report on land desertification' available at <https://www.ipcc.ch/srccl/chapter/chapter-3/>, accessed on 10 October 2022; Robert Scholes & Francois Engelbrecht 'Climate impacts in southern Africa during the 21st century, Report for the Centre for Environmental Rights' September 2021, Global Change Institute at the University of Witwatersrand, available at https://cer.org.za/wp-content/uploads/2021/09/Climate-impacts-in-South-Africa_Final_September_2021.FINAL_.pdf, accessed on 27 September 2022.

is therefore the only remaining option. It may also not be possible for affected persons to migrate internally where population density does not allow it, as is the case in Bangladesh, or where the entire territory of the country is affected by the same problem. Somalia has been plagued by the worst drought the nation has seen in over four decades. Over one million persons have been displaced due to the harsh climate and uninhabitable land.⁶³ In such instances, affected person would be forced to migrate across borders. In the case of Somalia, persons may even be forced to cross multiple borders, as many of the other states in the region are also drought-stricken.⁶⁴ Unlike rapid-onset disasters, such displacement is more likely to be permanent, as the reason for the displacement is the land becoming uninhabitable.⁶⁵ Such protracted displacement scenarios place persons at an increased risk of statelessness.⁶⁶

(e) Conflict due to the impacts of climate change

Conflict has historically been thought of as one of the biggest contributors to cross-border displacement.⁶⁸ While this is true, recent research suggests that much of this conflict may, in fact, be driven by the impacts of climate change.⁶⁸ For instance, where resources are limited due to drought or increasing water salinisation due to sea-level rise, conflict over these limited resources may lead to displacement.⁷⁰ Links have been found between repeated internal displacement due to disasters and conflict in states such as Mozambique and Angola.⁷⁰ Persons who flee this conflict into foreign states are also at risk of becoming stateless.

In all the above scenarios, from rapid-onset disasters to climate change-driven

⁶³ UNHCR 'Somalis abandon their homes in search of food, water and aid as drought deepens' 29 September 2022, available at <https://www.unhcr.org/news/stories/2022/9/633419134/somalis-abandon-homes-search-food-water-aid-drought-deepens.html>, accessed on 03 October 2022.

⁶⁴ Shazia Chaudhry & James Ouda 'Perspective on the rights of climate migrants in the Horn of Africa: A case study of Somalia' (2021) 8 *Journal of Somali Studies* at 13.

⁶⁵ Walter Kälin op cit note 39 at 89 and 90.

⁶⁶ Ajwang Warriia 'Stateless transnational migrant children in South Africa: Implications and opportunities for social work intervention' (2020) 6 *AHMR* at 6.

⁶⁷ Fatima Khan & Nandi Rayner 'A historical overview of forcibly displaced persons in Southern Africa (2011–2020): Realising the expectations of the Global Compact on Refugees' Reference Paper for the 70th Anniversary of the 1951 Refugee Convention 2020, available at <https://www.unhcr.org/people-forced-to-leave-book/wp-content/uploads/sites/137/2021/10/Fatima-Khan-and-Nandi-Rayner-A-historical-overview-of-forcibly-displaced-persons-in-Southern-Africa.pdf>, accessed on 19 September 2022. See also Allison J Petrozziello 'Statelessness as a product of slippery statecraft: A global governance view of current causes, actors and debates' (2019) 1 *Statelessness & Citizenship Review* at 136. IPCC Annual Report 5, 2014 at 16, available at https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, accessed on 10 October 2022. See also UNFCCC Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts 'Technical Meeting Action Area 6: Migration, displacement and human mobility' 2016 at 3, available at https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/excom_iom_technical_meeting_aa6_pillar_2_coordination_and_coherence.pdf, accessed on 10 October 2022.

⁶⁸ IPCC Annual Report 5, 2014 at 16, available at https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf, accessed on 10 October 2022. See also UNFCCC Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts 'Technical Meeting Action Area 6: Migration, displacement and human mobility' 2016 at 3, available at https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/excom_iom_technical_meeting_aa6_pillar_2_coordination_and_coherence.pdf, accessed on 10 October 2022.

⁶⁹ Shazia Chaudhry & James Ouda op cit note 64 at 24.

⁷⁰ Leah A Ndimurwimo & Leonard C Opara 'Access to justice for internally displaced persons: The global legal order' (2019) 6 *Journal of Law Society and Development* at 8.

conflict, displacement across borders does not automatically result in statelessness or a lack of protection. Depending on where persons are displaced and for how long, they may be protected by existing international and domestic legal instruments and may qualify as asylum seekers or refugees. The following section explores how the scenarios discussed above can result in statelessness and leave displaced persons without protection.

IV. CIRCUMSTANCES MAY LEAD TO UNCERTAIN RIGHTS AND LEGAL STATUSES OF STATELESS PERSONS

Various legal frameworks exist internationally and regionally aimed at the protection of persons forced or compelled to abandon their homes. The application of these frameworks depends on the nature of forced displacement. There are two types of forced displacement: internal and external.⁷¹ Internal displacement refers to the situation where persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters, and who have not crossed an internationally recognised state border.⁷² On the other hand, external displacement refers to situations where persons or groups of persons are forced or compelled to leave their country and seek sanctuary in or protection of another country. Depending on the nature of the displacement, the affected persons may fall into the categories of refugees (or asylum seekers), stateless persons, or IDPs. Affected persons may fall into more than one of these categories and have the rights and protections of more than one framework.⁷³ In each of the scenarios discussed in section III, the persons displaced may be at risk of statelessness, but depending on how they were displaced, and on what state they ultimately find themselves in, they will enjoy different rights, statuses, and protections.

(a) Statelessness status

Before dealing with how the status of such persons will be determined, it is necessary to elaborate on how the above scenarios can lead to statelessness specifically. While in the past, the focus has been on statelessness due to loss of statehood in the sinking state scenario, recently it has been acknowledged that statelessness is more likely to result in other discussed scenarios, that is, in the case of rapid- or slow-onset disasters, or climate change-induced conflict. This can occur because when persons are forced to migrate, they may lose their identity and registration documentation in the process.⁷⁴ This is especially true, for example, in the case of a rapid-onset disaster,

⁷¹ Walter Kälin op cit note 39 at 92.

⁷² Internal displacement, available at <https://www.internal-displacement.org/internal-displacement>.

⁷³ Walter Kälin op cit note 39 at 92.

⁷⁴ UNHCR 'Statelessness and climate change factsheet' 29 October 2021, available at <https://www.refworld.org/docid/617c01da4.html>, accessed on 7 February 2022.

such as flooding, where documentation may be swept away in flood waters. Affected persons may then be unable to be re-issued with documentation due to limited or no public services in the affected areas.⁷⁵ It is also possible that displaced persons were never in possession of identity or registration of birth documents and were therefore always at risk of being undocumented and potentially stateless, which risk is then exacerbated by the displacement, as they may be unable to return to their country of origin as they are unable to prove their nationality. The lack of documentation in itself, does not cause statelessness, as nationality can be proven in other ways. But the absence of documentation can make this process more difficult and for that reason can heighten the risk of a person being unable to prove their nationality and therefore becoming stateless.

Statelessness is also a possibility where single mothers, displaced across borders as a result of the impacts of climate change, give birth while displaced. Should the mother in question originate from a country that follows only the *jus soli* principle of nationality determination at birth, the child will not have the same nationality as its mother, because it was not born in the mother's state of origin. The state in which the mother gives birth may have laws that address this issue, but these laws do not always provide effective protection.⁷⁶ For example, in South Africa, section 2 of the South African Citizenship Act 88 of 1995 states that citizenship by birth may be acquired by children born in South Africa who would otherwise be stateless. However, in practice, this law is rarely applied properly. Often officials assume the child acquired its mother's nationality at birth. Often births to foreign nationals are not adequately registered or recorded in South Africa, making it difficult to prove that the birth did, in fact, occur in South Africa and that section 2 applies.⁷⁷ The protection of these laws is therefore limited and statelessness in childhood can result.

Irrespective of how persons came to be stateless, should their stateless status not be resolved, another risk is that of generational statelessness. For persons displaced permanently across borders due to the impacts of climate change, they will pass on their stateless status to their children, who will in turn pass it on to their children, unless the laws of Southern African nations develop to address this issue.

(b) Determination of statelessness status

Another important consideration in assessing the rights and status of stateless persons displaced by the impacts of climate change is how their status as a stateless person is determined, if at all. The majority of states in the Southern African region have not ratified either the 1954 or 1961 Statelessness Conventions. In Mozambique, where both have been ratified, a person may be considered *de jure* stateless if they meet the definition of a stateless person in Article 1 of the 1954 Convention. They would then be entitled to the protections offered by the 1954 Convention. However,

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Fatima Khan op cit note 3 at 17.

in South Africa or Tanzania, neither Convention has been ratified and there are no procedures for determining statelessness. In either of these countries, therefore, a person may be deemed at risk of statelessness or *de facto* stateless, but not *de jure* stateless as there is no mechanism for making this status determination. While the 1954 Convention encourages states to treat *de facto* stateless persons as *de jure* stateless persons, this is a recommendation rather than a requirement and is therefore not binding, even on those states that have ratified the 1954 Convention. In any event, should displaced persons find themselves in South Africa or Tanzania, they will not be entitled to protection under the Statelessness Conventions. In Mozambique, only *de jure* stateless persons may receive protection under these Conventions. None of these jurisdictions has legislation dealing with statelessness as a result of climate change or climate-induced displacement specifically. The importance of ratifying and domesticating the statelessness conventions, and of legislatively addressing climate-induced displacement, is therefore evident.

(c) *Refugee status*

There is general agreement that persons displaced by climate change do not qualify as refugees as the refugee situation is defined in a political context.⁷⁸ The 1951 Convention Relating to the Status of Refugees defines the term refugee as a person who,

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁹

Persons fleeing the impacts of climate change do not satisfy the requirement of persecution.⁸⁰ They are not persecuted on the grounds of who they are or what they believe in. Even if the definition of persecution could be extended, since weather events are non-discriminatory, it would not be possible to show persecution on one of the established grounds (race, religion, etc.). Certain persons displaced by climate change may qualify for refugee status and the rights and protections that flow therefrom, where climate change and its impacts have led to conflict. Those persons displaced by conflict, where climate change and its impacts were a driver for

⁷⁸ Shazia Chaudhry and James Ouda op cit note 64 at 16.

⁷⁹ The 1951 Convention Relating to the Status of Refugees, Art 1A(2).

⁸⁰ See, for example, *Ioane Teitiota v New Zealand* CCPR/C/127/D/2728/2016, UN Human Rights Committee (HRC), 7 January 2020. The HRC stated that the applicant's deportation was not unlawful because he did not face an immediate danger to his life on Kiribati Island. The HRC recognised that climate change represents a serious threat to the right to life, which must be considered when dealing with the deportation of asylum seekers.

that conflict, will likely qualify as refugees, even under this restricted definition of a refugee.

The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa has a slightly more expansive definition of refugee, which includes every person who, owing to ... 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.⁸¹

Section 3 of South Africa's Refugees Act 130 of 1998 defines the term refugee in such a way that encompasses the expanded definition.

Some scholars are of the opinion that persons displaced across borders by rapid-onset disaster will likewise qualify as refugees under the more expansive definition of refugee in both the 1969 Convention and South Africa's Refugees Act.⁸² However, this is uncertain, and the provision will likely be interpreted as applying to situations involving conflict or violence, and not environmental degradation.

To be a refugee is not the same as being stateless, and qualifying for a refugee status does not solve the issue of statelessness of these persons. It does, however, afford them rights and protections that other displaced persons may not have.

(d) Humanitarian and human rights law

For those persons who are permanently displaced across borders due to slow-onset disasters or weather events, the rights and protections available to them may also be under international human rights and humanitarian law. For some, these may be the only rights and protections available to them. Unless these persons find themselves in Mozambique and are legally determined to be stateless, they will not be afforded the rights and protections of the Statelessness Conventions. They are also unlikely to qualify as refugees even under the more expansive definition. One of the major reasons for this is that migration due to slow-onset disasters or weather events is often seen as voluntary, or as forced displacement in the economic context and not in the political context. Persons will tend to leave before the land becomes completely uninhabitable. Whether this is voluntary or apolitical in the truest sense is subject to academic debate,⁸³ but it is sufficient to disqualify such persons from refugee status.

It is important to note that humanitarian and human rights law protections are also available to other groups of displaced persons. However, for those who qualify as refugees or *de jure* stateless, the protection offered is greater than for those who must rely solely on international human rights and humanitarian law. Since these rights are limited, it is important for Southern African nations to better adapt their laws on statelessness to deal with the problem of statelessness flowing from or due to

⁸¹ The 1969 OAU Convention, Art 1(2).

⁸² Grant Dawson and Rachel Laut 'Human Mobility and Climate Change' (2017) 8 *International Humanitarian Legal Studies* at 147.

⁸³ *Ibid.* at 132.

climate change, especially since it is widely agreed that the effects of climate change on Southern Africa are only likely to get worse.

V. PROMOTING THE RIGHTS OF STATELESS PERSONS IN THE SOUTHERN AFRICAN REGION

As discussed, the problem of cross-border displacement leading to statelessness in the Southern African region due to the impacts of climate change is challenging. This section discusses the current legal regimes in South Africa, Mozambique, and Tanzania. It assesses the sufficiency and efficacy of these regimes when it comes to addressing statelessness due to climate change, and makes certain recommendations based on this assessment.

(a) South Africa

(i) Current legal framework

In the *Nottebohm* case, the International Court of Justice (ICJ) defined nationality as a legal bond between an individual and the state, as it is the basis for a social fact of attachment, a genuine connection of existence, interest, and sentiments, together with the existence of reciprocal rights and duties.⁸⁴ While South Africa is not a party to either Statelessness Convention, it is a party to several international legal instruments governing the right to a nationality. Article 15 of the 1948 Universal Declaration of Human Rights states that ‘everyone has the right to a nationality’ and that ‘no one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.’⁸⁵ The 1989 United Nations Convention on the Rights of the Child (CRC) states that all children are entitled to a name, the right to acquire a nationality, and immediate birth registration.⁸⁶ The 1990 ACRWC likewise provides that every child has the right to acquire a nationality.⁸⁷ It also provides for the acquisition of the nationality of the child’s country of birth in cases where the child would otherwise be stateless.⁸⁸ Article 9(1) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) obliges states to provide equal rights to men and women with regard to acquiring, changing and passing on nationality.⁸⁹ By protecting the right to nationality, the above-mentioned instruments serve the purpose of preventing statelessness. As a party to each of these instruments, South Africa is obliged to: respect and protect the right to nationality; ensure gender

⁸⁴ *Liechtenstein v Guatemala* ICJ (1955) ICJ Reports 23.

⁸⁵ United Nations Universal Declaration of Human Rights op cit note 7.

⁸⁶ The 1989 United Nations Convention on the Rights of the Child, Art 7.

⁸⁷ ACRWC op cit note 32, Art 6.

⁸⁸ ACRWC op cit note 32, Art 6(4).

⁸⁹ United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979).

equality in nationality laws; and protect the rights of children to acquire a nationality. In light of this, South Africa has attempted to domesticate these instruments in national legislation.⁹⁰

The importance of nationality is clearly acknowledged in the Final Constitution of the Republic of South Africa, 1996 (the Constitution). Section 20 states that no citizen may be deprived of citizenship.⁹¹ Section 28(a), pertaining to the rights of the child, states that every child has the right to nationality from birth.⁹² The South African Citizenship Act gives effect to South Africa's international law obligations, as well as the rights and spirit of the Constitution.⁹³

This right in the Constitution does not guarantee a right to South African nationality, but rather to a nationality.⁹⁴ Only children born to a South African parent will acquire South African nationality at birth.⁹⁵ Children born to foreign parents will acquire the nationality of their parents, based on the nationality laws of their parent's country of citizenship. Where the laws of this country do not allow this, for example as discussed above, where the country follows a system of *jus soli*, then the child can acquire South African nationality, as it would otherwise be rendered stateless.⁹⁶ It is important to note that the current legal framework discussed hereunder is currently under review, with the Minister of Home Affairs, Aaron Motsoaledi, suggesting that these various pieces of legislation are likely to be amended and may be consolidated.⁹⁷ This discussion is based on the law as it currently is and as it should be.

The Citizenship Act (as amended) has the potential to prevent and reduce statelessness as it has various sections that allow for the acquisition of South African citizenship by non-citizens.⁹⁸ Section 2(2) provides for the acquisition of South African citizenship at birth by a child born in South Africa if that child would otherwise be stateless. Section 4(3) provides for the acquisition of citizenship, upon reaching majority, by children born to non-South African citizens or permanent residents, who have their births registered in terms of the Births and Deaths Registration,⁹⁹ and who live in South Africa until the age of eighteen. Both of these sections, if consistently and properly applied, can prevent the statelessness of children born to foreigners on South African soil.

The Immigration Act has the potential to reduce statelessness and provide protection to those persons who are already stateless.¹⁰⁰ Currently, the Act, and the

⁹⁰ The South African Citizenship Act No. 88 of 1995.

⁹¹ The Constitution of the Republic of South Africa 1996.

⁹² *Ibid.*

⁹³ Citizenship Act op cit note 90.

⁹⁴ Raylene Keightley 'The child's right to a nationality and the acquisition of citizenship in South African law' (1998) *SAJHR* 411.

⁹⁵ Citizenship Act op cit note 90, section 2(1).

⁹⁶ Citizenship Act op cit note 90, section 2(2).

⁹⁷ *Business Day* 'Statelessness in the spotlight as Home Affairs to review three Acts' 27 January 2022, available at <https://www.businesslive.co.za/bd/national/2022-01-26-statelessness-in-spotlight-as-home-affairs-to-review-three-acts/>, accessed on 29 April 2022.

⁹⁸ Citizenship Act op cit note 90.

⁹⁹ The Births and Deaths Registration Act No. 51 of 1992.

¹⁰⁰ The Immigration Act No. 13 of 2002.

Regulations thereto, make no mention of stateless persons and how to admit or assist such persons. The Act requires applications for visas or permits to be made from outside the country. In this context, it does not cater for those persons who are stateless and unable to travel across borders. It nevertheless can be used to reduce statelessness and protect stateless persons through the application of section 31(2)(b). Section 31(2)(b) of the Immigration Act may offer potential relief for stateless persons, as it provides for an application to be made to the Minister for an exemption for permanent residence. This offers an alternative route to permanent residence for persons in special circumstances who have not been living in the country for over five years. The application can be made by an individual or category of foreigners and allows the Minister to grant a foreigner or category of foreigners the rights of permanent residence when special circumstances exist. It could be argued that persons displaced due to climate change are a category of persons that meets section 31(2)(b) requirements because their displacement due to the impacts of climate change constitutes special circumstances. Persons who have been displaced across borders and rendered stateless as a result of climate change find themselves in special circumstances because they cannot be returned to or relocated within their country, as, as stateless persons, they have no determined country. The use of this section will also not be necessary for persons who, while displaced as a result of climate change, qualify for refugee status. It may, therefore, be possible for stateless persons to use this exemption to acquire, if not citizenship, then at the very least permanent residence and the rights accompanying that status.

The Refugees Act, while not directly concerned with the issue of statelessness, can be used to protect stateless persons who also qualify as refugees.¹⁰¹ In terms of Section 3 of the Refugees Act, a person qualifies for refugee status if that person —

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

This is discussed more fully in section (ii) below.

The potential of the above legislative provisions to prevent and reduce statelessness, as well as protect stateless persons, depends on how the legislation is interpreted and applied in practice.

When interpreting the sections of the Citizenship Act, for example, the words

¹⁰¹ The Refugees Act No. 30 of 1998.

of the Constitutional Court in the case of *Chisuse and others v Director-General, Department of Home Affairs and another*¹⁰² must be borne in mind. The court herein states that citizenship goes to the core of a person's identity, belonging, and security of person, and that the spirit and purport of the Citizenship Act is to widen pathways to South African citizenship, not to narrow them.¹⁰³ Unfortunately, in practice, officials in the Department of Home Affairs, when applying these sections, do so in a far more restrictive manner. For instance, in the case of *Minister of Home Affairs v Jose*, two brothers applied for South African citizenship under section 4(3) of the Citizenship Act after turning eighteen. Both satisfied all the requirements of section 4(3). The Department of Home Affairs was also ordered by the High Court to grant citizenship to the brothers. Despite all of this, the matter proceeded to the SCA due to undue delays in granting the citizenship application. The SCA stated that once all the requirements of section 4(3) are met, citizenship must be granted and there is no room for discretion. The SCA shed light on the plight of the applicants who were forced to live as non-citizens in the only country they had ever known.¹⁰⁴ This case is one example of the discrepancy between the laws of South Africa aimed at preventing and reducing statelessness, versus the practice in South Africa which may be exacerbating the problem.

When it comes to the Refugees Act, there is a similar problem, in that the interpretation of the Act may be over-restrictive, thereby limiting the potential protections available to stateless persons. The High Court held in the case of *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others*¹⁰⁵ that when deciding an application for refugee status according to section 3(b) of the Refugees Act, two inquiries are necessary. The first inquiry is into whether any of the circumstances stipulated in section 3(b) exist in the country of origin (the objective inquiry). The second inquiry is more subjective and looks at whether those circumstances were the cause of the individuals being compelled to leave. Compulsion rather than volition must have been the *predominant* reason for leaving. The court also states when deciding a refugee status, section 6 of the Act requires a humanitarian approach, which considers human welfare and the alleviation of human suffering.¹⁰⁶ This judgement has been cited with approval by the High Court in the case of *FNM v RAB*.¹⁰⁷ The Constitutional Court, in the case of *Ruta v Minister of Home Affairs*, seems to have given the section a stricter interpretation, stating that for refugee status under section 3(b), asylum-seekers who flee external disruption must have left their habitual residence under compulsion.¹⁰⁸ The Constitutional Court seems to require that compulsion be the reason for fleeing, rather than the predominant reason for fleeing, as indicated by the High Court in the *Radjabu* case.

¹⁰² *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC).

¹⁰³ *Ibid.*

¹⁰⁴ *Minister of Home Affairs and others v Jose and another* 2021 (6) SA 369 (SCA).

¹⁰⁵ *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others* [2015] 1 All SA 100 (WCC).

¹⁰⁶ *Ibid.*

¹⁰⁷ *FNM v RAB and others* [2018] 4 All SA 8 (GP).

¹⁰⁸ *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC).

Since the Constitutional Court is the highest court in the land, it appears that its interpretation in *Ruta v Minister of Home Affairs* must be given to section 3(b). This is an unfortunate interpretation, especially when dealing with persons displaced across borders by slow-onset disasters due to the impacts of climate change. This is discussed in more detail in section (ii) below.

(ii) Does the current framework offer sufficient protection?

Clearly, any protection offered by the existing legal framework in South Africa is limited by restrictive interpretation and implementation. However, the question to be explored is whether there is still potential for this framework to address statelessness, specifically where it is a result of cross-border displacement arising from the conflict, or violence due to the impacts of climate change. This question is considered in relation to persons displaced in the various scenarios discussed above. To respond to the above question, the underlying questions are, whether the legal framework offers sufficient protection for those persons displaced across borders and thereby rendered stateless; and whether the current legal framework is sufficient to protect those born stateless within South Africa's territory.

First, the sufficiency of the current framework differs depending on the nature of the displacement leading to stateless persons being in South Africa.

For persons displaced due to conflict or violence, which was driven by the impacts of climate change, as discussed above, these persons will be more likely to qualify for refugee status and will therefore be protected under the Refugees Act. While this does not solve the issue of their statelessness immediately, it does ensure that they enjoy certain rights and protections. In the long run, refugee protection requires the country of asylum to integrate refugees into their society and to naturalise them as citizens as durable solutions to their protracted displacement.

For persons displaced by sudden-onset disasters, as discussed above, these persons may qualify as refugees under the more expansive definition of refugees, as suggested in the *Ioane Teitiota v New Zealand* case (the *Kiribati* case), as they fled their country of origin due to events seriously disturbing the public order and their lives being in danger.¹⁰⁹ South Africa does not yet have case law on whether this interpretation would be accepted and the provisions of section 3 of the Refugees Act do not clarify the issue. Therefore, while there is potential for protection, the law is still uncertain.

The situation for those displaced by slow-onset disasters is even more uncertain, since they likely do not qualify as refugees, even under the expanded definition, since there is arguably, a voluntary element in their displacement. However, if the reasoning of the court in *Radjabu* could be followed, it would allow for a more flexible approach to refugee status applications. For those displaced by slow-onset disasters, even though there may be an element of volition in their movement, compulsion was

¹⁰⁹ *Ioane Teitiota v New Zealand* op cit note 80.

the *predominant* reason for their displacement, and they can therefore potentially qualify as refugees.

Both those displaced persons due to slow- and sudden-onset disasters would benefit from the humanitarian approach to the protection of displaced people. Hence, section 3(b) of the Refugees Act covers non-political events disrupting the public order, thereby causing human suffering and a more humanitarian approach generally, as discussed by the court in *Radjabu*. This approach could be used to support an application for refugee status even where all technical requirements are not met. However, since the Constitutional Court in *Ruta* seems to have taken a more restrictive approach, it is unlikely that those displaced by slow-onset disasters, and even those displaced by sudden-onset disasters, will qualify as refugees.

The exemption application in section 31(2)(b) of the Immigration Act offers an alternative source of relief for these stateless persons. To repeat the essence of this provision — the Minister can grant a category of foreigners the rights of permanent residence, should special circumstances exist.¹¹⁰ The position taken by the authors of this article is that stateless persons, displaced across borders due to the impacts of climate change, could qualify as a category of persons and that the impacts of climate change, such as drought, flooding, and desertification, could qualify as special circumstances if they are permanent and thus a cause of protracted displacement. The risks inherent in relying on this exemption provision are that the application will undoubtedly take time, and these persons may not have rights or protections in the interim, such as asylum-seekers do while awaiting the outcome of refugee status applications. Another potential risk is that permanent residence rights and status can be granted for a specified period.¹¹¹ For those who are able to return to their country of origin, this may not be an issue, but for those who are unable to, this leaves them without protection once this period comes to an end. The Minister will also be required to consider these applications without supporting documentation, such as passports and visas, which these persons will not have.

There is therefore potential in South Africa's current immigration and refugee legal frameworks to protect stateless persons displaced across borders due to the impacts of climate change, but without development, it is unlikely that this legislation will provide much protection or relief.

With regard to the second question, many people who have been displaced due to the impacts of climate change and find themselves across the border in South Africa, may give birth while in the territory. These children may be stateless at birth, either due to the problem of generational statelessness, i.e., their parents also being stateless and therefore having no nationality to pass to the child,¹¹² or due to the nature of the nationality laws in the parents' country of origin, such as where a state uses only the *jus soli* principle to determine nationality or does not allow single

¹¹⁰ Immigration Act op cit note 100, section 31(2)(b).

¹¹¹ Section 31(2)(b) states that permanent residence can be granted for a specified period of time, and section 31(2)(b)(ii) states that the right can be withdrawn if good cause is shown.

¹¹² See *Centre for Child Law v Director General, Department of Home Affairs and others* 2020 (6) SA 199 (ECG).

mothers to pass their nationality on to a child.¹¹³

In theory, if section 2(2) of the Citizenship Act were applied perfectly and consistently, there would be no children born stateless in South Africa. Once it is identified that the child would otherwise be stateless, they should be granted South African citizenship. In other words, if a child is born in South Africa with no right to any other nationality, that child must be given South African nationality, otherwise, that child would be stateless. Section 4(3) bolsters this protection by providing for the acquisition of citizenship at the age of eighteen, where it was not acquired at birth. The letter of the law is therefore in compliance with South Africa's international obligations and constitutional duty to prevent and reduce statelessness. However, as is evidenced by the Jose case discussed above, these sections are not successfully applied in practice. One reason for this, in the case of section 4(3) specifically, is that there are no regulations which have been promulgated that may assist officials from the Department of Home Affairs to implement the provisions of section 4(3), thereby processing these applications. In 2018, the SCA in the case of *Minister of Home Affairs v Ali* ordered the Minister to make regulations in relation to section 4(3), and that pending promulgation applications for citizenship be accepted in affidavit form, but at the time of writing this article, no regulations have yet been promulgated.¹¹⁴ Furthermore, with regards to section 2(2), in the case of children born to refugees, for example, no consideration is given at the time of birth to whether these children could be stateless. They are simply assigned the nationality of their parents. This does not amount to a formal assigning of citizenship or nationality that will be recognised by the child's supposed home country, as South African officials cannot grant nationality of another country. This practice is also contrary to the provisions of section 2(2) because it prevents these children from acquiring South African citizenship, when under section 2(2) they should be able to do so. In sum, while the legislation in South Africa does go some of the way towards preventing and reducing statelessness, it does not go far enough.

(iii) Recommendations

The first and most obvious step South Africa could take towards reducing statelessness and protecting stateless persons would be to accede to both Statelessness Conventions. Acceding to the 1954 Convention in particular, will oblige South Africa to adopt a status determination procedure, which it does not currently have, to legally classify individuals as stateless. It will also provide minimum standards of treatment or rights due to these individuals. For those who are displaced across borders due to climate change, and do not qualify as refugees, this is a vital safeguard of their human rights. South Africa has pledged several times over the decades to

¹¹³ Such as is the case with Somalian nationals, although there is a Citizenship Amendment Bill which, if passed, will allow both mothers and fathers with Somalian nationality to pass this nationality on to their children.

¹¹⁴ *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169 (30 November 2018).

accede to both statelessness conventions.¹¹⁵ There is therefore at least some political will supporting this step.

Another step the legislature can take is to clarify the requirements for refugee status under the Refugees Act. Section 3(b) could be amended to explicitly include persons displaced across borders due to the impacts of climate change. Alternatively, an entire new sub-section could be included under section 3 dealing with these persons specifically. Again, while this will not solve the statelessness problem, it will provide interim protection, and can eventually lead to citizenship through naturalisation.¹¹⁶

In relation to preventing and reducing statelessness, the legislature could promulgate regulations for the various sections of the Citizenship Act, which are aimed at preventing statelessness and which currently do not have regulations. This would enable the Department of Home Affairs officials to better understand what is required of them and may lead to a reduction in statelessness for those born in South Africa to parents who were displaced by the impacts of climate change.

Unfortunately, both amending the Refugees Act and promulgating regulations to sections of the Citizenship Act require political will to welcome and provide a safe haven to foreign nationals in a protracted displacement. Such political will would be required at a time when xenophobic sentiment is high within the country and policy seems to be steering towards a stance of rejecting rather than accepting refugees and other people of concern. It may therefore be necessary for NGOs or other civil society bodies to conduct strategic litigation in the hopes of achieving these goals.

Finally, the Minister could, in terms of section 31(2)(b) of the Immigration Act designate stateless persons displaced as a result of climate change as a category of persons who, due to special circumstances, should be granted temporary residence, and if the situations persist, permanent residence. Any such decision should be accompanied by a specific application procedure with required evidence and regulations. This process would also remove these persons from the asylum system, which could assist in reducing the backlog in applications for refugee status.

(b) Mozambique

(i) Current legal framework

Unlike South Africa, Mozambique has acceded to both the 1954 and 1961 Statelessness Conventions. However, it has yet to domesticate either convention into its national legislation. It is also a party to the 1951 UN Refugee Convention and 1969 AU Refugee Convention, both of which have been domesticated into its national legislation.

¹¹⁵ An example of this are the pledges made by South Africa at the Ministerial Intergovernmental Event on Refugees and Stateless Persons that took place in Geneva from 7 to 8 December 2011. Here South Africa pledged to accede to or take steps to accede to both Statelessness Conventions.

¹¹⁶ By means of s27(c) of the Refugees Act and s5 of the Citizenship Act.

These Conventions have been domesticated in Mozambique's Refugee Act.¹¹⁷ Like South Africa, Mozambique's Act uses the same definition of refugee as the 1951 Convention, with the extended definition from the 1969 AU Convention, which includes events seriously disturbing the public order.¹¹⁸ It could therefore be argued that this legislation protects those displaced across borders due to climate change, if they satisfy the extended definition of the term refugee. While not directly dealing with the issues of statelessness, this will provide displaced individuals with protection, and can lead to permanent residency, and citizenship through the naturalisation process. Article 12 of the Refugee Act states that the Republic of Mozambique may authorise the acquisition of citizenship through naturalisation for persons with refugee status who seek to acquire such nationality, as long as the requirements of legislation concerning nationality have been met.

Mozambique's 2004 Constitution is the primary law on nationality.¹¹⁹ This is supplemented by the 1975 Nationality Act and Regulations (as amended). The legislation and regulations apply to the extent that they do not contradict the provisions of the Constitution. The 2004 Constitution provides for gender equality in nationality laws and aims to reduce childhood statelessness by providing for Mozambican nationality for all persons born on Mozambican territory. This is consistent with Mozambique's obligations under the ACRWC to which it is also a party. Article 27 of the Constitution also provides for the acquisition of citizenship through naturalisation, for persons who have been legally and habitually resident in Mozambique for at least ten years. This implies that displaced persons, who have become stateless persons, must wait for at least ten years, to apply for a new nationality.

(ii) Does the current framework offer sufficient protection?

First, does the legal framework protect those displaced across borders and thereby rendered stateless? For those stateless persons who qualify as refugees, such as those fleeing conflict or violence induced by climate change, or those fleeing sudden-onset disasters, they are protected by international and national refugee law. They also may potentially become citizens through naturalisation and will no longer be stateless. However, there is a major practical obstacle to refugees who are also stateless making use of the naturalisation laws and regulations. The regulations to the Refugee Act require certain information and documentation for an application for the acquisition of citizenship by naturalisation, such as a birth registration certificate, identity document or passport.¹²⁰ Clearly, for stateless persons, providing some of

¹¹⁷ Mozambique: Act No. 21/91 of 31 December 1991 (Refugee Act), available at <https://www.refworld.org/docid/3ae6b-4f62c.html>, accessed on 05 May 2022.

¹¹⁸ Ibid. Art 1.

¹¹⁹ The Constitution of the Republic of Mozambique 2004.

¹²⁰ Ibid. Art 14.

these items is simply not impossible. Therefore, while they may enjoy the protection of refugee law, they are likely to remain stateless. Many refugees, too, cannot meet these requirements because they may not have these documents, in particular, the passport.

For those persons who were displaced from foreign territories by slow-onset disasters, there is currently no protection in place. Domesticating the Statelessness Conventions would provide some level of protection for those persons rendered stateless due to climate change. This is equally as important for Mozambican nationals, as a major issue specific to Mozambique is the return of Mozambican nationals from foreign countries, who have no means of proving their nationality on return to Mozambique. Whether due to violent conflict or weather-related disasters, thousands of Mozambican nationals have crossed borders to escape these events. This is likely to continue due to Mozambique's vulnerability to disasters and the ongoing violence in the Cabo Delgado province.¹²¹ When these persons return to Mozambique after fleeing such events, due to the inconsistent nationality laws and application thereof within Mozambique, which is discussed below,¹²² these persons may find it difficult to realize their rights as citizens and have no protection under refugee law, leaving them particularly vulnerable.

Secondly, does the legal framework protect those born stateless within Mozambique? Both the 2004 Constitution and 1975 Nationality Act provide for Mozambican citizenship to be acquired at birth when a child is born on Mozambican territory to parents who are stateless, of unknown nationality or whose parents are unknown.¹²³ It would seem then that children born to foreign nationals on Mozambican territory are therefore protected from being stateless, as they acquire citizenship at birth. There are, however, practical obstacles to this. Mozambique's nationality laws are based on the existence of a comprehensive network of civil registries ensuring universal birth registration and issuance of identity documents.¹²⁴ Despite this, birth registration rates remain low, largely due to the inaccessibility of these civil registers.¹²⁵ Between 2000 and 2009, only 31 percent of children under the age of five years old had their births registered in Mozambique.¹²⁶ As of 2019, birth

¹²¹ OCHA 'Mozambique key message update: Attacks in northern Mozambique continue to displace households as the rainy season nears' (September 2022), available at <https://reliefweb.int/report/mozambique/mozambique-key-message-update-attacks-northern-mozambique-continue-displace-households-rainy-season-nears-september-2022>, accessed on 10 October 2022.

¹²² UNHCR 'Fighting Statelessness' available at <http://citizenshiprightsafrika.org/wp-content/uploads/2016/07/UNHCR-Mozambique-Statelessness-Project.pdf>, accessed on 04 May 2022. UNHCR 'Fighting Statelessness' available at <http://citizenshiprightsafrika.org/wp-content/uploads/2016/07/UNHCR-Mozambique-Statelessness-Project.pdf>, accessed on 04 May 2022.

¹²³ Constitution of Mozambique, Art 23; and the 1975 Nationality Act, art 8.

¹²⁴ Patricia Jerónimo 'Report on Citizenship Law: Mozambique' GlobalCit May 2019 at 2, available at https://cadmus.eui.eu/bitstream/handle/1814/62966/RSCAS_GLOBALCIT_CR_2019_06.pdf?sequence=1, accessed on 18 May 2022.

¹²⁵ UNHCR 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Mozambique' 2010 at 10, available at <https://www.refworld.org/pdfid/4c3abd512.pdf>, accessed on 18 May 2022.

¹²⁶ Bronwen Manby 'Statelessness in Southern Africa' UNHCR 2011 at 13, available at <https://www.refworld.org/pdfid/50c1f9562.pdf>, accessed on 18 May 2022.

registration rates were still below 50 percent.¹²⁷ Therefore, these legal protections may not be realized in practice.

For children born to Mozambican parents in a foreign country, the situation is even less certain. As discussed above, Mozambique is no stranger to disasters or extreme weather events. It is therefore likely that Mozambican nationals who have fled to a neighbouring country due to the impacts of climate change will give birth in that country, especially during periods of prolonged displacement. According to Article 24 of the 2004 Constitution, for a child to have Mozambican nationality, a declaration must be made by the child's parents, within a year of birth, that the parents wish the child to have Mozambican nationality. If this is not done, the child is able to make the declaration themselves, within a year of attaining majority. It is important to note that in this scenario, nationality is not automatically acquired. A process must be followed. For some children born across the border, whether it be due to lack of access to civil registry offices or lack of knowledge, a declaration may never take place, rendering such children at risk of statelessness. Furthermore, when making the declaration, a person, either the child or their parents, depending on the scenario, is required to provide certain information and documentation, such as proof of birth registration.¹²⁸ For vulnerable persons displaced due to climate change, it may not be possible to obtain these documents, putting these children at further risk of statelessness.

(iii) Incoherent legal framework

The main issue with Mozambique's legal framework on nationality is that it is incoherent and inconsistently applied. The 2004 Constitution did not repeal the 1975 legislation and regulations. Rather, as stated above, these continue to exist as supplementary to the Constitution and will apply in so far as they do not contradict the Constitution.¹²⁹ However, it is not always straightforward to determine whether a provision is contradictory or supplementary. For example, the 2004 Constitution provides for a list of grounds for attribution of citizenship, which is shorter than the list contained in the 1975 Act. While the wording of the Constitution indicates that the intention was for the list to be exhaustive, it could be interpreted in a way that the list in the Act supplements the list in the Constitution.¹³⁰ There has been no clear guidance provided on these rules, leaving state officials to decide for themselves what rules apply and when. This leads to inconsistent application of nationality laws at the provincial and national levels.¹³¹

¹²⁷ Patrícia Jerónimo *op cit* note 124.

¹²⁸ Constitution of Mozambique, Art 23(3).

¹²⁹ Patrícia Jerónimo *op cit* note 124.

¹³⁰ *Ibid.*

¹³¹ UNHCR *op cit* note 125.

(iv) *Recommendations*

First and foremost, Mozambique should domesticate the provisions of the Statelessness Conventions to ensure maximum protection for stateless persons and to reduce further instances of statelessness.

Like South Africa, Mozambique should amend the current definition of refugee in its Refugee Act to explicitly provide for refugee status where persons are displaced across borders due to the impacts of climate change. This will ensure that such persons, when stateless, at least enjoy the rights and protections afforded to refugees.

To prevent confusion with regard to nationality laws, Mozambique should repeal the 1975 Nationality Act and Regulations and enact new nationality legislation that is in line with the 2004 Constitution and should provide detailed guidance on how the rules are to be applied in practice. This is a step that the UNHCR has been recommending for several years.¹³²

With regards to children born in foreign territories to Mozambican parents, considering that Mozambique already has a nationality law framework with a combination of *jus soli* and *jus sanguinis* principles, it may be worth including in the new legislation a provision to the effect that children born to Mozambican parents abroad are automatically considered Mozambican citizens. The provision can include something to the effect that such children must affirm their wish to *retain* their Mozambican nationality within a certain period following the age of majority.

Finally, for stateless persons looking to naturalise as Mozambican citizens, should their application for citizenship be denied, the only option is for them to appeal to the Minister of Justice.¹³³ This is a limited and potentially time-consuming avenue for stateless persons to be forced to take, and will likely result in an extended period of statelessness. Therefore, for a state that has acceded to the 1961 Convention, it may be advisable to provide for an alternative form of review, such as a judicial review of naturalisation application decisions.

(c) *Tanzania*

(i) *Current legal framework*

Unlike Mozambique, Tanzania has not acceded to either the 1954 or the 1961 Statelessness Conventions. Yet, Tanzania is a State Party to a number of international and regional human rights treaties.¹³⁴ Tanzania is also among the States Parties to the 1951 UN Refugee Convention and 1969 AU Refugee Convention, both of which

¹³² Patrícia Jerónimo op cit note 124.

¹³³ Patrícia Jerónimo op cit note 124.

¹³⁴ The 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1989 Convention of the Rights of the Child (CRC), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the 1990 African Charter on the Rights and Welfare of the Child (ACRWC).

have been domesticated into its national legislation. The Refugees Act No. 9 of 1998 was promulgated to repeal its predecessor Refugees (Control) Act of 1966. Although the Refugees Act is silent on how refugees can be naturalised, however, the country has a comprehensive solution strategy policy commonly known as the Tanzania Comprehensive Solutions Strategy (TANCOSS) of 2017 that granted citizenship to refugees and asylum seekers from Burundi in 2020, but also refugees from Rwanda, Somalia, were granted citizenship before in 1982.¹³⁵ Tanzanian group naturalisation for refugees has been commended as one of the durable solutions to end the refugee situation and, by extension, statelessness.

Tanzania ratified the ACRWC of 1990, and the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which all contain provisions on the right to a nationality. For that reason, Tanzania is under the obligation to protect the right to a nationality and the rights of stateless persons, including taking action to prevent statelessness. Article 6 of the ACRWC confirms that every child has the right to a nationality and the States Parties have an obligation to grant nationality to otherwise stateless children born on the territory.

In Tanzania, the right to nationality is provided for under the Citizenship Act, 2002 (Cap 357 R.E.2002). This Act states that there are three ways in which nationality can be acquired in Tanzania: by birth, descent, and naturalisation. However, the Citizenship Act does not guarantee the right to a nationality for stateless persons. Since Tanzania is not a party to the 1954 and 1961 Statelessness Conventions, the protection of stateless persons remains uncertain. For example, the African Court on Human and People's Rights in the case of *Anudo Ochieng Anudo v United Republic of Tanzania*¹³⁶ indicated that under Tanzanian law, the acquisition of nationality by birth does not have recourse to a judicial remedy where such nationality cannot be recognised.¹³⁷

The Tanzania Citizenship (Amendments) Regulations 2017 brought some changes to grant citizenship to persons who would be otherwise stateless. Despite these changes, there is still a significant number of persons who are at high risk of being stateless. These include persons who are displaced due to climate change and cross-border migration, like refugees.

Furthermore, the legal framework in Tanzania provides an example of how unequal or discriminatory nationality laws, when applied in the context of climate-induced displacement, can be particularly unjust and contribute to statelessness. For example, the Citizenship Act has been viewed as discriminatory in nature because it does not afford equal rights to women and men to pass on citizenship to their spouses. A married woman cannot pass nationality to her foreign/stateless spouse on an equal basis as a married man. Section 11(1) states that:

¹³⁵ Amelia Kuch 'Naturalization of Burundian refugees in Tanzania: The debates on local integration and the meaning of citizenship revisited' (2017) 30 *Journal of Refugee Studies* 468–87.

¹³⁶ African Court on Human and Peoples' Rights, App No 012/2015, Judgement of 22 March 2018 116, available at <http://www.african-court.org/en/index.php/56-pending-cases-details/877-app-no-012-2015-anudo-ochieng-anudo-v-united-republic-of-tanzania-details>, accessed on 19 May 2022.

¹³⁷ A Kuch op cit note 135.

a woman who is married to a citizen of Tanzania shall at any time during the lifetime of the husband be entitled, upon making an application in the prescribed form, to be naturalised as a citizen of the United Republic.

This implies that non-citizen women are entitled to naturalisation once they are married, but non-citizen men do not qualify for automatic naturalisation. Such discriminatory laws have an increased effect on vulnerable populations, such as those displaced by climate change. For instance, should a stateless male from a foreign country find himself in Tanzania as a result of climate-induced displacement, and find himself in a scenario where he is marrying a Tanzanian woman, he would not be able to receive his wife's nationality and would remain stateless. Therefore, gender inequalities in the Tanzanian nationality laws can lead to and exacerbate statelessness, including that induced by climate change.

(ii) Does the current framework offer sufficient protection?

Stateless persons who qualify as refugees, such as those fleeing conflict induced by climate change, or those fleeing sudden-onset disasters, are protected by international and national refugee law. They are likely to become Tanzanian citizens through naturalisation. However, gender inequalities and limitations imposed under the Citizenship Act as mentioned above, are among the obstacles that can prevent stateless refugees and other types of stateless persons from benefitting from the naturalisation laws, regulations, and policies. In essence, there is no legal framework in place to effectively protect the rights of stateless persons or people who are at risk of becoming stateless, like the offspring of refugees in protracted displacement and those who are displaced due to the impact of climate change in Tanzania.

The law in Tanzania allows a woman who renounced her Tanzanian nationality due to marriage to a man of a different nationality, to reclaim her citizenship after divorce; however, the same protection is not afforded to men. Likewise, gender discrimination exists in the aspect of the acquisition of nationality by descent. Although a person can become a citizen by descent if either the father or mother is a citizen of Tanzania, this does not apply if the parent's citizenship was solely descent-based. This discrimination becomes an issue since it may lead to statelessness if nationality was acquired by descent. The Citizenship Act provides that where a person's father was a citizen by descent, the child can acquire citizenship through naturalisation. This revokes what would be a gender-neutral aspect of the acquisition of nationality by descent, since a person born outside Tanzania to a Tanzanian mother who is a citizen by descent, would not be covered under this provision. Accordingly, citizenship of Tanzania does not transmit to the second generation born outside the country; this can create risks of statelessness if the children are unable to acquire the citizenship of the country in which they were born.

Moreover, a naturalised citizen can be deprived of citizenship on various grounds, including: obtaining citizenship by fraud; demonstrating disloyalty towards the state;

and residing abroad for more than five years without communicating an intention to retain their Tanzanian citizenship. Before the deprivation decision is made, the Minister must determine that a continuation of citizenship is 'conducive to the public good' in the broad sense. However, this provision on deprivation of citizenship does not apply to citizens by birth. This creates a hierarchy of citizenship whereby birth citizenship is less perilous than naturalised citizenship. The Immigration Act, CAP 54 (R.E. 2016), which amended the previous Immigration Acts of 1995, 1997, 2002, 2004, 2008, and 2015, puts the burden of proof of citizenship on the person alleged to be a non-citizen, instead of the state.¹³⁸ In the landmark decision in the Anudo's case in 2018 on the revocation of Tanzanian nationality, the court held that Tanzania had arbitrarily deprived Anudo of his nationality, by violating Article 15(2) of the Universal Declaration of Human Rights and Article 13 of the ICCPR.

What is important to note about Tanzania, unlike South Africa, the Constitution of 1977 as amended, does not clearly state the right to a nationality. Instead, it refers to the 'citizen or citizenship' in terms of 'citizenship law' in several sections, such as sections 5, 47, and 67. This is a *lacuna* in law that undermines the universal norm of the supremacy of the Constitution and favours parliamentary sovereignty. Under President Jakaya Kikwet's regime, Tanzania started the constitutional review processes. The Constitutional Review Act was enacted in 2011. But such an Act underwent three amendments to improve and broaden public participation. The first amendment was approved by the Parliament on 10 February 2012 and urged the Tanzanian Mainland and Island (Zanzibar) to engage and agree on fundamental matters pertaining to the constitutional review process, that included having representatives from both sides of the Tanzanian Union (Tanzania Mainland and Island or Zanzibar).

Since the promulgation of the Constitutional Review Act in 2011, there has been a call to amend the Constitution. The Draft Constitution sets out provisions that address some of the shortcomings in the national laws, which include citizenship acquisition for foundlings under seven years of age; and providing that any person who marries a Tanzanian citizen may apply for citizenship by registration. However, the Draft Constitution contains no provisions against the deprivation of nationality. Although the Draft Constitution was submitted in December 2013, the Referendum to adopt the Constitution was postponed, and following the presidential elections of 2015, the Draft Constitution is still pending a referendum.

(iii) Does Tanzania's legal framework protect those displaced across borders due to climate change?

Answering this question requires that recognition be given to the large portion of the Tanzanian population that originates from other states. Since most African countries gained independence, protracted armed conflicts or violence have encouraged cross-border migrations. Conflicts in countries like Mozambique, Rwanda, Burundi, the

¹³⁸ The Immigration Act, 2016 s44(b).

Democratic Republic of the Congo, Congo-Brazzaville, Uganda, Ethiopia, Somalia, Angola, and South Africa during apartheid, led to many people seeking asylum in Tanzania. In line with its pan-African spirit and support for liberation struggles, Tanzania welcomed refugees to reside and settle in rural refugee settlements.¹³⁹ Some of the refugees eventually left the settlements where they were required to stay and mixed with the local communities.¹⁴⁰ While some of these persons may have been able to naturalise and acquire Tanzanian citizenship, many are in a situation where they do not have Tanzanian nationality, nor can they prove the nationality of their country of origin, especially, of their offspring. Some may no longer have the nationality of their country of origin due to the relevant state's nationality laws pertaining to long absence and passing on nationality to children. This population is therefore already at severe risk of statelessness.

(iv) Does Tanzania's legal framework protect those born stateless within its territorial boundaries?

Under municipal law, there are principles that guide nationality acquisition, which means, nationality by birth or *jus soli*,¹⁴¹ by blood or *jus sanguinis*, or a combination of two principles.¹⁴² The immigration and/or nationality laws in Tanzania have created a class of persons who can register as citizens but never did despite continued residence in Tanzania. Put clearly, there is no political will to implement the nationality laws. Therefore, the *jus soli* provision had been interpreted and applied literally, while some persons can be viewed as Tanzanian citizens by birth.¹⁴³ In this context, the persons who cannot be categorised as Tanzanians by birth or blood can be expelled or deported to another country but will be unable to prove their nationality and in some instances, such expulsion may result in stateless status.

The authors argue that the basic principle for nationality recognition and acquisition must always be mindful of the genuine and strong link between a given state and individuals. Such a link is a fundamental one in determining the claim of nationality since the state in a practical sense is not always ready to grant nationality to all individuals. Hence, there are requirements that must be met to prove the linkage between an individual and the state. For example, the common law principle of *jus soli* requires that nationality must be acquired by virtue of being born on a country's territory.¹⁴⁴ However, some states apply *jus soli* in a limited form of acquiring nationality and set conditions for individuals who are born on the territory to meet certain conditions to obtain nationality, if Tanzania can be cited among other

¹³⁹ Caroline Nalule & Anna Nambooze 'Report on citizenship law: Tanzania' GlobalCit April 2020 at 22, available at <http://hdl.handle.net/1814/66748>, accessed on 18 May 2022.

¹⁴⁰ Peti Siyame 'Tanzania: Nchemba tells former refugees – behave, else you forfeit citizenship' *Tanzania Daily News* 24 August 2017, available at <https://citizenshiprightsfr.org/tanzania-nchemba-tells-former-refugees-behave-else-you-forfeit-citizenship/?lang=fr>, accessed on 25 May 2022.

¹⁴¹ Hudson Report on nationality, including statelessness, A/CN.4/50 (1952), available at <https://digitallibrary.un.org/record/1299414?ln=en>, accessed on 25 May 2022.

¹⁴² *Ibid.*

¹⁴³ Caroline Nalule & Anna Nambooze op cit note 139.

¹⁴⁴ Laura van Waas *Nationality Matters: Statelessness under International Law* (2008) at 52.

examples.

Occasionally states use what Vela calls a conditional form of *jus soli*, which tends to limit the right to nationality and other fundamental human rights.¹⁴⁵ Some countries apply a limited form of *jus soli* and set out conditions for individuals born on their territories to obtain nationality or be recognised as their citizens. Likewise, the *jus sanguinis* principle recognises descent or parentage as the indication of a genuine link.¹⁴⁶ Also, some issues arise due to the application of the *jus sanguinis* principle, which plays a critical role in the continuation of statelessness.¹⁴⁷

(v) Incoherent legal framework

Like Mozambique's legal framework on nationality, the Tanzanian legal framework is incoherent and inconsistently applied. In many instances, the limitations imposed under the Citizens Act, the Immigration Act, and the Refugee Act, tend to limit the application of *jus soli* and violate the basic human rights of stateless persons, especially children of undocumented refugees, cross-border migrants like Comorians who have lived in Zanzibar for many years, the Makonde tribe that migrated from Northern Mozambique, and Burundians, Rwandese, Congolese, Kenyans, and Ugandans who migrated to Tanzania due to the massive labour recruitment during colonial rule, who came to work in the sugar, tea and coffee plantations. Similarly, the children of displaced persons, due to the impacts of climate change, are likely to face statelessness challenges because they may not benefit from *jus soli* and *jus sanguinis* or may even not be granted citizenship by naturalisation.

(vi) Recommendations

Like Mozambique, Tanzania should accede to both Statelessness Conventions and domesticate the provisions of the Statelessness Conventions to ensure the protection of stateless persons and to reduce further instances of statelessness. We recommend that, like South Africa, Tanzania should amend the current definition of refugee in its Refugee Act and extend it to include refugee status when persons are displaced across borders due to the impacts of climate change. This will ensure that such persons can still enjoy the rights and protections afforded to refugees under the refugee conventions and other human rights instruments. Such protection can deter them from becoming stateless persons.

To prevent confusion with regards to nationality laws, Tanzania should amend the Constitution and Citizenship Act and clearly provide for the right to nationality to be in line with the international human rights law by providing practical guidelines in ensuring that stateless persons who are displaced across borders due to the impacts of climate change are fully protected. The Tanzanian government should also provide detailed guidance on how the rules are to be applied in practice.

¹⁴⁵ María José Recalde Vela op cit note 2 at 17.

¹⁴⁶ Ibid.

¹⁴⁷ Laura van Waas op cit note 144 at 52.

Statelessness situations that occur in cross-border migration result in persons losing or being deprived of their nationality without having a habitual residence.¹⁴⁸ Also, Tanzanian nationals can become stateless within Tanzania or if they are displaced across borders. Furthermore, in Tanzania, like South Africa and Mozambique, stateless persons may remain in their respective countries but still become stateless in the long term due to inadequacies in the national law and policy frameworks or implementation of nationality laws. We recommend that children born in foreign countries to Tanzanian parents automatically benefit from the application of *jus soli* and *jus sanguinis* principles. The laws should be amended to allow children born to Tanzanian parents outside of Tanzania to automatically become Tanzanian citizens. For example, children born to foreign parents must acquire Tanzanian citizenship, and then children of Tanzanians born outside Tanzania should also acquire citizenship of the country in which they were born to the unfair discrimination in acquiring nationality. If children of Tanzanians born outside Tanzania must acquire Tanzanian citizenship, likewise, the children born to foreign parents in Tanzania must acquire citizenship of their foreign parents to avoid the possibility of becoming stateless. This can be among the solutions to reduce statelessness in Tanzania.

Finally, for stateless persons who wish to naturalise as Tanzanian citizens, should their application for citizenship be denied — like in the Anudo's case — alternative remedies of review and judicial review of naturalisation applications must be utilised to limit the powers of the Minister of Home Affairs, who is currently empowered to grant nationality while his/her decisions cannot be challenged.¹⁴⁹

IV. CONCLUSION

There are currently two related crises affecting nations of Southern Africa: statelessness and climate change. The UNHCR has recognised that there are potentially millions of stateless persons in the Southern African region, as they are not, or would not be, considered nationals of any state under the operation of law. When the broader definition of statelessness is considered, where all persons who are unable to establish a nationality are considered stateless, this number is likely to be even greater.

These numbers are likely to continue to rise while widespread displacement continues to ravage the region. Much, if not most of this displacement, is caused by climate change and the impacts thereof. The African continent and the Southern African region are particularly vulnerable to these impacts. These impacts, such as slow- and rapid-onset disasters are only likely to increase in both frequency and intensity. When these disasters lead to permanent cross-border displacement and are combined with issues such as low birth registration, lack of documentation, protracted situations of displacement, and inconsistent or unequal nationality laws, the result can be a catastrophic worsening of the current statelessness problem in the

¹⁴⁸ UNHCR *Handbook on Protection of Stateless Persons Under the 1954 Convention Relating to the Status of Stateless Persons* (2014) at 3.

¹⁴⁹ The Citizenship Act, s23.

region.

International and regional legal instruments have highlighted the problem of statelessness and provided a roadmap to prevent it and protect those who are already stateless. Unfortunately, at the national level, Southern African countries have been slow to implement similar legal developments. States such as South Africa and Tanzania should immediately take steps to accede to both Statelessness Conventions. States such as Mozambique, which have already acceded to the Statelessness Conventions, should take steps to domesticate these instruments and implement statelessness determination procedures. All states should ensure that their current nationality laws are implemented effectively and amended where necessary to avoid further situations of statelessness. These and further recommendations discussed in this article will go a long way towards preventing and reducing statelessness in general.

To prevent climate change-induced statelessness in particular, more targeted steps are required. These can include humanitarian visas, special permanent residence exemption permits, or refugee status for those displaced by climate change and its impacts. All these options will provide a legal basis for remaining in the host country and must be accompanied by a naturalisation procedure. Legislative reforms are required in South Africa, Mozambique, and Tanzania in order to provide these rights and protections.

Both statelessness and climate change are problems that cannot be confined to any state's borders. Fighting both crises requires concerted efforts on a national level as well as regional cooperation. Southern African nations must start taking steps to respect and protect their people by ensuring the most basic and fundamental of human rights, the right to a nationality.