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## Abstract

The United Nations High Commissioner for Refugees set a 10-year timeline in 2014 to prevent childhood statelessness and believes this is possible if the following four steps are taken. First, it urges all states to allow children who would otherwise be stateless to gain nationality in the country where they are born. Secondly, it urges states to reform citizenship laws that discriminate on the ground of gender, so that mothers are able to pass nationality on to their children on an equal basis as fathers. Thirdly, it calls for the elimination of laws and practices that deny children nationality because of their ethnicity, race, or religion. Lastly, and most importantly, it calls on states to ensure universal birth registration to prevent statelessness. The specific focus of this article will be to examine the risk of childhood statelessness in South Africa. It will begin by providing an explanation of statelessness, followed by the causes and consequences of statelessness. It will briefly comment on the two Statelessness Conventions and examine the extent to which the right to nationality in international human rights laws can protect the stateless child. South Africa has not ratified either of the two Conventions on statelessness, but it believes its citizenship laws are sufficient to prevent childhood statelessness. This article aims to interrogate whether South Africa's laws can protect children at risk of being born stateless and provide adequate solutions to this problem. Through this analysis, the four steps identified by the UNHCR to prevent statelessness will be tested against South African law. This article utilises a child-centred approach, viewing children as beings with rights and not merely as objects of protection, as with the State-centred approach.

## Keywords

Children; statelessness; birth registration; doctrinal and juridical approaches in South Africa.

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## 1 Introduction

The prevention and resolution of childhood statelessness is one of the key goals of the United Nations High Commissioner for Refugees (UNHCR) and its Campaign to End Statelessness in ten years,<sup>1</sup> or by 2024. According to the UNHCR, 70,000 stateless children are born each year, and the effects of being born stateless are severe.<sup>2</sup> To achieve the goal of eradicating statelessness, the UNHCR has urged all states to take steps in line with the Global Action Plan to End Statelessness.<sup>3</sup> The four steps identified by UNHCR include: states to allow children to be granted the nationality of the country in which they are born if they would otherwise be stateless; reform laws that prevent mothers from passing their nationality on to their children on an equal basis as fathers; eliminate laws and practices that deny children nationality because of their ethnicity, race or religion; and ensure universal birth registration to prevent statelessness.<sup>4</sup>

The specific focus of this article will be to examine the risk of childhood statelessness in South Africa. This article will begin by defining statelessness and will then examine the causes and consequences of statelessness. It will also briefly comment on the two Statelessness Conventions and examine the extent to which the right to nationality provided for under international human rights laws can protect stateless children. Thereafter, the focus will be on the situation in South Africa. The author will question whether the laws effectively protect children who are at risk of being born stateless and provide solutions to this problem. In doing so, the four steps identified by the UNHCR to prevent statelessness will be tested against South Africa's laws. This article will use a child-centred approach, viewing children as beings with rights and not merely as objects of protection, as with the state-centred approach.

## 2 Children as bearers of rights

The parents of a child, or any other guardian, and the state are the most significant role-players in the life of children. However, since children (for

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<sup>1</sup> UNHCR 2014 <https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>.

<sup>2</sup> UNHCR 2015 [http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport\\_ENG16.pdf](http://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf).

<sup>3</sup> UNHCR 2014 <https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>.

<sup>4</sup> UNHCR 2014 <https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html>.

the most part) cannot act on a right autonomously, social theorists have questioned whether or not it is necessary for children to have rights.<sup>5</sup> Choice theorists, for example, believe that because children are too young to exercise their rights, they should not be given rights.<sup>6</sup> However, this reasoning is flawed if it is applied to those who are mentally ill. An argument that opposes rights entitlements simply because of a child's age is thus without merit. Though parents have the primary duty of care in the lives of their children, they may not be able to effectively care for their children, especially if their children are not recognised as rights bearers by a state.<sup>7</sup> On the other hand, interest theory, which conflicts with choice theory, holds that rights should be given to children because it is an effective way of protecting their interests.<sup>8</sup> Tobin captures the overall rationale for using a rights-based approach for children's issues when he writes:<sup>9</sup>

[u]ltimately the fundamental aim of a rights-based approach is to transform the way in which States (and indeed all other actors that impact on the enjoyment of children's rights) perform their role by demanding that every issue is examined and responded to through a human rights lens.

The "children as bearers of rights" approach is adopted because the human rights approach is strongly advocated as a tool for the prevention of statelessness by several scholars.<sup>10</sup> Moreover, because the *Convention on the Rights of the Child* (CRC)<sup>11</sup> and the *African Charter on the Rights and Welfare of the Child* (ACRWC)<sup>12</sup> will be used as the normative framework, this article endorses a children's rights perspective. The human rights approach is based on the four general principles of the CRC, namely non-discrimination, the best interests of the child, the right to life, survival, and development, and the right to be heard.<sup>13</sup> Both the CRC and the ACRWC provide children with a series of rights, most significantly, within the context of this paper, the right to a nationality.<sup>14</sup> Both instruments recognise children as the bearers of rights rather than mere objects of protection.<sup>15</sup>

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<sup>5</sup> Human "Theory of Children's Rights".

<sup>6</sup> Archard "Children's Rights".

<sup>7</sup> Archard "Children's Rights".

<sup>8</sup> Archard "Children's Rights".

<sup>9</sup> Tobin "Understanding a Human Rights Based Approach to Matters Involving Children".

<sup>10</sup> See Sloth-Nielsen and Mezmur 2007 *AHRLJ* and Liefaard and Sloth-Nielsen *United Nations Convention on the Rights of the Child*.

<sup>11</sup> *Convention on the Rights of the Child* (1989) 1577 UNTS 3 (hereafter the CRC).

<sup>12</sup> *African Charter on the Rights and Welfare of the Child* (1990) (hereafter ACRWC).

<sup>13</sup> *Committee on the Rights of the Child General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (2003) (hereafter *General Comment No 5*) para 6.

<sup>14</sup> Article 7 of the CRC; Art 6 of the ACRWC.

<sup>15</sup> Van Bueren *International Law on the Rights of the Child*.

In addition to the role of parents in the life of a child, there is also a direct link between children as bearers of rights and the state as a duty bearer. The state may intervene if the parents fail the child, but there are also instances when the state is the primary duty bearer.<sup>16</sup> This relationship between the state and the child necessitates a thorough interrogation.

Given the infinite role of the state in the lives of children and that all children are "in need of care",<sup>17</sup> one must ask who is to blame for childhood statelessness? Is it the parents or is it the state? One way of answering these questions is to analyse the provisions on childhood nationality. Because the central component of a rights-based approach is accountability, holding states and parents accountable is of the utmost importance. In fact, the Committee on the Rights of the Child considers this accountability a legal obligation on states and parents.<sup>18</sup> The principle of accountability provides the benchmark to assess the efforts of states to respond to the rights and needs of children and requires that states be answerable for their efforts to comply with their obligations.<sup>19</sup>

As duty-bearers, states are accountable to the bearers of rights. Pursuant to this principle, states have the duty to respect, protect and fulfil their obligations.<sup>20</sup> This requires states to respect individuals and their rights.<sup>21</sup> As an example, states are required to provide stateless children with birth registration, as without it they remain vulnerable and can be subjected to abuse. The "duty to protect" requires states to take actions that are effective to implement their obligations and protect the bearers of rights.<sup>22</sup> The "duty to fulfil", linked to the duty to protect, requires positive efforts on the part of states to enable "the actual realisation of the rights".<sup>23</sup> South Africa has not ratified either of the two Conventions on statelessness, namely the 1954 *Convention Relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*. However, it has ratified both the CRC and ACRWC, which are being used to establish the normative framework of this article. This article will therefore examine the laws necessary to access state care and protection for stateless children in South Africa. Attention will be drawn to South Africa as the custodian of children, as well as the courts as the upper guardian.<sup>24</sup> This article will also evaluate

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<sup>16</sup> Sloth-Nielsen and Mezmur 2007 *AHRLJ*.

<sup>17</sup> Section 150 of the *Children's Act* 38 of 2005.

<sup>18</sup> *General Comment No 5* para.6.

<sup>19</sup> See Tobin 2006 *Int'l J Children's Rts; General Comment No 5* para 11.

<sup>20</sup> The African Commission on Human and Peoples' Rights also include the duty to promote. See *SERAC v Nigeria* (ACHPR) 2155/96 of 27 October 2001; Tobin 2006 *Int'l J Children's Rts* 283.

<sup>21</sup> *SERAC v Nigeria* (ACHPR) 2155/96 of 27 October 2001 para 45.

<sup>22</sup> *SERAC v Nigeria* (ACHPR) 2155/96 of 27 October 2001 para 46

<sup>23</sup> *SERAC v Nigeria* (ACHPR) 2155/96 of 27 October 2001 para 47

<sup>24</sup> Section 45 of the *Children's Act* 38 of 2005.

current domestic law that caters for children born in South Africa who would otherwise be stateless, and explore how the law addresses their rights. In addition, this article will assess what administrative systems should be established to assist such children.

### 3 What is statelessness?

It is evident that all forms of membership in the state system, such as citizenship, permanent residence, temporary residence, a refugee or asylum-seeker permit, are determined through an individual's relationship with the state.<sup>25</sup> A stateless person is not recognised by any state as a national. In the case of citizens there is full recognition based on the laws of citizenship acquisition. Such citizenship acquisition clearly demonstrates the strongest bond between the state and an individual.<sup>26</sup> On the other hand, for a person that has unlawfully entered a territory the bond is extremely limited, because he or she has not formally garnered permission from the state to be present, notwithstanding the citizenship or bond such a foreigner maintains with another country.<sup>27</sup> Statelessness is not something caused or deserved by the individual affected, especially in the case of children. Children do not have a choice when it comes to the place of birth, the actions of their parents, the identity of their parents, or the actions of states.

The two international conventions dealing with statelessness are the 1954 *Convention on the Status of Stateless Persons* (1954 Convention)<sup>28</sup> and the 1961 *Convention on the Reduction of Statelessness* (1961 Convention).<sup>29</sup> The 1954 Convention was adopted pursuant to the events of the Second World War, when many persons lost their right to live as citizens in the territories that they had once considered home.<sup>30</sup> The purpose of the 1954 Convention was to increase international awareness of the plight of stateless people who were not refugees, and to provide for their rights in the absence of formal state affiliation. Such rights include the freedom to practise religion,<sup>31</sup> freedom of association,<sup>32</sup> free access to courts,<sup>33</sup> and freedom of movement,<sup>34</sup> to name just a few. The obligations of the stateless

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<sup>25</sup> Manby *Citizenship Law in Africa*.

<sup>26</sup> Manby *Citizenship Law in Africa*.

<sup>27</sup> Manby *Citizenship Law in Africa*.

<sup>28</sup> *Convention Relating to the Status of Stateless Persons* (1954) 360 UNTS 117 (hereafter the 1954 Convention).

<sup>29</sup> *Convention on the Reduction of Statelessness* (1961) 989 UNTS 175 (hereafter the 1961 Convention).

<sup>30</sup> Van Waas "UN Statelessness Conventions".

<sup>31</sup> Article 4 of the 1954 Convention.

<sup>32</sup> Article 13 of the 1954 Convention.

<sup>33</sup> Article 16 of the 1954 Convention.

<sup>34</sup> Article 26 of the 1954 Convention.

persons toward their state of residence and the standards of treatment that are due to the stateless are also delineated in the 1954 Convention.

In addition, the 1954 Convention provides a definition of statelessness. It states at Article 1 that a stateless person is "a person who is not recognised as a national by any state under the operation of its laws".<sup>35</sup> In other words, the individual may be officially recognised as a national without being treated as one, or may not be recognised as a national at all.<sup>36</sup> These two situations should be considered separately. The former problem is related to the rights attached to nationality, whereas the latter problem is connected with the right to nationality itself.<sup>37</sup> This definition assigns importance to the domestic laws on acquiring a nationality and shows why statelessness is often described as a "man-made problem".<sup>38</sup> The definition requires a careful examination of the domestic laws of a country and has been clarified by UK Supreme Court<sup>39</sup> and the Italian Court<sup>40</sup> in two noteworthy cases, namely *Pham v Secretary of State for the Home Department* in 2015 and the Supreme Court of Cassation judgment number 28873/2008 of December 2008 and April 2011.

The 1954 Convention's definition identifies a *de jure* stateless person as a person not regarded "as a national of any State under the operation of its law".<sup>41</sup> This differs from the situation of *de facto* stateless persons, who are nationals under the operation of a country's laws but do not receive the rights and benefits of such a legal status. While there is no agreed definition of a *de facto* stateless person, nor any international legal framework for dealing with *de facto* stateless persons, the expression has entered common use. The description of *de facto* statelessness is most often invoked to describe a situation in which a person holds a legal nationality, but where this nationality is in some way ineffective.<sup>42</sup>

In the discourse on statelessness much attention has been devoted to the concept of *de facto* statelessness.<sup>43</sup> Laura van Waas has identified different situations in which *de facto* statelessness can arise. These include

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<sup>35</sup> Foster and Lambert 2016 *IJRL* 564, 584.

<sup>36</sup> Van Waas "UN Statelessness Conventions" 66.

<sup>37</sup> Van Waas "UN Statelessness Conventions" 66.

<sup>38</sup> UNHCR 2010 <http://www.refworld.org/docid/4ca1ae002.html>.

<sup>39</sup> *Pham v Secretary of State for the Home Department* 2015 1 WLR 1591 (SC).

<sup>40</sup> Supreme Court of Cassation (Italy) Judgment number 28873/2008 of 9 December 2008; Supreme Court of Cassation (Italy) Judgment number 7614/2011 of 4 April 2011.

<sup>41</sup> A *de jure* stateless person is defined in the 1954 Convention 3 as "a person not considered as a national by any State under the operation of its law".

<sup>42</sup> Van Waas "UN Statelessness Conventions" 66.

<sup>43</sup> Van Waas "UN Statelessness Conventions" 66.

situations where persons are deprived of their rights associated with nationality, where a person's nationality is contested or disputed, or where a person is unable to prove his or her nationality.<sup>44</sup> It is evident that, where citizenship is disputed or where the person is unable to prove nationality, the person is considered to be at risk of statelessness. A resolution to the person's status will require a statelessness determination, which poses substantial challenges. It will require an understanding of the national citizenship laws of other jurisdictions.<sup>45</sup> Both *de facto* and *de jure* stateless persons are in need of protection. O'Malley and Van Waas argue that the issue of statelessness should be brought under the mantle of "responsibility to protect".<sup>46</sup>

The 1961 Convention arose to provide solutions to statelessness which the 1954 Convention did not provide. It does this by outlining measures to diminish the incidence of statelessness at birth and by demarcating the boundaries within which statelessness could occur. Goodwin-Gill, a leading scholar on statelessness, points out that the 1961 Convention places an obligation on states to grant nationality in certain instances, even though it does not recognise an outright right to a nationality.<sup>47</sup> This urges states to grant nationality to children born on its territory who would otherwise be stateless.<sup>48</sup>

Regrettably, both Statelessness Conventions are plagued by low levels of ratification.<sup>49</sup> For example, South Africa has not ratified either of these Conventions.

#### **4 Citizenship as a human right in international law**

According to Goodwin-Gill, statelessness was perceived by many as a mere technical problem, yet statelessness is indeed a broad human rights issue, even as it retains a distinct technical dimension.<sup>50</sup> He is of the view that stateless persons can receive better protection from states if the right to nationality is perceived from a human rights perspective.<sup>51</sup> This viewpoint proposes that, if the 1954 and 1961 Conventions cannot adequately protect

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<sup>44</sup> Van Waas "UN Statelessness Conventions" 66.

<sup>45</sup> Van Waas "UN Statelessness Conventions" 66.

<sup>46</sup> See O'Malley 2015 <https://www.e-ir.info/2015/06/14/statelessness-a-responsibility-to-protect/>; and Van Waas 2007 *NQHR*.

<sup>47</sup> Goodwin-Gill "Rights of Refugees and Stateless Persons" 378.

<sup>48</sup> Article 1 of the 1961 Convention.

<sup>49</sup> According to UNHCR, there were 83 states party to the 1954 Convention and 61 states party to the 1961 Convention in November 2014 when the Campaign to End Statelessness in 10 Years was launched.

<sup>50</sup> Goodwin-Gill "Rights of Refugees and Stateless Persons" 378.

<sup>51</sup> Goodwin-Gill "Rights of Refugees and Stateless Persons" 378.

a stateless person, the person can still have recourse through several other human rights conventions.<sup>52</sup>

While international human rights law does not explicitly impose a positive obligation on states to grant nationality, both general and specific human rights instruments contain relevant restrictions on state discretion on this issue. For example, Article 24(2) and (3) of the *International Covenant on Civil and Political Rights* (ICCPR)<sup>53</sup> sets out obligations to prevent the denial of citizenship by insisting on birth registration and the reaffirmation that "[e]very child has the right to acquire a nationality". Furthermore, Article 27 of the ICCPR is useful in dealing with minority rights because it prohibits the arbitrary denial of citizenship based on cultural and linguistic grounds.

Article 7(1) of the CRC specifically states that every child has a right to a nationality and urges states to ensure birth registration, and Article 7(2) specifically draws attention to possible instances of statelessness if births are not registered. It obliges states to implement procedures for birth registration in accordance with their domestic and international laws.

Other relevant international law documents that include named groups such as women and children include the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW),<sup>54</sup> and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICMW).<sup>55</sup> In fact, Article 29 of the ICMW guarantees the right to a nationality to children of migrant workers explicitly.

From a regional perspective, the ACRWC at Article 6 proclaims a child's right to acquire a nationality. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) adopted a general comment because it noted that birth registration was not being implemented. It also observed that the high rate of unregistered African children makes them vulnerable to a vast range of abuses and, most importantly, it recognised the strong link between the lack of effective birth registration and statelessness.<sup>56</sup>

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<sup>52</sup> Goodwin-Gill "Rights of Refugees and Stateless Persons".

<sup>53</sup> *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (hereafter the ICCPR).

<sup>54</sup> *Convention on the Elimination of All Forms of Discrimination against Women* (1979) 1249 UNTS 13 (hereafter the CEDAW).

<sup>55</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) UN Doc A/RES/45/158 (hereafter the ICMW).

<sup>56</sup> Assefa 2015 <https://africlaw.com/2014/12/15/realising-the-right-to-birth-registration-to-prevent-statelessness-in-africa-in-the-context-of-the-general-comment-on-article-6-of-the-african-childrens-charter/>.

In addition to the introduction of general comments, a body of international jurisprudence on the prohibition of nationality-based discrimination has developed as a result of this approach.<sup>57</sup> The most ground-breaking of these occurred in 2011 when ACERWC challenged the Kenyan government's refusal to grant citizenship to children of Nubian descent and argued that this refusal resulted in the gross violation of their human rights. Since independence Nubian communities had become stateless and Nubian children were deprived of the right to nationality<sup>58</sup> and the documentation that enabled access to education and health care. The ACERWC found that this discrimination was in violation of "African human rights standards"<sup>59</sup> and it used a human-rights approach to address the discrimination caused by statelessness. Thus, South Africa's history of the ratification of international human rights instruments, including those detailed above, as well its own legislation, such as the Constitution<sup>60</sup> and the *Children's Act*,<sup>61</sup> gives effect to a human-rights approach. Ultimately, this could effectively target the issue of statelessness, and as a result, stateless persons could undoubtedly receive better protection.

## 5 Causes and consequences of childhood statelessness

There are many pathways to becoming stateless, some of which were known and anticipated by the drafters of the 1954 and 1961 Conventions. Others have become apparent as a result of state practice to address access to citizenship. Statelessness occurs largely as a result of state action or inaction. Despite section 2.2 of the *South African Citizenship Act's* promising to protect any child from becoming stateless, the following cases demonstrate the difficulty of ensuring that this occurs in practice.

The UNHCR has identified several cases of statelessness as a result of gaps in nationality laws and advises that nationality laws can help to prevent statelessness where parents have a nationality but are unable to pass it on to their children.<sup>62</sup> According to the UNHCR, more than half the states in the world have inadequate safeguards in their nationality laws to grant nationality to stateless children born in their territory.<sup>63</sup> For instance, states that place safeguards in their nationality laws against statelessness at birth

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<sup>57</sup> *African Committee of Experts on the Rights and Welfare of the Child, Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (obo Children of Nubian Descent in Kenya) v Kenya* Communication number 002/Com/002/2009 of 22 March 2011.

<sup>58</sup> Fokala and Chenwi 2013 AJLS 358.

<sup>59</sup> OSJI Date Unknown <https://www.justiceinitiative.org/litigation/children-nubian-descent-kenya-v-kenya>.

<sup>60</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>61</sup> *Children's Act* 38 of 2005.

<sup>62</sup> UNHCR Date Unknown <http://www.unhcr.org/stateless-people.html>.

<sup>63</sup> UNHCR Date Unknown <http://www.unhcr.org/stateless-people.html>.

can prevent statelessness from being passed down from one generation to another.<sup>64</sup> Abandoned children, whose parents cannot be identified, are often referred to as "foundlings" and are another group that can be at risk of statelessness. As the research indicates, nearly one third of all states lack provisions in their nationality laws which grant nationality to abandoned children found in their territories.<sup>65</sup> In addition, in certain cases, the UNHCR has found that, although nationality laws may include safeguards for children found within a state's territory, there may be gaps in the implementation of these laws.<sup>66</sup>

The 1961 Convention does not pronounce a right to nationality, but it has foreseen several of the above cases of childhood statelessness, and it obliges states to grant citizenship to these children, who would "otherwise" be stateless.<sup>67</sup> According to Article 1, a child who is denied the nationality of any other state, and who would otherwise be stateless, may not be rejected by the state where the child was born.<sup>68</sup>

There are various known instances where a child would otherwise be stateless. For example, a child born to stateless parents would otherwise be stateless if not granted the nationality of the state where he or she was born. On the other hand, foundlings are protected under Article 2 of the 1961 Convention, which states that:<sup>69</sup>

[A] foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory.

States are therefore obliged to grant citizenship to foundlings. Another common way for children to be at risk of statelessness is in situations where the laws of two countries conflict; that is, where children are born in territories where the citizenship laws conflict with those of the state from where their parents have a nationality.<sup>70</sup> Statelessness may, therefore, be the inadvertent result of the application to a person of different states' citizenship laws. For example, where an individual is born in a state which grants citizenship based upon *jus sanguinis* practices, nationality is granted on grounds of descent (by blood).<sup>71</sup> States that grant nationality upon the

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<sup>64</sup> UNHCR Date Unknown <http://www.unhcr.org/stateless-people.html>.

<sup>65</sup> UNHCR Date Unknown <http://www.unhcr.org/stateless-people.html>.

<sup>66</sup> UNHCR Date Unknown <http://www.unhcr.org/stateless-people.html>.

<sup>67</sup> Article 1 of the 1961 Convention.

<sup>68</sup> Article 1 of the 1961 Convention.

<sup>69</sup> Article 2 of the 1961 Convention.

<sup>70</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

<sup>71</sup> When nationality is granted on the basis descent. See Manby *Citizenship Law in Africa* 43.

*jus soli* principle do so on the basis of birth territory (of the soil).<sup>72</sup> Thus, unless the state in which the parents were born readily provides citizenship to the children of their citizens born abroad, statelessness may result.<sup>73</sup> Furthermore, some states do not recognise citizenship acquisition via the maternal line. Accordingly, a child born out of wedlock will be regarded as stateless.<sup>74</sup> In addition, childhood statelessness can occur when nationality laws do not comply with international standards. This can happen when states deliberately discriminate against certain ethnicities and exclude certain groups from citizenship.<sup>75</sup>

There are several examples where statelessness has resulted because states break up and new states are formed.<sup>76</sup> In such cases children are often the victims.

Childhood statelessness is also subject to state action such as the revocation of citizenship of one of its members. Although the 1961 Convention calls on all states to refrain from revoking a person's citizenship until they have obtained another one (Articles 5 and 7), in reality this occurs by the operation of laws of some countries such as Cuba, which dictate a specified time frame in which their citizens must return to their country of origin. If children are born to such persons in their country of residence and the parents' country of nationality refuses citizenship, the children will "otherwise be stateless", provided the country of birth does not grant them citizenship.<sup>77</sup> The UNHCR observes that some states "will not grant [their] nationality until the individual has first renounced the nationality"<sup>78</sup> of the state in which he or she currently holds citizenship.<sup>79</sup> Hence, a reason for revocation can include the acquisition of another citizenship, but several other reasons could also lead to revocation, such as political activity in another state, failure to renew one's passport, residency abroad, obtaining citizenship via fraudulent means, divorce, being deemed a "security threat", or failing to adapt to a state's customs.<sup>80</sup>

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<sup>72</sup> When nationality is granted on the basis of birth in a territory. See Manby *Citizenship Law in Africa* 43.

<sup>73</sup> For example, in Chad; see Manby *Citizenship Law in Africa* 54.

<sup>74</sup> For example, in Somalia; see Manby *Citizenship Law in Africa* 54.

<sup>75</sup> For example, the Rohingya people, who have been denied citizenship by the government of Myanmar.

<sup>76</sup> For example, when Eritrea succeeded from Ethiopia and the government of Ethiopia denationalised those of Eritrean descent.

<sup>77</sup> *Minister of Home Affairs v DGLR* (SCA) (unreported) case number 1051/2015 of 6 September 2016.

<sup>78</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

<sup>79</sup> Countries including Tanzania, Algeria, Cameroon, Botswana, DRC, Ethiopia, Somalia, Zimbabwe and Malawi do not allow dual citizenship; see Manby *Citizenship Law in Africa* 63.

<sup>80</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

Laws that permit the revocation of citizenship due to changes in marital status also make women particularly susceptible to statelessness. Some states, including Burkina Faso and Equatorial Guinea,<sup>81</sup> revoke citizenship upon a woman's marriage to a foreigner, because they assume that the woman will obtain the citizenship of her husband's state. Other states such as Togo<sup>82</sup> revoke citizenship from a naturalised woman when she becomes divorced from her husband without first ensuring that she will regain her original citizenship. If the country of birth does not provide citizenship, children born to such women would be stateless.

The UNHCR has observed that:<sup>83</sup>

[G]overnments may amend their citizenship laws and denationalise whole sections of society in order to punish or marginalise them or to facilitate their exclusion from the state's territory.

For example, the Biharis, an ethnic group originating from the Indian State of Bihar, are one such group that has ended up being stateless as a form of punishment. Descendants of people who sided with West Pakistan when East Pakistan, now Bangladesh, attempted to secede from the Republic, they have consistently been denied citizenship from both Bangladesh and Pakistan.<sup>84</sup> Bihari children are therefore denied citizenship simply on the basis of their ethnicity. Statelessness is thus particularly harsh in the case of children, and the circumstances under which statelessness occurs for children appears to be increasing.<sup>85</sup>

As demonstrated above, many situations were foreseen by the drafters of the 1954 and 1961 Conventions; however, what the drafters did not anticipate were how poor administrative practices such as a lack of documentation, including birth certificates, would create problems for children.<sup>86</sup> The lack of birth registration has emerged as a prominent cause of statelessness.<sup>87</sup> Birth certificates, at a minimum, record a child's name, date, and place of birth, and the parents' names. Therefore, a child who is born in a country where the practice of *jus soli* is observed will be able to prove the place of birth, or a child who is born in a country where *jus sanguinis* is observed will have the names of both parents to assist in recording such.

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<sup>81</sup> Manby *Citizenship Law in Africa* 82.

<sup>82</sup> Manby *Citizenship Law in Africa* 82.

<sup>83</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

<sup>84</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

<sup>85</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

<sup>86</sup> UNHCR 2014 <http://www.refworld.org/docid/53b676aa4.html>.

<sup>87</sup> Van Waas 2007 *NQHR* 437-458.

Although Article 7 of the CRC stipulates that a child "shall be registered immediately after birth and have the right to acquire a nationality", birth registration does not automatically confer citizenship to children in all countries. Several cases reveal that a lack of birth registration has led to a denial of citizenship,<sup>88</sup> because even though birth recording does not confer nationality, it establishes a legal record as to where the child was born and to whom. These elements are necessary for proving entitlement to a nationality.

Even though the CRC and ACRWC set out a range of rights for children, children that are not registered at birth will have great difficulty in accessing these rights in many countries.

In addition, the consequences for stateless children can include age-related abuses such as early marriages, forced recruitments into the military service, and exploitation in the labour market.<sup>89</sup> Other issues include a lack of legal recognition in the state of residence, limited freedom of movement, and the damaging psychological impact on stateless children. If there is no birth registration it becomes very difficult to address such problems because proof of age is a first step towards protecting children and is often necessary in the promotion and realisation of rights.<sup>90</sup>

The UNHCR estimates that some 50 million births go unregistered each year, with the highest percentage occurring in sub-Saharan Africa.<sup>91</sup> Reasons for not registering the birth of a child include the absence of a mandatory birth registration system in a state; fear of discrimination, persecution or expulsion; ignorance of state registration requirements; inability to access registration centres; and costs.<sup>92</sup> Even when a group does not fear persecution, race and ethnicity often hinder birth registration in some countries when the ruling party refuses to register the birth of groups that it does not "deem fit" for citizenship by undermining its own citizenship laws.<sup>93</sup>

It is clear that the majority of stateless children around the globe have acquired this status involuntarily. The sources of statelessness are as varied as the groups that suffer from this lack of standing.

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<sup>88</sup> Van Waas 2007 NQHR 437-458.

<sup>89</sup> Van Waas 2007 NQHR 437, 458.

<sup>90</sup> Van Waas 2007 NQHR 437, 458.

<sup>91</sup> Aird, Harnett and Shah *Stateless Children*.

<sup>92</sup> Aird, Harnett and Shah *Stateless Children*.

<sup>93</sup> Aird, Harnett and Shah *Stateless Children*.

The consequences of statelessness are harsh because it is "a condition of legal invisibility".<sup>94</sup> Without a citizenship, stateless people are not entitled to legal standing in a state and all the concomitant rights and protections that this confers.<sup>95</sup>

## 6 Children at risk of becoming stateless in South Africa

In 1994 Goodwin-Gill set a challenge for the international community, namely to address the need for the greater recognition and protection of stateless persons.<sup>96</sup> About twenty years later Foster and Lambert examined the progress made by the international community by dividing Goodwin-Gill's challenge into three key themes: factual, institutional and jurisprudential (or doctrinal).<sup>97</sup> Goodwin-Gill framed statelessness as a factual theme through the simple observation that the number of stateless persons in the world is unknown.<sup>98</sup> He questioned the UNHCR's institutional ability to prioritise the rights of stateless persons, knowing that protecting refugees is the UNHCR's first priority.<sup>99</sup> Lastly, he encouraged jurisprudential growth in this area of law by means of strategic litigation and ratifying important human rights instruments to use the legal protections that exist effectively.<sup>100</sup>

Because the issue of statelessness is now increasingly conceived of in human rights terms "there is room for optimism".<sup>101</sup> In South Africa the intervention by civil society, academics and non-governmental organisations (NGOs) in collaboration with the UNHCR has led to the acknowledgement of the need for greater protection and recognition of the stateless. The executive director of the Open Society Justice Initiative (OSJI), James Goldston, maintains that "whether *de jure* or *de facto*, the impact of statelessness is grave".<sup>102</sup> He suggests that what can be done for stateless persons is to:<sup>103</sup>

[B]etter document the problem, take advantage of those legal protections that exist, and reinforce and expand those additional legal protections that do exist.

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<sup>94</sup> Bequele *Universal Birth Registration*.

<sup>95</sup> Bequele *Universal Birth Registration*.

<sup>96</sup> Foster and Lambert 2016 *IJRL* 564-584.

<sup>97</sup> Foster and Lambert 2016 *IJRL* 564-584.

<sup>98</sup> Foster and Lambert 2016 *IJRL* 564-584.

<sup>99</sup> Foster and Lambert 2016 *IJRL* 564-584.

<sup>100</sup> Foster and Lambert 2016 *IJRL* 564-584.

<sup>101</sup> Foster and Lambert 2016 *IJRL* 564-584.

<sup>102</sup> Goldston 2004 [https://www.opensocietyfoundations.org/sites/default/files/stateless\\_20041006.pdf](https://www.opensocietyfoundations.org/sites/default/files/stateless_20041006.pdf).

<sup>103</sup> Goldston 2004 [https://www.opensocietyfoundations.org/sites/default/files/stateless\\_20041006.pdf](https://www.opensocietyfoundations.org/sites/default/files/stateless_20041006.pdf).

In 1994 South Africa changed from an apartheid government to constitutional democracy and, most importantly, from a country that disregarded human rights to one that comprehensively embraced them. The following section of the article will utilise Goodwin-Gill's three broad themes to evaluate whether the laws that South Africa has put in place to respect human rights extend to stateless persons.

### **6.1 Knowing your constituency**

Goodwin-Gill bases his factual theme on the observation that the constituency, in other words, the stateless population, is not known.<sup>104</sup> Regrettably this is very much the case in South Africa. The South African government does not have any data on stateless persons. Moreover, South Africa has not ratified the 1954 or 1961 Conventions and therefore has no obligation to keep a database of stateless persons. In addition, the government body which is tasked with keeping statistics, Statistics South Africa (STATS SA), has also not reported on statelessness in South Africa.

However, NGOs such as Lawyers for Human Rights (LHR) and the Institute on Statelessness and Inclusion (ISI)<sup>105</sup> have identified individual cases of statelessness in South Africa. The UNHCR has played a huge role in trying to understand the situation of stateless persons in South Africa. The UNHCR has also raised awareness on stateless persons and supported research in this area. Various workshops have been held at academic institutions<sup>106</sup> where legal practitioners have identified the types of situations where children are at risk of statelessness. I am of the opinion that the UNHCR could have gone a step further by acting as *amicus curiae* in some of the ground-breaking cases in South Africa. Though there is no quantitative data, the UNHCR has done much to increase the qualitative data on statelessness in South Africa. It is on the basis of this qualitative data that this article will analyse the issue of stateless children in South Africa.

Unfortunately, children born to refugees in South Africa and the risk of their becoming stateless is an area lacking in statistics and research. Children

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<sup>104</sup> Foster and Lambert 2016 *IJRL* 564, 584.

<sup>105</sup> LHR and ISI 2016 [https://www.lhr.org.za/sites/lhr.org.za/files/childhood\\_statelessness\\_in\\_south\\_africa.pdf](https://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf).

<sup>106</sup> For example, Stellenbosch University 2018 <https://www.unhcr.org/ibelong/event/ending-statelessness-the-role-of-faith-based-organizations-in-the-southern-african-region/>; Nelson Mandela University "Comments on the South African White Paper on Migration"; University of Cape Town 2018 <http://sihma.org.za/events/strengthening-south-african-academia-in-preventing-statelessness-and-protecting-stateless-persons-in-southern-africa/>; *North West University International Human Right to Nationality*. The author participated in these workshops.

born to foreign nationals in South Africa can usually be registered at their consulates and, if the rule applies, the parents can claim nationality for their children. In South Africa such children are issued with a notice of birth, in terms of the *Births and Deaths Registration Act (BDRA)*,<sup>107</sup> which they can present at their embassies. However, refugees do not have the option of approaching their consulates, otherwise they risk persecution from their home governments or even possible expulsion by the host state.<sup>108</sup> Any such interaction with their embassy can be viewed by the host state as re-availment to the country of origin. Some countries require registration if a child is born abroad, but this is not possible in the case of refugees, thereby exposing these children to statelessness.

In South Africa the major refugee nationalities are Somali, Congolese, Ethiopian and Burundian. As an example, Somalia, by operation of its laws, will confer the father's nationality on the child irrespective of where the child is born, which can give rise to some challenges. In protracted refugee situations, the child's nationality may end up being a "legal fiction"<sup>109</sup> because in theory they will have a nationality, but in reality they will not benefit from it. Such an outlook has little in common with how the International Court of Justice defined nationality, as:<sup>110</sup>

... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties.

Because of the continued serious disturbance of the public order in Somalia, children of Somali refugees have no prospect of claiming Somali nationality, due to their fathers' inability to approach their embassy.

There is little evidence that the South African government has considered the issue of nationality for children born in South Africa to refugees. In fact, the South African government refers to children born to refugees in South Africa by the nationality of the parent.<sup>111</sup> Because nationality can be conferred by a state only on its own nationals, the government's reference to children born to refugees by their parent's nationality is meaningless. Even though South Africa has an obligation under its law to provide nationality to children, it remains unknown whether the government considers children born to refugees in South Africa as "not having a

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<sup>107</sup> *Births and Deaths Registration Act* 51 of 1992 (hereafter the BDRA).

<sup>108</sup> UNHCR 2011 <https://cms.emergency.unhcr.org/documents/11982/49074/UNHCR,+Handbook+and+Guidelines+on+Procedures+and+Criteria+for+Determining+Refugee+Status+under+the+1951+Convention+and+the+1967+Protocol+Relating+to+the+Status+of+Refugees/30fe78f2-5414-47ec-9439-0f2663889e58> paras 120-121.

<sup>109</sup> Gyulai *Statelessness in Hungary*.

<sup>110</sup> Gyulai *Statelessness in Hungary*.

<sup>111</sup> Children born to refugees are issued with refugee documentation.

nationality" and therefore as "otherwise stateless".<sup>112</sup> Children born to refugees are also disadvantaged as a result of the nature of their documentation. Not only are the birth certificates issued hand written, but it has also been confirmed that these registrations are not entered into the South African Population Register.<sup>113</sup> Therefore, there is no official record of these children's births, and the only purpose this handwritten birth certificate serves is to have the child joined to the mother's refugee status in South Africa.

The work done by Lawyers for Human Rights and the UNHCR in identifying statelessness<sup>114</sup> has drawn attention to a variety of cases involving childhood statelessness that exist in South Africa. It bears mentioning that South Africa can be held accountable for the lack of oversight, even if it has not ratified the 1954 and the 1961 Conventions, because children are at risk of statelessness. Statelessness places children in positions of vulnerability, where their best interests are not met, and this goes against the spirit of the CRC, which South Africa has ratified.

## **6.2 UNHCR as the custodian of the Statelessness Conventions**

One of the main criticisms is that the UNHCR already has a primary task of assisting refugees. Some argue that, despite the legal recognition given to the stateless in the creation of the 1954 and 1961 Conventions, it is evident that stateless persons are not afforded the same opportunities and aid as refugees.<sup>115</sup> This is partly true. Although the UNHCR's second mandate is considered to be the prevention and reduction of statelessness, nowhere in the 1954 and 1961 Conventions is the UNHCR officially charged with this role. Whereas the UNHCR are directly appointed to provide assistance to refugees in terms of Article 35 of the 1951 *Convention Relating to the Status of Refugees* (1951 Convention),<sup>116</sup> the stateless are not afforded any such body in either of the Conventions concerning statelessness.

Article 11 of the 1961 Convention only states that:

[t]he Contracting States shall promote the establishment within the framework of the United Nations ... of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.

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<sup>112</sup> Section 2(2) of the *Citizenship Act* 88 of 1995. Discussed in greater detail later in the paper.

<sup>113</sup> Khan "Citizenship in South Africa" 129-148.

<sup>114</sup> See LHR and ISI 2016 [https://www.lhr.org.za/sites/lhr.org.za/files/childhood\\_statelessness\\_in\\_south\\_africa.pdf](https://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf).

<sup>115</sup> Foster and Lambert 2016 *IJRL* 562.

<sup>116</sup> *Convention Relating to the Status of Refugees* (1951) 189 UNTS 150.

It was the General Assembly (GA) that asked the UNHCR to "provisionally ... undertake the functions foreseen under the Convention on the Reduction of Statelessness in accordance with Article 11."<sup>117</sup>

Thus, the UNHCR's mandate over the stateless was initially an interim measure that was put forward by the GA several years after the ratification of the 1954 and 1961 Conventions because no other body had been formed to which the stateless could turn. The UNHCR's provisional mandate, therefore, turned into a *de facto* mandate.

The subject of statelessness is not high on the list of priorities for states, the United Nations (UN), or the international community in general.<sup>118</sup> The UNHCR has, however, had an increase in the number of ratifications<sup>119</sup> and has received many pledges.<sup>120</sup> Nevertheless, the South African government remains un-persuaded to sign the 1954 and 1961 Conventions.

Notwithstanding the South African Government's stance, the UNHCR's Global Campaign to End Statelessness must be commended. It is ambitious, as it has the aim of ending statelessness by 2024. Yet the campaign is also problematic because it focusses solely on non-refugee stateless persons, thus overlooking the risks refugee statelessness presents. Furthermore, as it does not recognise stateless refugees, any remedies with respect to prevention and reduction will go unexplored.<sup>121</sup> The implications for the many children born to refugees in South Africa is great, because South Africa simply asserts that they are refugee children. No studies have been undertaken of the various refugee nationalities present in South Africa and whether their respective states will accept these children, who were born in South Africa to refugee parents, as citizens.

### **6.3 Doctrinal or juridical developments in South Africa**

Determining whether a person is considered a national by a state under the operation of its laws requires a careful analysis of how a state applies its nationality laws in practice.<sup>122</sup> As stated above, "it is the position under domestic law that is relevant".<sup>123</sup> The specific question this section seeks to address is whether the jurisdictional or doctrinal approach has benefitted the stateless person and those at risk of statelessness in South Africa.

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<sup>117</sup> The 1961 Convention.

<sup>118</sup> Foster and Lambert 2016 *IJRL* 564

<sup>119</sup> Foster and Lambert 2016 *IJRL* 565.

<sup>120</sup> Gentleman 2014 <https://www.theguardian.com/world/2014/nov/04/un-refugee-agency-global-campaign-statelessness>.

<sup>121</sup> ENS 2014 [https://www.statelessness.eu/sites/www.statelessness.eu/files/ENS\\_Still\\_Stateless\\_Still\\_Suffering\\_online%20veversi\\_2.pdf](https://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_Still_Stateless_Still_Suffering_online%20veversi_2.pdf).

<sup>122</sup> UNHCR 2010 <http://www.refworld.org/docid/4ca1ae002.html>.

<sup>123</sup> UNHCR 2012 <http://www.refworld.org/docid/4f461d372.html>.

Moreover, can South Africa, with its current laws, prevent the statelessness of any child at risk of statelessness, or grant citizenship to a stateless child?

In 2011 South Africa pledged to ratify the 1954 and the 1961 Conventions, but on several occasions since it has refused the UNHCR's challenge to end statelessness by 2024<sup>124</sup> by responding that South Africa's laws are sufficient to protect children born on its territory from statelessness. The relevant laws include South Africa's Constitution,<sup>125</sup> the *Citizenship Act*,<sup>126</sup> the *Refugees Act*,<sup>127</sup> the BDRA<sup>128</sup>, and the *Children's Act*.<sup>129</sup> In addition, South Africa has ratified the CRC<sup>130</sup> and believes it will provide protection for children at risk of statelessness in South Africa.

In accordance with its Constitution, South Africa must consider international law, which demands respect for the human rights of all present in South Africa.<sup>131</sup> The wide range of laws applicable to the protection of the stateless child in South Africa means that South Africa ought to be well-equipped to respond to the third leg of Goodwin-Gill's challenge - to assist the stateless. Under section 28 the Constitution guarantees every child a right to a name and nationality,<sup>132</sup> and the *Citizenship Act* at section 2(2) promises citizenship to every child born in South Africa if he or she does not have the nationality of any other country.<sup>133</sup> While this may be the case, citizenship does not happen for such children by operation of law in South Africa; it requires an application, and the practice has revealed that the implementation of these generous laws has been met with great difficulty.<sup>134</sup> The following cases demonstrate that despite South Africa's generous laws, children are at risk of becoming stateless for various reasons including instances where parents' citizenship has been revoked, where one parent is a foreign national, where a child is a foundling, and where the child is born in South Africa to refugee parents.

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<sup>124</sup> LHR 2017 <http://www.ngopulse.org/press-release/press-statement-states-ask-south-africa-give-rights-stateless>.

<sup>125</sup> *Constitution of the Republic of South Africa*, 1996.

<sup>126</sup> *Citizenship Act* 88 of 1995.

<sup>127</sup> *Refugee Act* 130 of 1998.

<sup>128</sup> *Births and Deaths Registration Act* 51 of 1992

<sup>129</sup> *Children's Act* 38 of 2005.

<sup>130</sup> Article 7 of the CRC states that "no child should be left stateless".

<sup>131</sup> Sections 231 and 233 of the *Constitution of the Republic of South Africa*, 1996.

<sup>132</sup> Section 28 of the *Constitution of the Republic of South Africa*, 1996.

<sup>133</sup> Section 2(2) of the *Citizenship Act* 88 of 1995.

<sup>134</sup> Lawyers for Human Rights notes that Section 2(2) of the *Citizenship Act* makes it impossible for stateless children to apply for citizenship "because there is no regulation to provide a form to fill out" (LHR and ISI 2016 [https://www.lhr.org.za/sites/lhr.org.za/files/childhood\\_statelessness\\_in\\_south\\_africa.pdf](https://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf)).

In the case of *Minister of Home Affairs v DGLR*,<sup>135</sup> a child's right to South African nationality, because she would "otherwise be stateless", was put to the test. This child was born to Cuban parents who had permanent residence in South Africa. The mother - who was not allowed by the Cuban government to remain outside of Cuba for longer than 12 months - overstayed in South Africa and consequently her citizenship was withdrawn. Throughout this time, while residing in South Africa, the parents were Cuban nationals and identified as such. The Cuban government refused to extend citizenship to their child because of the parents' actions. The Cuban Embassy issued a *note verbale* declaring that the child was not a Cuban citizen in terms of its domestic nationality laws. The child was therefore considered stateless, provided no other country granted citizenship. In order to prevent statelessness for their child the family attempted to invoke section 2(2) of the *Citizenship Act*, but the South African government rejected the application and denied this child a nationality. The Department of Home Affairs (DHA) refused it on the basis that Cuba ought to have granted nationality to the child. The South African government also suggested that the child could be granted permanent residence, but permanent residence is not an answer to the question of stateless children. Because section 25 of the *Citizenship Act* allows for judicial oversight, and section 2(2) is directly linked to the constitutional right of a child to nationality, the Court's intervention was sought on the basis that the child has a right to nationality in terms of the Constitution. After a long battle the Court instructed the DHA to issue citizenship to the child.

Even though section 2(2) of the *Citizenship Act* appears to be the saving grace for children born in South Africa who would otherwise be stateless, the section can be properly implemented only if regulations are promulgated, which are thus far absent.<sup>136</sup> As a result, administrators fumble and they did not know how to properly implement this section of the *Citizenship Act*. Still, this section has been South Africa's only explanation for not ratifying the Statelessness Conventions. The process to ensure nationality for this child in South Africa was onerous, and citizenship was granted only with the Court's intervention.

A child known as MK<sup>137</sup> was found in South Africa without any identification documents and placed in the care of a social worker after he had been

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<sup>135</sup> *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014.

<sup>136</sup> Khan "Citizenship in South Africa" 129-148.

<sup>137</sup> Lawyers for Human Rights made an application for citizenship for M.K. in terms of s 2(2) of the *Citizenship Act*. The Department of Home Affairs granted M.K. permanent residence only in 2016, although the Children's Court had instructed the DHA to document him after finding him to be in need of care in 2006. M.K. accepted the

removed from an abusive guardian. The child was two years old and there was no trace of the parents and no documentation to prove where the child had been born. The only knowledge anyone had was that the child had been taken care of by a Portuguese-speaking woman prior to his removal. The social worker in whose care the child was placed tried to have him documented by the DHA but was unsuccessful. The child remained undocumented until the age of 16. This child was a foundling and was in "need of care".<sup>138</sup> He did not have the nationality of any state and was therefore stateless. That this child remained without any identity documentation even after being found to be in "need of care" by a South African Children's Court when he was 6 years old is evidence of how difficult it is for non-South Africans to access any kind of identity registration in South Africa.

According to the 1961 Convention the child in the above case is a foundling, but South African legislation makes no reference to foundlings. There is an acknowledgment, nonetheless, since South Africa has signed the Hague Convention which makes reference to foundlings. South African legislation under the *Children's Act* makes reference to abandoned children<sup>139</sup> and recognises them as being "in need of care". The state has a duty toward a child "in need of care" and section 12 of the BDRA allows for the registration of an abandoned child. In addition, the South African government could have offered relief in terms of section 2(2) of the *Citizenship Act* by providing citizenship. It is apparent that there are a number of options in law to protect such a child, but none were extended to the child until Court intervention was threatened.

At the age of 16 this child, with the assistance of Lawyers for Human Rights, served a letter of demand on the Minister of Home Affairs and made an application<sup>140</sup> to seek citizenship in terms of section 2(2) of the *Citizenship Act* or a certificate of naturalisation in terms of section 5(4) of the *Citizenship Act*. Should the application not be approved, the alternative remedy was to appeal to the Minister to exercise her discretion to grant him permanent residence. Though the child could not be determined to be stateless, it was argued that the refusal to grant documentation and citizenship would only prolong the undue hardship and trauma that he had faced. As provided by Article 15 of the *Universal Declaration of Human Rights* (UDHR),<sup>141</sup> Article 6 of the ACRWC, and section 28(1)(a) of the Constitution, all children have

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permanent residence and did not pursue the citizenship application at the time. Case file on record with Lawyers for Human Rights.

<sup>138</sup> Section 150 of the *Children's Act* 38 of 2005.

<sup>139</sup> Section 150 of the *Children's Act* 38 of 2005.

<sup>140</sup> LHR and ISI 2016 <http://www.institutesi.org/SouthAfricaUPR2016.pdf>.

<sup>141</sup> Resolution 217 of the *Universal Declaration of Human Rights* GA Res 217 A (III) (1948).

the right to a nationality. In addition, State Parties to the CRC are obliged, under Article 8, to respect and protect a child's nationality, inclusive of taking measures of expeditious restoration when he or she is deprived of one. In spite of international human rights law and its own domestic legislation, the Minister refused to grant the child citizenship and instead exercised her discretion in terms of section 31(2)(b) of the *Immigration Act* and granted him permanent residence. The child and the social workers were relieved to be afforded an option for legitimate stay, and ultimately decided to settle the matter by accepting the permanent residence permit. Upon turning 18 years of age, he will be able to apply for citizenship. This case shows South Africa's resistance to registering children who appear foreign, and to extending section 2(2) of the *Citizenship Act* to them.

Children are also at risk of statelessness in South Africa because the government does not ensure universal birth registration in South Africa. The absence of birth registration has been identified as a source of statelessness; for without registration a child does not typically have the opportunity to acquire citizenship.<sup>142</sup> According to Laura van Waas, lack of birth registration was not envisaged by the Statelessness Conventions.<sup>143</sup> Correspondingly, birth registration has been defined as:<sup>144</sup>

... the continuous, permanent and universal recording, within the civil registry, of the occurrence and characteristics of birth in accordance with the national legal requirements of a country.

As a result, birth certificates are a key form of proof to confirm or acquire citizenship.

The issue of birth registration and citizenship are inextricably linked in South Africa, but birth registration has proven to be complicated and not easily accessible to all children born in South Africa. Even though the *Citizenship Act* governs citizenship, the BDRA has a direct effect on access to citizenship, because only those children registered at birth and entered into South Africa's population register are able to acquire citizenship. It is noteworthy that South Africa's nationality laws do not prevent mothers from passing their nationality on an equal basis to their children, and the main provision through which citizenship is acquired in South Africa is through the *jus sanguinis* principle.<sup>145</sup> Section 2(1)(b) of the *Citizenship Act* states that any person born in or outside South Africa, one of the parents being a South African on the day of the birth, shall be a citizen by birth. This is by

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<sup>142</sup> Van Waas 2007 NQHR 437-458.

<sup>143</sup> Van Waas 2007 NQHR 437-458.

<sup>144</sup> Van Waas 2007 NQHR 437-458.

<sup>145</sup> Khan "Citizenship in South Africa".

operation of law; it is automatic and non-discretionary, and birth registration is not required for this right to take effect.<sup>146</sup>

Despite section 2(1) of the *Citizenship Act*, unmarried South African fathers are struggling to pass their nationality on to their children without discrimination if their mothers are foreign nationals. This gender discrimination has the potential to lead to statelessness for children born out of wedlock to South African fathers. There are two cases in South Africa where this issue has been addressed. In the *Nkosi*<sup>147</sup> and *Naki*<sup>148</sup> cases the children were born in South Africa to one South African parent and one foreign parent. In the *Naki* case the child has a South African father and a Congolese mother. The mother was documented and legally present in South Africa, whereas in the *Nkosi* case the mother was an undocumented foreigner. In both cases the children were born out of wedlock.

The BDRA provides the legal framework for the registration of all births of children in South Africa, whether to South African parents or foreign parents. South Africa does not have a universal births registration, and the restraints placed by the BDRA make it difficult for all children to be properly registered in South Africa. Section 9 of the BDRA states:<sup>149</sup>

- (1) In the case of *any child born alive*, anyone of his parents or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.
- (3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.

However, regulation 12(1) of the regulations to the BDRA provides for "a notice of birth of a child born out of wedlock shall be made by the mother of the child of form DHA-24 illustrated in annexure 1A of form DHA-24/LRB illustrated in Annexure 2, whichever [is] applicable."<sup>150</sup>

The above regulation clearly clashes with section 9 of the BDRA, which provides for the birth registration of a child "born alive" by any of the parents and not subject to the parents' marital status. No differentiation is made of those children born out of wedlock. It thus follows that section 9 does not forbid unmarried fathers from registering their children's birth. The

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<sup>146</sup> Khan "Citizenship in South Africa".

<sup>147</sup> *Nkosi v Minister of Home Affairs* 2017 ZAGPPHC 1078 (18 December 2017).

<sup>148</sup> *Naki v Director-General: Department of Home Affairs* 2018 3 All SA 802 (EHC).

<sup>149</sup> Section 9 of the BDRA. Emphasis added.

<sup>150</sup> Section 12 of the BDRA.

regulation was accordingly challenged in the above cases because it discriminates against the unmarried father and is also not in the best interest of the child.

According to the BDRA, nationality cannot be accessed without birth registration. Both parties went to Court to have the regulations declared unconstitutional. In such cases, where the party involved is an unwed South African father and the mother is foreign, many issues can arise. First, fathers may be unwilling to cooperate, which prevents the child from accessing nationality, particularly because the costs of proving paternity may be prohibitive. Secondly, if only the mother can register the child who is born out of wedlock, the child may never be registered if the mother is undocumented. Thirdly, given that the mother is a foreigner, the child will not be included in the population register because the BDRA issues only notices of birth and not birth certificates in such cases.<sup>151</sup> In both the *Nkosi* and *Naki* cases, citizenship was at risk because the parents were unable to register their children. Even after the court ruled that the children should be properly registered so that they could access their South African citizenship, it "took relentless advocacy for the Court order to be implemented."<sup>152</sup>

The BDRA also expects parents to have valid documentation before they are able to register their child. The above section 9 of the BDRA, read with regulation 3(3) of the BDRA, requires the parents to have legally valid documentation which confirms their legal status. This means that undocumented parents, and parents with expired refugee permits, cannot register their children. This section is not in the child's best interest. Registration at birth not only makes the protection against statelessness provisional, but also poses a legal conundrum because registration can take place only if the parents are legally documented. Though yet to be tested in court, this provision is contrary to South Africa's Constitution and in contradiction of Article 7 of the CRC.

Another example where children would be at risk of statelessness became apparent in cases where children born to refugees in South Africa reached the age of eighteen. In the case of *Mariam Ali v Minister of Home Affairs*,<sup>153</sup> the children were born to refugee parents and all of them had reached the age of 18. According to section 4(3)<sup>154</sup> of the *Citizenship Act*, any child born in South Africa to foreign parents that have lived in South Africa continuously may apply for citizenship at the age of 18. However, the BDRA

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<sup>151</sup> Section 8 of the BDRA.

<sup>152</sup> LHR 2019 <https://www.lhr.org.za/news/2019/press-release-high-court-dismisses-attempt-revoke-stateless-childs-citizenship>.

<sup>153</sup> *Ali v Minister of Home Affairs* 2017 JOL 38775 (WCC)

<sup>154</sup> Section 4(3)(b) of the BDRA.. His or her birth has been registered in accordance with the provisions of the Act

places an obstacle to this route to citizenship, as it requires such children to be registered in the population register. Further, children born to refugees are not registered in the population register at birth (recall that the birth certificates they receive are handwritten). The citizenship for children in these circumstances thus does not occur as a result of the operation of law. Citizenship necessitates an application submission by which they affirm or claim South African nationality. In the *Miriam Ali* case the DHA refused their application for citizenship and instead offered permanent residency. The Court intervened to instruct the DHA to grant citizenship. The Supreme Court of Appeal has since upheld the decision of the Western Cape High Court and has instructed the DHA to receive applications for citizenship from children born to refugees in South Africa once they reach the age of 18.<sup>155</sup> Thwarting citizenship under its own domestic legislation, the South African government has come under heavy scrutiny.

The juridical approach appears to yield results in South Africa in spite of legislation like the BDRA, which blocks access to the right to nationality. In the abovementioned cases, the relevant government authority placed obstacles in the way of the acquisition of citizenship, leaving the Courts as the only solution. As is evident from the cases discussed, state officials failed to assist applicants in a uniform way, and in some instances no regulations were promulgated. What is incontestable is that there has clearly been a bias to exclude those who appear foreign, and that South Africa is reluctant to bestow citizenship even on the youngest among them. A matter for debate is the reason for such action (or lack thereof). It is not clear whether this is due to a lack of policy, xenophobia, or institutional racism. For those "granted" access, however, it has been the result of their relentless pursuit of that goal,<sup>156</sup> which is unequivocally against the ethos of the Constitution, as it advocates nationality for all children.

#### **6.4 Lack of state functioning**

In addition to the lack of laws, knowledge, and oversight mechanisms, there are various other impediments that may contribute to statelessness. It could well be that the limits of the capacity of public officials and public institutions may also contribute to statelessness. After apartheid South Africa had a mammoth task to complete the registration of all its citizens who had not been registered by the apartheid government.<sup>157</sup> Many problems still arise today because public officials are struggling to understand the many variances of unregistered births. As already said, regulations have not been

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<sup>155</sup> *Minister of Home Affairs v Ali* 2019 2 SA 396 (SCA).

<sup>156</sup> LHR 2019 <https://www.lhr.org.za/news/2019/press-release-high-court-dismisses-attempt-revoke-stateless-childs-citizenship>.

<sup>157</sup> Klaaren 2010 *ICON* 94-110.

promulgated for complex sections of the *Citizenship Act* as it pertains to the nationality of children. The lack of regulations leads to an *ad hoc* application of the law whereby authorities are often unresponsive and do not apply the law in a consistent manner. This ultimately increases the risk of statelessness.

The South African government is not obliged to determine whether any child is stateless or could possibly be at risk of statelessness. Because of a lack of statelessness determination procedures, South Africa will continue to struggle to extend the protection of section 2(2) of the *Citizenship Act* to children who would otherwise be stateless. Hence section 2(2) is insufficient to protect stateless children in South Africa. Since international law guarantees protection only to those who are actually stateless, section 2(2) can assist those at risk. Domestic legislation will prove to be inadequate alone. For efforts to protect stateless children to be successful, South Africa must promulgate regulations and bolster its civic services. However, for the effective functioning of section 2(2), the government must also promote an understanding of statelessness, because section 2(2) of the *Citizenship Act* requires a statelessness determination to be made. Though there are proven difficulties, case law has demonstrated that there is also hope. The courts have provided the mechanism for accountability, ensuring that the government respects, protects, and ensures a child's right to nationality.

## 7 Conclusion

Statelessness is a human-made problem. It rests with states to solve the problem by granting nationality to stateless persons. However, states must be willing and able to do so. It is apparent from the above discussion that most of the causes of statelessness arise from state action, either that which is objective insofar as there is a conflict of the nationality principles of *jus soli* and *jus sanguinis*, or that which is motivated by extraneous factors to exclude particular sections of the population from its nationality. A human rights approach holds states accountable, irrespective of whether or not they have ratified the Statelessness Conventions. Furthermore, a lack of birth registration, even though not envisaged by the drafters of the Statelessness Conventions, has also been identified as a key reason for the statelessness of children. Globally there has been a concerted effort to register all children. With continued and progressive action, the issue of statelessness will become obsolete.

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## List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	The African Committee of Experts on the Rights and Welfare of the Child

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ACHPR	African Court on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AJLS	African Journal of Legal Studies
BDRA	Births and Deaths Registration Act
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DHA	Department of Home Affairs
ENS	European Network on Statelessness
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICON	International Journal of Constitutional Law
IJRL	International Journal of Refugee Law
Int'l J Children's Rts	International Journal of Children's Rights
ISI	Institute on Stateless and Inclusion
LHR	Lawyers for Human Rights
NGO	Non-Governmental Organisation
NQHR	Netherlands Quarterly of Human Rights
OSJI	Open Society Justice Initiative
SERAC	Social and Economic Rights Action Centre
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series