A critical analysis of South Africa's obligation to grant nationality to stateless children under treaty law

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SUMMARY

A stateless person is someone who is not recognised by the operation of state laws as a national of any state in the world. Literature has shown that a lack of nationality presents significant barriers to accessing basic rights, thus making nationality a prerequisite for the enjoyment of basic rights. Therefore, there is uncertainty as to whether in the absence of nationality, stateless children can effectively access basic rights. To this end, it has been argued that since the appearance of nationality is a prerequisite for the enjoyment of rights, granting nationality to all stateless children would be an effective solution. However, before advancing this argument, it must be determined whether there is an obligation on South Africa to grant nationality to stateless children. By critically analysing the treaty framework at the United Nations level and the African Union level, this article argues that treaty law does not provide a right to nationality, it merely makes provision for the acquisition of nationality. Moreover, this article critically analyses the framing of nationality under treaty law to determine the extent, if any, of South Africa's obligation to grant nationality to stateless children. A critical analysis shows that none of the treaties impose an explicit and binding obligation on South Africa to grant nationality to all stateless children.

1 Introduction

Statelessness is not a new phenomenon; rather, it is a problem of time in memorial.[1] However, it has become an emerging issue due to the attention it has drawn from the United Nations (UN). A stateless person is a person who is not recognised as a national of any state by the operation of its laws.[2] The exact number of stateless people is difficult to quantify due to a lack of reliable data and because some states do not have identifying measures such as Statelessness Determination Procedures.[3] It is estimated that there are roughly 4.4 million stateless

1 The oldest group of stateless people can be traced back to 1919 when Austria-Hungary dissolved and new states were created. See Arendt *The Origins of Totalitarianism* (1958) 267. Lang *Statelessness in Public Law* (2023).
2 Section 1 of the Convention on the Stateless Persons.
3 The World's Stateless People (2014) Institute on Statelessness and Inclusion https://files.institutesi.org/worldsstateless.pdf (accessed 19 July 2023).

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people in the world.[4] Moreover, it is estimated that there are 10 million stateless people who are not accounted for globally.[5] South Africa is one of the numerous states that does not have data on the number of stateless people within its territory. Nonetheless, it is reported that South Africa has more than 15 million undocumented people (this figure includes South Africans and non-South Africans), 3 million of these being children, and a considerable number are considered to be stateless.[6] Admittedly, not all undocumented people are stateless, however, not having documentation to prove nationality or identity does put one at risk of becoming stateless. Statelessness is a humanitarian crisis that requires more than just a humanitarian response but aggressive state action too.[7] A viable solution often presented in discussions to ending statelessness is granting nationality. Arguably, since statelessness translates to the absence of nationality, a solution to ending statelessness is to grant nationality to all stateless people. However, a question that remains unanswered is whether there is an obligation on states, particularly South Africa, to grant stateless children nationality.

South Africa is a party to various conventions that relate to the issue of nationality. In this article, a critical analysis of a range of international conventions is undertaken to determine how the notion of nationality has been framed under international law and whether such framing places an obligation on South Africa to grant nationality to stateless children. This will be done by analysing the treaty framework at the United Nations level and the African Union level. However, before this engagement, the notion of nationality and how the principle of state sovereignty places some limitations on the right to nationality will be unpacked.

2 The emergence of statelessness

Statelessness is an issue that dates back to 1919. The emergence of statelessness as a new problem may be attributed to the attention it has

4 Statista Number of stateless people worldwide from 2000 to 2022 https://www.statista.com/statistics/268720/number-of-stateless-people-worldwide/ (accessed 9 August 2024).

5 UNHCR Statistical Reporting on Statelessness: Statistics Technical series 2019:1 https://www.unhcr.org/5d9e182e7.pdf (accessed15 July 2024).

6 "15 million' people in SA are unregistered, and many are stateless children" *The Citizen* (14-11-2023) https://www.citizen.co.za/news/south-africa/15-million-people-in-sa-are-unregistered-and-many-are-stateless-children/ (last accessed 13-09-2024); "15m undocumented people in SA, says Lawyers for Human Rights" (*Newsroom Africa* on 23-06-2024) https://www.youtube.com/watch?v = RHs4JNmTrc4 (last accessed 20-06-2024).

7 Forsterd & Lambert "Statelessness as a Human Rights Issue: A Concept Whose Time Has Come" 2016 *International Journal of Refugee Law* 564–584; Kingston "Conceptualizing Statelessness as a Human Rights Challenge: Framing, Visual Representation, and (Partial) Issue Emergence" 2019 *Journal of Human Rights Practice* 52–72; Kingston "A Forgotten Human Rights Crisis: Statelessness and Issue (Non)Emergence" 2013 *Hum Rights Rev* 73–87.

garnered in recent times from the international community. Although not a new phenomenon, following World War II, statelessness rose to unprecedented proportions, it was exacerbated by the displacement of millions of people.[8] In addition, only a few conventions either prevented or protected the rights of stateless persons.[9] Following the completion of the study, the United Nations Ad Hoc Committee on Refugees and Stateless Persons recommended that stateless persons should be traced and afforded better protection which resulted in certain conventions being adopted.[10] For the first time, an official definition of statelessness was established.[11]

3 State sovereignty as a limitation to nationality

The principle of state sovereignty advances the view that states have the prerogative to determine how they exercise and apply their laws. This means that as much as international law may set standards and principles, however, ultimately states are the ones who decide how those principles are applied. Articles 1 and 2 of the Hague Convention Relating to Certain Questions on Conflict in Nationality Laws of 1930 states:

> "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State."

This principle was reaffirmed by the International Court of Justice (ICJ) in *Liechtenstein v Guatemala*, where it was stipulated that "[i]t is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality".[12] Since it is left to the states to determine who its nationals are, states have generally limited nationality to those with a "genuine connection" to the state. The laws of most, if not all states contain criteria for establishing such connection, amongst which are place of birth, family ties, parentage, or place of residence.[13]

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8 UN Ad Hoc Committee on Refugees and Stateless Persons, A Study of Statelessness, United Nations, August 1949, Lake Success – New York 1 August 1949.

9 As above.

10 The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

11 There was no established definition of statelessness before the coming into effect of the United Nations Convention on the Status of Stateless Persons 1945.

12 *Liechtenstein v Guatemala* 1955 (ICJ) 20.

13 J Park Minority Rights Constraints on a State's Power to Regulate Citizenship under International Law (PhD thesis, University of London,2006) 73.

From the finding in the above case, one gathers that states have the discretion and power to determine who is considered a national or not. Thus, in principle, the notion of nationality under international law falls within the purview of domestic jurisdictions. Because states are sovereign entities, they enjoy broad discretion to enact laws that determine who should be a national of their country. This is a limitation on the right to acquire nationality.

5 The framing of the right to nationality under treaty law

5 1 International treaties and conventions dealing with nationality at the United Nations level

The United Nations is an international organisation founded in 1945 through the United Nations Charter,[14] comprising 193 member states.[15] Amongst others, it seeks to develop friendly relations between nations based on respect, and the principle of equal rights and self-determination of peoples as well as taking other appropriate measures to strengthen universal peace.[16] It also seeks to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction in terms of race, sex, language, or religion.[17] Over the years, various human rights instruments have been adopted by the United Nations to guarantee the right to nationality, including the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1976, the Convention on the Rights of the Child 1989, and the African Charter on the Rights and Welfare of the Child 1990.[18]

The regulation of treaties under international law is governed by the Vienna Convention on the Law of Treaties 1969 (Vienna Convention). South Africa acceded to the Vienna Convention in August 1989.[19] The Vienna Convention establishes rules, procedures, and guidelines for how

14 Article 1.
15 United Nations https://www.un.org/en/about-us (last accessed 13 August 2024).
16 Article 1(2) of the United Nations Charter 1945.
17 Article 1(3) of the United Nations Charter 1945.
18 International Covenant on Civil and Political Rights 1976, Convention on the Rights of the Child 1989, African Charter on the Rights and Welfare of the Child 1990. Pertinent to note that South Africa has not ratified the Convention on the Status of Stateless Persons 1945 and the Convention on the Status of Stateless Persons 1954.
19 United Nations Treaty Collection https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en (last accessed 11-08-2024).

treaties are defined, drafted, amended, interpreted, and generally operated.[20] Article 31 of the Vienna Convention states:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In discussing and unpacking the various United Nations and African Union instruments, Article 31 of the Vienna Convention on the Law of Treaties will be a lens through which the discussion is conducted. In terms of this Convention, a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in its context and the light of its object and purpose.[21] Amongst others, there is an obligation to enforce the treaties that states ratify in good faith.[22] It follows that where treaties make provisions for nationality, there is an obligation on South Africa to enforce such provisions in good faith. The starting point, however, is to establish whether there is a right to nationality in terms of these treaties and instruments.

5 1 1 The Convention on the Rights of the Child 1989

The Convention on the Rights of the Child 1989 (CRC) is arguably more progressive as far as the rights of children are concerned. It has been ratified by 196 states (including South Africa, which ratified the CRC in 1995), except for the United States.[23] It is one of the most widely ratified human rights conventions in history. It is the first convention that is legally binding and provides for norms and standards regarding the protection and promotion of children's rights. The fact that the CRC has received such widespread ratification speaks to the commitment of states to protect and promote children's rights. The drafting of Article 7 was contentious with some states making numerous reservations regarding the specific wording of Article 7.[24] The drafters of the CRC

20 Vienna Convention on the Law of Treaties 1969.
21 Vienna Convention on the Law of Treaties 1969, Article 31.
22 Article 26 Vienna Convention on the Law of Treaties 1969.
23 Boumans "Filling the gaps: New proposals for the convention on the rights of child" 2015 *Syracuse Journal of International Law and Commerce* 191-222.
24 Germany noted that "Article III of the draft gives rise to serious reservations. Unlike the texts of other provisions concerning nationality (Article 15 of the Universal Declaration of Human Rights of 10 December 1948 and Article 24, paragraph 3 of the International Covenant on Civil and Political Rights of 19 December 1966), Article III of the draft implies that the Convention wishes to establish the child's nationality". Question of a Convention on the Rights of the Child: Report of the Secretary-General (E/CN.4/1324) 30 https://digitallibrary.un.org/record/6629?ln = en#record-files-collapse-header (accessed 20-06-2024).

deviated from the phrasing of "the right to a nationality" and opted for the phrasing of "the right to acquire a nationality" because using the former risked undermining state sovereignty.[25] The United States of America noted, for example, that using "the right to acquire nationality" instead of the "right to a nationality" would avoid any suggestion that the convention would automatically entitle stateless children entering the territory of a member state to the nationality of that state.[26] Malawi raised the concern that nationality is a matter of municipal law and that it is for each state to determine its nationals.[27] Germany noted that nowhere does the acquisition of nationality by birth depend solely on the natural fact of birth; all nationality laws require additional elements that must be related to the birth and which are the essential factors to conferring nationality.[28] Ultimately, the drafters of the CRC reached a compromise as reflected in Article 7, which just like Article 24(3) of the ICCPR, does not provide the child with a right to nationality. Article 7 of the CRC states:

> "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality. State parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

This provision is progressive because it not only recognises the right for a child to acquire nationality at birth, but it also requires states to ensure that this right is realised through the implementation of national law. More importantly, states are expected to ensure that the right to acquire nationality is especially realised where a child would otherwise be stateless. The obvious shortcoming of Article 7 of the CRC is that it does not place an obligation to grant nationality to a stateless child in any particular state. However, Article 7, though lacking in clarity, is an impressive development when compared to the provisions of other instruments, such as the UDHR and the ICCPR, which make no mention of statelessness.

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25 In noting its reservation against "the right to nationality", Germany stated that "nowhere does the acquisition of nationality by birth depend solely on the natural fact of birth; quite the contrary, apart from birth, all nationality laws require additional elements which must be related to the birth and which are the really essential factors conferring nationality. These correlative factors are sanctified as principles by international law". Question of a Convention on the Rights of the Child: Report of the Secretary-General (E/CN.4/1324) 30, https://digitallibrary.un.org/record/6629?ln=en#record-files-collapse-header (accessed 20-06-2024); Detrick "The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires" 1992 *American Journal of International Law* 640.

26 Report of the Working Group to the Commission on Human Rights (1980) (E/CN.4/L.1542) para 37 https://digitallibrary.un.org/record/12887?ln=en (accessed 20-06-024).

27 Question of a Convention on the Rights of the Child: Report of the Secretary-General (E/CN.4/1324) addendum 4.

28 As above.

The position remains that it is for states, based on the operations of their national laws, to determine which children will acquire a nationality. Moreover, the right to acquire nationality is not a right to a specific nationality.[29] Thus, the overall limitation of Article 7 is that it still leaves states with the power to determine who their nationals are in accordance with the notion of state sovereignty. Effectively, states still enjoy the prerogative to decide the requirements that must be met for a stateless child to be granted nationality. It is, thus, easy to see again how despite making mention of the term "nationality", Article 7 of the CRC still places no binding obligation on states, including South Africa, to grant all stateless children nationality.

Although Article 7 of the CRC does not explicitly impose an obligation on State Parties, Article 4 of the Convention mandates States to take all appropriate legislative, administrative, and other measures to implement the rights recognised therein. This provision can be interpreted as placing a duty on South Africa to ensure the realisation of the right to acquire nationality. When a State ratifies an international convention, it assumes a binding obligation under international law to implement its provisions in good faith.[30] It has been widely recognised that States must align their domestic legal frameworks with international treaties to which they are parties. Ensuring that national legislation is fully compatible with the Convention and that its principles and provisions are directly applicable and enforceable is a fundamental requirement of compliance. Consequently, it can be argued that South Africa has a duty to apply the provisions of the Convention in good faith by ensuring that its domestic nationality laws conform to the standards set by the CRC.

5 1 2 The Universal Declaration of Human Rights 1948

This section discusses treaties. Although the Universal Declaration of Human Rights (UDHR) is not a treaty, a discussion of treaties under the UN system would be incomplete without discussing the UDHR which was adopted in 1948. It is the most widely adopted and most influential declaration and the most cited human rights document.[31] The significance of the UDHR is that it was the first document to clearly set out the fundamental rights that are to be protected universally. It set the precedence for binding treaties including the International Covenant on Civil and Political Rights 1976 and the International Covenant on Economic, Social and Cultural Rights 1976. Moreover, the UDHR has

29 Stein "The Prevention of Child Statelessness at Birth under the Convention on the Rights of the Child: The Committee's Role and Potential" (2014) *The International Journal of Children's Rights* 12.

30 The *Pacta sunt servanda* rule, a principle entrenched in international law in article 26 of the Vienna Convention of the Law of Treaties 1969, equates treaties to contracts and demands that they be interpreted in good faith.

31 Brown The Universal Declaration of Human Rights in the 21st Century. A living document in a changing world. A report by Global Citizens Commission 13. https://www.openbookpublishers.com/books/10.11647/obp.0091 (last accessed 13-08-2024).

been influential in fostering the idea that all human beings have rights by virtue of being human beings. The UDHR is a living document and as such, is still relevant to society today. However, with the changing needs and values of society, it becomes important to revisit this declaration especially as it relates to the rights of stateless persons. The most relevant right in the UDHR is the right to nationality provided in Article 15.

Article 15 of the UDHR states that everyone has the right to nationality. It is, however, broadly formulated and does not provide detail on how this right is to be interpreted and applied nor is there any indication of which states bear the onus of ensuring the realisation of the right to a nationality. The wording used in the article raises various issues and questions on its interpretation. In the first instance, Article 15 (1) makes no mention of which state bears the obligation to make this right a reality. Secondly, this provision does not make it clear which nationality a person is entitled to. The framing of nationality under the UDHR is in such a way that the onus is on states to determine their nationals. Furthermore, in contrast to a convention or a treaty, the UDHR is not a legally binding document and there is no obligation on states to give effect to it.[32] During the drafting of the UDHR, Eleanor Roosevelt, the Chairman of the United Nations Commission on Human Rights, stated:

> "The UDHR is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations."[33]

The status of the UDHR as a declaration means that it falls within the ambit of 'soft law' under international law.[34] Soft law refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour.[35] Soft law "expresses a preference and not an obligation that a state should act, or should refrain from acting, in a specified manner."[36] The effectiveness and applicability of the rights contained in the UDHR have come under scrutiny in the past decades with the courts

32 Vlieks *et al* "Solving statelessness: Interpreting the right to nationality" 2017 *Netherlands Quarterly of Human Rights* 158-175; Huurman "The status of the Universal Declaration of Human Rights in national and international law" 1996 *Georgia Journal of International and Comparative Law.*

33 Quoted in Whiteman *Digest of International law* 243 (Washington, D.C.: Dept. of State Publication 7873 (1965).

34 United Nations The International Bill of Human Rights 1 New York: UN Dept. of Public Information, 1988.

35 Shelton "Soft Law. Handbook of international law" 2008 *Routledge Press GWU Legal Studies Research* Paper 3.

36 Gold "Interpretation: The IMF and International Law" 1996 *American Journal of International Law* 405–407. Gold "We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law" 2012 *Leiden Journal of International Law* 335–368.

and human rights bodies holding different views.[37] Some scholars and legal bodies have argued that the UDHR, although not binding, imposes a legal obligation on states to comply with its provisions.[38] This, however, remains a contentious issue, making it implausible to argue that the UDHR, based on its guarantee of the right to a nationality, imposes an obligation on states to grant stateless children nationality.[39]

It is worth noting, however, that there have been instances where the courts have relied on the rights in the UDHR to find that there was a violation of human rights. For example, as in the case of *Anudo v The Government of Tanzania*.[40] In this case, the authorities in Tanzania alleged that Anudo had obtained his Tanzanian identifying documents (birth certificate and passport) fraudulently. As such, they confiscated his documents, declared him an illegal immigrant, and deported him to Kenya. Anudo brought an application to the court arguing that the confiscation of his passport, the "illegal immigrant" status issued against him, and his expulsion from the United Republic of Tanzania deprived him of his right to Tanzanian nationality as guaranteed and protected in Article 15 (2) of the Universal Declaration of Human Rights.[41] Similarly, the Inter-American Court of Human Rights has repeatedly reaffirmed the customary nature of the right to nationality. In its Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, it held that "[t]he right of every human being to a nationality has been recognised as such by international law".[42] However, the shortcomings of section 15 of the UDHR have been noted. For example, the European Court of Human Rights stated:

37 Huurman *J. Int'l & Comp. L* 517. Some view the UDHR as having given content to the Charter pledges, partaking therefore of the binding character of the Charter as an international treaty. Others see both the Charter and the Declaration as contributing to the development of a customary law of human rights binding on all states. See Henkin *The Age of Rights* (1990) 19; Tai-Heng "The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States" 2008 *Cornell International Law Journal* 251-297.

38 Human Rights Watch "South Africa's obligation under international and domestic law" https://www.hrw.org/legacy/reports98/sareport/App1a.htm (last accessed 17-06-2024).

39 Ganczer "The Universal Declaration of Human Rights: A Commentary" 2015 *Scandinavian University Press* 233; Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), reprinted in 9 *J. Intl Comm. Jurists Rev.* 94 (1968); Declaration of Tehran, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (1968); Humphrey "The International Bill of Rights: Scope and Implementation" (1976) 17; WM. & Mary L. Rev. 527-529. Statement by Finland in the Third Committee of the U.N. General Assembly, Nov. 13, 1980, summarised in U.N. GAOR, 3d Comm., 35th Sess., 57th mtg., at 4, U.N. Doc. AIC.3/35/SR.57 (1980).

40 *Anudo v United Republic of Tanzania* 012/2015.

41 Para 76.

42 *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica,* OC-4/84, Inter-American Court of Human Rights 1984, para 34.

> "Even though the content of the Article has changed over time and the development of international law has influenced the discretion of states with regard to nationality issues, its content is still limited".[43]

In the ongoing debate regarding the status and development of the UDHR, it is debatable whether section 15 of the UDHR imposes an obligation on states to grant nationality to stateless children.[44] This article acknowledges that the UDHR provides for the right to nationality.[45] However, the issue is not whether the UDHR provides for the right nationality but about the extent of the obligation imposed on states to grant nationality to stateless children in terms of the UDHR.

From the analysis provided in this section, it can be concluded that the right to nationality as provided for under Article 15 of the UDHR does not, in itself, impose obligations on states to grant nationality to stateless children.[46] As much as everyone has the right to nationality in terms of the UDHR, this right is not binding on any state; it is not qualified, and more importantly, it is a right contained in a declaration, by which no state is bound by.[47] There is no doubt that the UDHR has attained significant international legal status, however, its nature and character remain that of an international agreement.

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43 *Petropavlovskis v Latvia* (44230/06) 2015 European Court of Human Rights, para 16.2

44 Ganczer 2015 *Scandinavian University Press* 233. Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), reprinted in 9 *J. Intl Comm. Jurists Rev.* 94 (1968). Declaration of Tehran, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (1968). Humphrey "The International Bill of Rights: Scope and Implementation" (1976) *WM. & MARY L. REV.* 17. Statement by Finland in the Third Committee of the U.N. General Assembly, Nov. 13, 1980, summarised in U.N. GAOR, 3d Comm., 35th Sess., 57th mtg., at 4, U.N. Doc. AIC.3/35/SR.57 (1980).

45 *Petropavlovskis v Latvia* (44230/06) 2015 European Court of Human Rights para 16.2

46 Human Rights Committee, 'General Comment 17' para 8; *Denny Zhao v The Netherlands* 2918/2016 (2020) para 8.2.

47 According to Huurman *GA. J. Int'l & Comp.* 289, courts may explicitly or implicitly reject the relevance of the Declaration to domestic law; such opinions frequently cite the non-self-executing nature of the Declaration. The status of the Declaration when it was adopted in 1948 is described by the United Nations as that of "a manifesto with primarily moral authority," see, United Nations, The International Bill of Human Rights New York: U.N. Dept. of Public Information 1988. Schwelb "The influence of the Universal Declaration of Human Rights on international and national law" In Proceedings of the American Society of International Law at its annual meeting (1921-1969)" 1959 *Cambridge University Press* 217-229.

5 1 3 The International Covenant on Civil and Political Rights 1976

South Africa ratified the International Covenants on Civil and Political Rights 1976 (ICCPR) in December 1998.[48] The ICCPR was adopted to ensure the promotion and protection of civil and political rights.[49] Some of the rights provided for by the ICCPR include the right against discrimination, the right to equality between women and men, the right to human dignity, the right to freedom from torture, and the right to life. More importantly, and for this discussion, Article 24(1) of ICCPR states that every child shall have, without any discrimination as to race, birth status, national or social origin, the right to protection based on his status as a minor. Moreover, Article 24(3) of the ICCPR guarantees the right to nationality in more specific terms by referring to children. It provides that every child has the right to acquire a nationality. However, the shortcoming of this provision follows the same pattern as the UDHR in that it makes no mention of which state bears the onus of realising this right and fails to clearly articulate which nationality the child has a claim to. One is left to wonder whether there are clear obligations set in this regard that ensure universal possession of a nationality. In addition, Article 24(3) of the ICCPR narrows the right to nationality to children specifically, unlike the UDHR, which refers to 'everyone'.

As much as the ICCPR narrows the right to nationality to children, it does not address the gap regarding clear obligations on which state bears the onus on granting nationality to children. According to the Human Rights Committee (HRC),[50] there is no obligation for any state to grant nationality to all children born within its territories.[51] In its comment on Article 24, the HRC has noted that states often underestimate their obligation to ensure that children are afforded special protection.[52] However, the HRC does concede that the measures to be adopted by states for the realisation of Article 24 of the ICCPR are not specified.[53] Therefore, it is left to states to adopt their own measures.

Perhaps the most helpful guidance provided by General Comment 17 of the ICCPR is that states are to ensure that there is no discrimination concerning the acquisition of nationality under international law between legitimate children and children born out of wedlock, or of stateless parents, or based on the nationality status of one or both of the parents.[54] Furthermore, the right of every child to a name and nationality

48 South African Human Rights Commission Civil and Political Rights Report 2016/17 https://www.sahrc.org.za/home/21/files/Civil%20and%20Political%20Rights%20Report%20Final%20Version.pdf (last accessed 18-08-2024).
49 Preamble to the ICCPR.
50 ICCPR General Comment 17: Article 24 (Rights of the Child) para 8.
51 As above.
52 Para 1.
53 Para 2.
54 Para 8.

at birth is also left to states to establish based on their own special measures of protection.[55] In terms of the ICCPR, states are required to adopt appropriate measures to ensure that every child acquires nationality when they are born; however, there is no obligation on states to grant nationality to every child born within its territory.[56] This is problematic considering that the current discourse argues that granting nationality to children is the best way to protect and promote their rights. In terms of the ICCPR, member states have no obligation to grant every child born within their territory nationality. States are, however, obliged to take special measures to ensure that children are granted nationality. Consequently, the obligation is not that of granting nationality to every child born within a state's territory but, rather, to ensure that there are special measures in place that make provision for children to acquire nationality.

Moreover, unlike the UDHR which frames the right as "the right to a nationality", the ICCPR makes use of the wording "the right to acquire nationality". An engagement with the drafting history of the ICCPR suggests that the drafters steered clear from using the "right to a nationality" because this risked undermining state sovereignty in deciding who its nationals are.[57] Thus, the phrase "right to acquire nationality" was favoured.[58] Phrased this way, Article 24(3) does not prescribe to states the manner in which nationality is obtained. Therefore, Article 24(3) of the ICCPR does not provide the child with a right to nationality. Thus, despite guaranteeing the right to acquire a nationality, the wording of Article 24(3) of the ICCPR empowers the states to determine how individuals should acquire the nationality of a given country. Effectively, the framing of nationality under the ICCPR is state-centric. This means that the acquisition of nationality is based on the operation of national law. When exercising its discretion, there is no guarantee that a given state will in terms of its national laws cater to all or any stateless children.

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55 Para 7.

56 ICCPR General Comment 17, para 8. See, also Committee under Article 5(4) of the Optional Protocol, concerning communication No.2918/2016. The Human Rights Committee noted that while the purpose of Article 24(3) of the Covenant was to prevent a child from being afforded less protection by society and the State because he or she was stateless, this did not necessarily make it an obligation for States to give their nationality to every child born in their territory; see, Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2918/2016 para 8.2.

57 Report of the drafting committee to the Commission of Human Rights (1947) E/CNA/21 https://documents-dds-ny.un.org/doc/UNDOC/GEN/GL9/000/26/PDF/GL900026.pdf?OpenElement (last accessed 19-06-2023). See also Doek "The CRC and the right to acquire and preserve a nationality" 2006 *Refugee Survey Quarterly* 26-32.

58 Report of the drafting committee to the Commission of Human Rights (1947) 26 – "The drafters of the ICCPR felt that a State could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless of the circumstances".

5 1 4 The Convention on the Elimination of All Forms of Racial Discrimination 1969

South Africa acceded to the Convention on the Elimination of All Forms of Racial Discrimination 1969 (CERD) on 10 December 1998.[59] The CERD is the principal international human rights instrument that defines and explicitly prohibits racial discrimination in all sectors of private and public life.[60] The CERD aims to eliminate racial discrimination in all its forms and manifestations and to prevent and combat racist doctrines and practices.[61] In terms of Article 5(iii) of the CERD, everyone has the right to nationality, irrespective of race, colour, or national or ethnic origin and gender. The shortcoming of CERD, like the UHDR and ICCPR, is that it does not qualify for the right to nationality, nor does it place an obligation on any state to grant nationality. The committee on CERD has urged member states to reduce statelessness among children by encouraging their parents to apply for citizenship on their behalf.[62] The Committee, however, fails to give clear guidance on whether states have an obligation to grant nationality to stateless children. Moreover, considering that the issue of nationality is subject to state sovereignty, the vagueness of the CERD in stopping at providing everyone "the right to nationality", not only leaves it unclear which state is mandated to grant nationality, but also leaves the obligation on states ambiguous. Consequently, the framing of the right to nationality in the CERD does not reflect the state's obligation to grant nationality to every child born within its territory.

5 1 5 The Convention Relating to the Status of Stateless Persons 1954

In noting the unsettling and increasing number of stateless persons as well as the lack of effort from states to prevent and end statelessness, this Convention was promulgated to reduce statelessness. The 1954 United Nations Convention on the Status of Stateless Persons (hereinafter the 1954 Statelessness Convention) is a key international legal instrument that places a clear obligation on states to protect stateless people, including children. The Convention aims to ensure that stateless people enjoy fundamental human rights and freedom from discrimination.[63] Despite various calls on South Africa to ratify the 1954 Statelessness Convention,[64] it has not done so. It is, however, important to discuss this convention considering that it provides the overarching legal framework on the status of stateless persons. Moreover, South Africa has pledged to

59 United Nations Treaty Collection https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en (accessed 16-06-2024).

60 Preamble to The Convention on the Elimination of All Forms of Racial Discrimination.

61 As above.

62 Committee on the Elimination of Racial Discrimination General Comment 30 Discrimination against non-citizens CERD/C/64/Misc.11/rev.3 para 16.

63 Preamble of the 1954 Statelessness Convention.

ratify the convention.[65] Article 12 of the convention states that the personal status of a stateless person shall be governed by the contracting state. It is worth noting that the convention makes no mention of what nationality entails: it does not refer to nationality being a right nor does it mention the link between nationality and the enjoyment of rights. What the Convention does establish is a legal framework for the protection of stateless people. It does not place an obligation on contracting states to grant nationality to stateless people. States are only obliged to put measures in place that allow for the recognition and protection of stateless people.[66]

Several institutional bodies have urged states to ratify this convention to eradicate childhood statelessness.[67] This push for ratification is premised on very few states having signed or ratified this Convention. As of June 2023, there were only 29 signatories and 96 parties to the convention.[68] The limited number of signatories and lack of interest in ratifying this convention is significant for two reasons. Firstly, it means that states are skeptical about committing to a convention that places an explicit obligation on them to protect stateless people. This skepticism may be due to various factors such as the lack of political will,[69] issues of xenophobia, and immigration policies. Secondly, states might not have the necessary resources that are required to give effect to the provisions

64 UPR of South Africa (4th Cycle - 41st Session) https://www.ohchr.org/en/hr-bodies/upr/za-index (accessed 20 July 2024). The New Humanitarian "Solving Statelessness in Southern Africa" (30 January 2013) https://www.thenewhumanitarian.org/analysis/2013/01/30/solving-statelessness-southern-africa (accessed 19-06-2024).

65 Presentation to the Department of Home Affairs Portfolio Committee 9 March 2021 Statelessness and Nationality in South Africa https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf (accessed 4-08-2024); Solving statelessness in Southern Africa, 30 January 2013. https://www.refworld.org/docid/510bbe262.html (accessed 4-08-2024)

66 Bianchini Protecting Stateless Persons the Implementation of the Convention Relating to the Status of Stateless Persons Across EU States (2018) 112.

67 See, for example, Resolution 2099 (2016) issued by the Council of Europe on 'The need to eradicate childhood statelessness', https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid = 22556&lang = en; Open Justice Initiative 'Children's Rights to a Nationality' https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/RelatedMatters/Other Entities/OSJIChildrenNationalityFactsheet. pdf. (accessed 18 October 2023). The United Nations Refugee Agency https://www.unhcr.org/ending-statelessness.html. The UN Agency on Refugees ensuring that no child is born stateless, https://www.refworld.org/pdfid/58cfab014.pdf. UNHCR 'Under the Radar and Under Protected: The urgent need to address stateless children's rights 2012 https://www.unhcr.org/509a6bb79.pdf. (accessed 18-10-2023).

68 The United Nations Treaty Collections, https://treaties.un.org/pages/ViewDetailsII.aspx?src = TREATY&mtdsg_no = V-3&chapter = 5&Temp = mtdsg2&clang = _en (accessed 19-07-2023).

69 Bloom, Problematizing the Statelessness Conventions UNU-GCM Institute on Globalization, Culture and Mobility United Nations University https://collections.unu.edu/eserv/UNU:1969/pdf0201BLOOM.pdf (accessed 20-06-2024).

of the convention. For example, Article 25 of the Convention requires member states to provide administrative assistance to a stateless person to obtain assistance from authorities of a foreign country to whom he cannot have recourse. This can be difficult for countries that lack the resources required for this kind of administrative assistance. Admittedly, Article 25(4) allows for states to charge fees for these services, however, assisting a stateless person to obtain assistance from authorities of a foreign country requires more than financial resources. It also requires a state to have sufficient and well-trained officials who will be able to perform this task efficiently. For the eradication of childhood statelessness, this Convention does little to help us understand the issue of nationality and which states bear the onus of granting nationality to stateless children.

5 1 6 The Reduction of Statelessness 1961

Although South Africa has not ratified the Convention on the Reduction of Statelessness 1961, it is critical to discuss this Convention considering that it provides the foundation for the international legal framework to address statelessness. The Convention on the Reduction of Statelessness 1961 (1961 Statelessness Convention) was adopted with the specific aim of reducing and preventing statelessness.[70] The difference between the 1954 Statelessness Convention and the 1961 Statelessness Convention is two-fold. The 1954 Statelessness Convention acknowledged and recognised the legal status of stateless people and the need for them to be afforded rights. The 1961 Statelessness Convention went a step further by requiring contracting states to reduce and prevent statelessness within their territories. Article 1 of the 1961 Statelessness Convention requires a contracting state to grant nationality to a person born within its territory if the person would otherwise be stateless. Article 1 has two limitations. Firstly, Article 1(a) provides that the acquisition of nationality at birth shall be granted by the operation of national law. This gives a contracting state the power to enact a national law that sets out the requirements to be met by a potential stateless person born within its territory. These requirements may be structured in a manner that results in some stateless people not qualifying for nationality.

The wording of Article 1(b) highlights the second limitation. In terms of this subsection, a contracting state has the power to enact national laws that provide the requirements on how an application for the acquisition of nationality may be lodged. Even though Article 1 is clear on who bears the onus of granting nationality to a potentially stateless person, states still have the autonomy to limit this right through national laws. Another shortcoming of this article is that it does not provide details and guidance on what it means for a person to be 'otherwise stateless'. This leaves room for states to decide what it means to be 'otherwise

70 See introductory note by the Office of the United Nations High Commissioner for Refugees, https://www.unhcr.org/media/30028 (accessed 19-06-2024).

stateless'. Article 2 of the Convention falls short in that it merely recognises that an abandoned child found in the territory of a contracting state shall, in the absence of proof of the contrary, be considered to have been born within the territory of parents possessing the nationality of that state. The problem with this provision is that it does not guarantee that an abandoned child will be given nationality, rather, it merely speaks to the status of birth of such a child. Being born in a particular state does not guarantee the acquisition of nationality. Although this Convention provides better guidance on which states bear the onus of granting nationality to a stateless child, it limits the right to nationality by giving states the prerogative to give effect to this right through national law. However, it is worth noting that Goodwin, a leading scholar on statelessness, is of the view that the Convention does places an obligation on states to grant nationality in certain situations.[71] Goodwin does, however, concede that there is no outright right.[72] Considering that nationality plays an important role in the enjoyment of rights, this convention does not impose an obligation on states to grant nationality to stateless children. Imposing an obligation on a state to grant nationality to everyone born within its territory is considered superfluous by some states.[73]

5 2 International treaties and policies dealing with nationality at the African Union level

The African Union (AU) was officially launched in 2002 as a successor to the Organisation of African Union (OAU).[74] The AU consists of 55 states comprising the countries of the African continent.[75] As the guardian of human rights and other related issues within the African continent, the AU has made progress in terms of human rights protection. However, as far as the issue of the right to nationality is concerned, the AU has fallen short. For instance, there is no regional African convention governing issues of nationality and statelessness. This is comparable to other regions, such as Europe and Asia, which have continental legal instruments on the issue.[76] It is pertinent to note that the AU admits that

71 Goodwin-Gill "Rights of Refugees and Stateless Persons" in Saksena (ed) *Human Rights Perspective and Challenges: In 1990 and Beyond* (1994) 378-401.

72 As above.

73 United Nations Legislative History of the Convention on the Rights of the Child (2007) 1,at 171 https://www.ohchr.org/sites/default/files/Documents/Publications/LegislativeHistorycrc1en.pdf.(accessed 20-06-2024).

74 The Organisation of African Unity (OAU). https://au.int/en/overview (accessed 13-09-2024); Adibe "African Union and the Quest for African Solution for Africa's Problems" 2022 *Journal of African Union Studies* 5-12.

75 As above.

76 See, for example, The European Convention on Nationality 1997; The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession 2006; Human Rights Declaration of the Association of Southeast Asian Nations 2012.

there is no right to nationality in the region.[77] Moreover, the AU in Resolution 234 on the Right to Nationality, which called for a study on the issue of the right to nationality, observed that there is no continental treaty that recognises the right to nationality as an individual's basic right.[78] Some treaties under the AU, however, make provisions for nationality in one way or another. These treaties are discussed to assess whether they provide a solid foundation for the right to nationality, with the potential to address the challenge of statelessness.

5 2 1 The African Charter of the Rights and Welfare of the Child 1990

As of June 2024, the African Charter on the Rights and Welfare of the Child 1990 (ACRWC) has been ratified by 50 out of the 55 member states of the African Union.[79] It has undoubtedly enjoyed significant ratification by member states. The ACRWC, unlike the UDHR, ICCPR, and CRC, provides clarity on which state the onus of granting stateless children rests. Article 6 of the ACRWC states:

> "Every child has the right to be registered immediately after birth and the right to acquire a nationality at birth. Furthermore, states are to ensure that Constitutional legislation recognise the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its law."

The wording of Article 6 of the ACRWC provides a progressive and clear unpacking of the right to nationality at birth as far as the rights of the child are concerned. It places an obligation on states to ensure the realisation of this right through their constitutional legislation. What this means is that states need to enact legislative provisions that ensure that children born within their territory and are unable to acquire the citizenship of another state, are given the opportunity to acquire nationality especially if not doing so would render them stateless. This is significant progress compared to other international treaties[80] which fall short in placing an absolute obligation on a particular state to make provision for children to acquire nationality. Perhaps the most significant aspect of Article 6 of the ACRWC is its specificity on which state bears the obligation to protect children against statelessness – the state where the child is born. However, in as much as a clear obligation is placed on a

77 Department of Political Affairs: African Union Commission. The African Union Approach to the Right to Nationality: Statelessness Impact on Africa's Development and the Need for its Eradication, presentation _approach_on_statelessness_in_africa_dpa_auc.pdf (achpr.org), para 7 (accessed 18-07-2024).

78 The African Commission on Human and Peoples' Rights adopted the resolution at its 54th Ordinary Session in 2013.

79 ACRWC Ratification table https://www.acerwc.africa/en/member-states/ratifications (accessed 20-06-2023).

80 Universal Declaration of Human Rights 1948; Internal Covenant on Civil and Political Rights 1996.

state to grant nationality to a child born within its territory, this obligation does, nevertheless, not translate into the right to a nationality. By its own admission, the African Union has conceded that whilst the ACRWC provides the right to a name at birth and the right to acquire a nationality, it does not provide for the right to a nationality.[81]

The African Committee of Experts on the Rights and Welfare of the Child (ACRWC Committee) has given guidance regarding the interpretation of Article 6 of the ACRWC.[82] ACRWC Committee concedes that the right to grant nationality remains a state's prerogative, however, it urges states to ensure that national law relating to nationality is in line with international law principles. Regarding international law principles, mention can be made of the principle of the best interest of the child which is entrenched in very strong terms under the ACRWC.[83] The Committee asserts that the state in which a child is born bears the onus of providing nationality to the child if not doing so would render the child stateless.[84] The obligation that flows from Article 6 of the ACRWC was clearly defined in *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, (*Nubian* case).[85] In this case, children of Nubian descent faced administrative and legislative barriers when trying to register their births. Even when their births was registered, the birth certificate would indicate that it is not proof of citizenship. Moreover, Nubian children could only apply for a national identity document upon reaching the age of 18, after going through a long vetting and discriminatory process.[86] The Kenyan government was found to be in violation of Article 6 of the ACRWC.[87] The ACRWC Committee recommended that the government of Kenya should take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent in Kenya, who would otherwise be stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.[88] This was a result of a lack of legislative measures in place that ensured that Nubian children obtained citizenship like any other Kenyan

81 Department of Political Affairs: African Union Commission. The African Union Approach to the Right to Nationality: Statelessness Impact on Africa's Development and the Need for its Eradication, presentation_approach_on_statelessness_in_africa_dpa_auc.pdf (achpr.org) (accessed 12-08-2024).

82 General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: ACERWC/GC/02 (2014).

83 Article 4 of the ACRWC.

84 ACERWC/GC/02 (2014), paras 34-40.

85 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya* Decision No 002/Com/002/2009.

86 Specific application days are set for *Nubian* children who want to apply for citizenship, vetting also includes appearing before a vetting panel. As above, para 5.

87 As above.

88 As above.

child.[89] The Kenyan government also failed to put measures in place to prevent Nubian children from becoming stateless.[90] Therefore, the issue, in this case, was not whether Kenya had the obligation to grant Nubian children nationality, but rather, the lack of legislative measures to prevent childhood statelessness as required by Article 6.[91] The *Nubian* case makes it abundantly clear that the state where a child is born bears the onus of preventing that child from becoming stateless if the child is unable to obtain the nationality of any other country.

It must be borne in mind, however, that the ACRWC, just like the ICCPR and CRC, phrases nationality in a manner that gives discretion to South Africa to determine how nationality is acquired. The right is phrased as "the right to acquire nationality" rather than "the right to a nationality". Admittedly, the ACRWC is progressive in that it makes it clear that the state where a child is born has the obligation to grant nationality where a child would otherwise be stateless, however, the limiting factor is that this provision only applies to children born in South Africa and excludes stateless children born outside the borders of South Africa.

Similar to the Article 4 of the CRC, Article 1 of the ACRWC requires member states to take the necessary steps, in accordance with their Constitutional processes and with the provisions of the Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter. By ratifying the Charter, South Africa assumed a binding obligation under international law to implement its provisions in good faith.[92] Consequently, this provision can be interpreted as placing an obligation on South Africa to ensure the realisation of the right to acquire nationality.

5 2 2 The African Charter on Human and Peoples' Rights 1986

The African Charter on Human and Peoples's Rights (ACHPR) came into effect in 1986 and has been signed and ratified by 54 states, including South Africa.[93] The ACHPR recognises that fundamental human rights stem from the attributes of human beings which justifies their national and international protection. The ACHPR places an emphasis on the protection and promotion of human rights in Africa.[94] The glaring shortcoming of the ACHPR is that it makes no mention of the right to nationality.

89 As above.
90 As above.
91 As above.
92 The *Pacta sunt servanda* rule, a principle entrenched in international law in article 26 of the Vienna Convention of the Law of Treaties 1969, equates treaties to contracts and demands that they be interpreted in good faith.
93 State Parties to the African Charter https://www.achpr.org/ratification table?id = 49 (accessed 18-10-2023).
94 Preamble to the African Charter on Human and People's Rights.

5 2 3 Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa was formally adopted in 2024. The Protocol aims to facilitate the inclusion of individuals within African states by providing legal solutions to practical problems linked to lack of nationality, eradicate statelessness, and above all, to identify the principles that should govern relations between individuals and states concerning these issues.[95]

Article 3 of the Protocol provides that each state has the prerogative to decide who its nationals are but must agree and recognise that every person has a right to nationality. This wording is contradictory because it is problematic to recognise the right to nationality while making it explicit that it is for states to determine who their nationals are. The wording is not only state-centric but also, in allowing states the discretion to determine who their nationals are, such determination generally has the effect of making it impossible for certain individuals to meet the criteria for nationality in those states, thus, defeating the notion of a right to a nationality.

In terms of the Protocol, states have the obligation to act, both alone and in cooperation with each other, to eradicate statelessness and ensure that every person has the right to the nationality of at least one state where he or she has an appropriate connection.[96] The framing of the right to nationality in the traditional state-centric approach, which leaves nationality issues at the discretion of the states, is a common thread seen in the preceding discussions on international conventions. Article 3 reiterates state sovereignty and merely provides general principles for states to consider when deciding who their nationals are. Article 5 states that a state party shall, at a minimum, attribute nationality by operation of law from the moment of birth to a category of people, including a child, who would otherwise be stateless. Qualifying the acquisition of nationality by giving states the power to decide, by operation of national laws, who its nationals are, reinforces the lack of clear treaty obligations on states to grant nationality to stateless people.

The adoption of a collective legal framework relating to statelessness in Africa is progressive, however, the Protocol does not bring any new solution to addressing the ambiguity of whether there is an obligation on South Africa to grant stateless children nationality. Instead, it reinforces

95 Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa Explanatory Memorandum para 2 https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_originalexplanatory_memorandum.pdf (accessed 20-06-2024).

96 Article 3(2)(c).

the framing of the right of nationality as a matter of state prerogative. General principles do not automatically amount to an obligation; they merely serve as guiding principles that states are to consider when implementing a particular right.[97] The overall framing of the Protocol is similar to other conventions,[98] which recognise the right to nationality but leaves it to states to determine how this right is acquired.

5 3 An analysis of South Africa's obligation to grant nationality to all stateless children

In the above discussion, it was established that the CRC and ACRWC have made strides in the framing of nationality in comparison to other instruments such as the ICCPR and the UDHR. An analysis of the CRC illustrated that in as much as children have the right to acquire a nationality, it does not necessarily translate into every child having the right to nationality. Fundamentally, having a right to acquire a right is not the same as having a right to something. Further analysis of the ACRWC demonstrated that children have the right to acquire nationality if they are unable to acquire the nationality of any other state. Accordingly, children who are unable to acquire the nationality of any other state have the right to South African nationality, through a state's nationality laws, to acquire the nationality of the state in which they are born. Consequently, this means that children born in South Africa do not necessarily have a right to South African nationality merely by being in South Africa. Rather, this right provides them with the opportunity to be dealt with in accordance with South African nationality laws. Section 2(2) of the Citizenship Act 88 of 1995 provides stateless children born in South Africa with the opportunity to acquire nationality provided that their birth was registered according to the Death and Birth Registration Act 51 of 1992.

The wording of nationality as being a right to acquire nationality through the enactment of nationality laws of states rather than being an automatic right to a nationality is in line with the internationally accepted principle of state sovereignty. This principle has long been established in international law. It was reiterated in the 1985 International Court Judgment of *Continental Shelf, Libya v Malta,*[99] where the ICJ stated that

97 Egget "The Role of Principles and General Principles in the 'Constitutional Processes' of International Law" 2019 *Netherlands International Law Review* 197–217. Guiding principles applicable to unilateral declarations of states capable of creating legal obligations, with commentaries thereto and United Nations Human Rights (2016) https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf (accessed 18-10-2023).

98 For example, The International Covenant on Civil and Political Rights 1976, the Convention on the Status of Stateless Persons 1954; the Convention on the Reduction of Statelessness, the Convention on the Rights of the Child 1989 and the African Child on the Rights and Welfare of the Child 1990.

99 *Continental Shelf (Libyan Arab Jarnahiriya/Malta),* Judgment, I. C.J. Reports 1985, p. 13.

each state has the prerogative to decide who its nationals are so far as the laws are consistent with principles of international law.

Therefore, despite the explicit entrenchment of nationality in various treaties, these treaties have not changed the position in international law established in the ICJ case of *Nottebohm, Liechtenstein v Guatemala*,[100] which established that based on states' sovereignty, it is for each state, based on its discretion, to determine who its nationals are. The most important contribution of the African Charter on the Rights and Welfare of the Child on the subject of children and nationality is that it makes it clear that the state that bears the obligation to grant nationality to a stateless child, if such a child would otherwise be stateless, is the state where the child is born. Although the issue regarding which state bears the onus has now been settled, the realisation of this right remains at the discretion of these states by the operations of their nationality laws, in this case, South Africa's nationality laws

5 3 1 The best interests of the child principle as a basis for curtailing South Africa's discretion on issues of nationality

Considering the lack of clear obligation on South Africa to grant nationality to all stateless children under treaty law,[101] the question to be answered is whether the best interest principle of the child can be invoked to ensure that nationality laws enacted by South Africa ensure access to nationality by all stateless children.

The rights contained in the CRC are considered to carry equal weight. However, according to Freeman,[102] the child's best interest principle underpins all the other provisions in the CRC. The best interest principle of the child can be considered a golden thread that runs through the fabric of children's rights,[103] because it forms the basis for the interpretation of all rights and matters concerning children.[104] When assessing matters relating to a child, states are required to take into account what would be in the best interest of the child. Moreover, the best interest principle is broad and extends to all areas of children's rights and any other matters where a child is involved. According to Pobjoy,[105] the best interest of the child principle is taking a direction towards becoming an independent source of international protection.[106] Moreover, Pobjoy argues that the best interest of the child principle in the

100 *Nottebohm, Liechtenstein v Guatemala* 1955 ICJ (4) 185.
101 Khan "Exploring Childhood Statelessness in South Africa" 2020 *Potchefstroom Electronic Law Journal* 1-34.
102 Freeman *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: the Best Interests of the Child: Freeman Article 3: the Best Interests of the Child* (2007).
103 Bekink & Bekink "Defining the standard of the best interest of the child: Modern South African perspectives" 2004 *De Jure* at 22-40.
104 Freeman *A Commentary on the United Nations Convention on the Rights of the Child* at 1.
105 Pobjoy *The International and Comparative Law Quarterly* 333.
106 As above.

CRC may be used as an independent basis for protection outside the traditional refugee protection regime.[107] An assessment of the best interests of the child may preclude the return of a child to her home country even though the child is not eligible for protection under the Refugee Convention 1951.[108] This broad application and extension of this principle has had a major impact on state sovereignty. The best interest of the child principle is not explicitly defined in the CRC and the ACRWC, however, according to the Committee on the ACRWC a purposive reading and interpretation of the relevant provision strongly suggest that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the African Children's Charter which requires that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration"[109]

The CRC committee has noted that the elements to be taken into account when assessing and determining the child's best interests, as relevant to the situation, including the child's identity, protection and safety of the child, a situation of vulnerability, the child's right to health and the child's right to education.[110] South Africa may have the power to exercise its discretion, however, the best interests of the child curtail this power by placing an obligation on South Africa to ensure that, when making rules and laws that affect children, the best interests of the child are considered paramount. This is one of the most effective ways in which South Africa's discretion is limited. According to the CRC committee, Article 3(1) of the CRC creates an intrinsic obligation for states, that is directly applicable (self-executing), and can be invoked before a court.[111] The Committee also acknowledges the role of Article 3 as an interpretative legal principle, stating that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen.[112]

Section 28(2) of the South African Constitution guarantees the paramountcy of a child's best interest, to which every child is entitled regardless of nationality status.[113] South Africa is thus obliged, not only by its own constitution but also by international standards, to ensure that the best interest of the child is paramount. Consequently, South Africa's discretion in matters pertaining to children is limited by both the Constitution as well as the best interest of the child principle provided for

107 As above.
108 As above.
109 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya* Decision No 002/Com/002/2009.
110 As above.
111 As above.
112 As above.
113 Article 2(1) CRC. See also, CRC General Comment on the right of the child to have his or her best interests taken as a primary consideration (2014) para 21.

by conventions such as the CRC and the ACRWC. The best interest principle is a significant curtailing factor of South Africa's discretion when it comes to children and their right to acquire nationality. This principle is enshrined in the Constitution as well as international instruments. It requires South Africa to take all legislative measures to ensure that the rights of stateless children are respected and protected. The obligation to ensure that a child's best interests are considered extends to the implementation of all rights relating to children. Where the circumstances result in more than one interpretation, the interpretation that is in the best interest of the child should be favoured.[114] In *M.M.E v Director General, Department of Home Affairs*, the Court held that the circumstances in which the minor child finds herself, fall squarely within the provisions of section 2(2) of the Citizenship Act. It is constitutionally directed that a child is to have a nationality from birth, and it follows axiomatically that it is in the best interest of the child that this is so.[115]

Based on the best interest principle, being stateless and thus, being without a nationality is not in the best interest of any child.[116] This is due to the difficulties that stateless children face in accessing basic rights such as education and health care. It is difficult to think of a situation where it would be in the best interests of a child to be rendered stateless. This was reiterated in the Kenyan *Nubian* case,[117] where the Commission expressed that, the practice that left children of Nubian descent without acquiring a nationality for a very long period of 18 years is neither in line with the spirit and purpose of Article 6 of the ACRWC, nor promotes children's best interests, and therefore constitutes a violation of the African Children's Charter.[118]

It is to be noted that despite faced by stateless children, South African courts have made great strides in ensuring that stateless and undocumented children can access basic rights such as education. The case *Centre for Child Law; Phakamisa High School v Minister of Basic Education* illustrates the judiciary's strict stance towards protecting the rights of stateless children.[119] In this case, the Eastern Cape Basic

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114 Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya.

115 *M.M.E v Director General, Department of Home Affairs* 2025 ZAGPPHC 202, para 40.

116 Mahleza & Maake-Malatji "A Case for the Right to Education for Stateless and Undocumented Children: A South African Analysis in the Light of International Law" 2024 *Potchefstroom Electronic Law Journal* 1-33.

117 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya* Decision No 002/Com/002/2009.

118 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya,* Decision No 002/Com/002/2009; African Committee of Experts on the Rights and Welfare of the Child, para 42

119 (2840/2017) [2019] ZAECGHC 126; [2020].

Education issued a circular June 2016 which stated that learners who did not have identity documents or passport numbers would be removed from schools. The children who were affected by the department's decision included children born of South African parents, but who have, for a variety of reasons, not been able to obtain birth certificates, as well as children of foreign nationals residing in South Africa without the necessary documentation allowing them to reside or study in South Africa. Certain provisions of the Admission Policy also came under scrutiny in this case. Clause 15 of the Admission Policy makes the admission of children to public schools conditional upon the production of a birth certificate within 3 months; failure to comply with this condition results in the child of the defaulting parent being excluded from enrolment. The Court held that Clause 15 of the Admission Policy effectively denies children access to education based on their documentation status, which constitutes unfair discrimination and was thus unconstitutional.[120] Furthermore, the Court held that Clause 21 of the Admission Policy was unconstitutional, as it excluded undocumented children from accessing education. The Court further held that the right to education[121] extends to everyone within the boundaries of South Africa; their nationality or immigration status is immaterial.[122]

6 Conclusion

This article examined international conventions to determine whether South Africa has a legal obligation to grant nationality to stateless children. An analysis of treaties at both the United Nations (UN) and African Union (AU) levels revealed that there is no absolute right to nationality under international law. Instead, South Africa has the discretion to decide who its nationals are through nationality laws. This gives South Africa the prerogative to define nationality criteria, which may result in some stateless children being excluded. The Convention on the Rights of the Child (CRC) establishes a right to acquire nationality, but this does not equate to an automatic entitlement. Similarly, the African Charter on the Rights and Welfare of the Child (ACRWC) provides that a child unable to acquire any other nationality should have access to the nationality of their birth state. However, this is subject to South Africa's domestic laws, which may still exclude some stateless children. A finding that South Africa is not explicitly obliged under international law to grant nationality to all stateless children, however, does not negate it from its obligation under international children's right principles. South Africa is bound by the best interest of the child principle under international law and section 28 of the Constitution to consider children's interests as

120 At para 83. This finding is also in line with recommendations that South Africa must strengthen mechanisms to eliminate discrimination against stateless children, Concluding observations on the combined third to sixth periodic reports of South Africa C/ZAF/CO/3-6.
121 Section 29(1)a of the South African Constitution.
122 *Centre for Child Law v Minister of Basic Education*, para 90.

paramount in all matters relating to stateless children. Consequently, in applying national laws relating to stateless children, South Africa must apply the best interests of the child. Given that statelessness is never in a child's best interest, South Africa must apply its nationality laws in a manner that is consistent with the best interest of the child principle.