LAWYERS FOR HUMAN RIGHTS

TOWARDS RATIFICATION OF THE STATELESSNESS TREATIES

PREPARED FOR MEETING WITH DIRCO, 11TH AUGUST 2011

Executive Summary

1. Introduction

The concept of nationality represents a legal link between an individual and a particular State. Nationality underpins the enjoyment of all rights associated with the bond of citizenship: the right of residence, the right to work, the right to education, the right to free movement, and the right to vote, to name but a few. Without such security, stateless persons live the lives of unwanted aliens, denied basic rights and in a state of legal limbo.

There are two international conventions that aim to prevent and reduce statelessness: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These conventions define a stateless person as "a person who is not considered as a national by any State under the operation of its law" (also known as *de jure* stateless). The Final Acts include a recommendation that each Contracting State extend the provisions of the conventions to *de facto* stateless persons, who still technically hold a nationality but do not receive any benefits from it, due to failure to meet State administrative requirements, voluntary renunciation or intentional discrimination on the part of the State.

South Africa already recognises the right to a nationality in various international and regional human rights instruments. The respect, protection and promotion of this right require that South Africa make a positive commitment to address statelessness. The statelessness conventions provide a set of comprehensive and authoritative guidelines from which South Africa will benefit in its quest to protect human rights and specifically, the right to nationality.

2. Groups of Concern

In March 2011, Lawyers for Human Rights launched the Statelessness Project. Lawyers for Human Rights has identified 8 main groups of concern in South Africa, who are either stateless or at high risk of statelessness: 1) Many *Zimbabwean-born migrants* are stateless due to discriminatory amendments to Zimbabwean citizenship law, beginning in 1984, which have systematically withdrawn citizenship from those with foreign parentage. 2) *Orphans and vulnerable children* in South Africa are at high risk of growing up to be stateless, due to barriers to birth registration and absence of parents and legal guardians to act on their behalf. 3) *Unaccompanied foreign minors* often enter South African with no enabling documentation and no legal status in this country; upon reaching adulthood many cannot prove their citizenship in their home country and yet do not qualify for South African citizenship. 4) *Victims of ID fraud* find themselves effectively stateless if they cannot meet Home Affairs' requirements to prove they are the true South African citizen in cases of duplicate IDs. 5) *Children born to migrants* in South Africa face obstacles in accessing birth registration; without a birth certificate they can access neither their parents' nationality nor South African citizenship provisions. 6) *Children of single fathers* remain unregistered due to Home Affairs' regulations, which prevent fathers from registering a child out of wedlock without the mother's consent and presence to acknowledge paternity. 7) *Communities bordering neighbouring countries* are faced with suspicion of being illegal foreigners at

Home Affairs in remote areas and thus face heightened barriers to accessing citizenship. 8) *Stateless migrants* that suffer from a conflict of laws and/or state succession in other African nations migrate to South Africa.

3. The Statelessness Treaties

It should be noted that South Africa, should it sign and ratify these conventions, should seriously consider extending its provisions to both *de jure* and *de facto* stateless persons. The mass migration, discriminatory practices around citizenship and low levels of birth registration common across Africa mean that *de facto* statelessness is not an issue which can be overlooked in our context.

a) The 1954 Convention on the Status of Stateless Persons

The 1954 Convention is the main international instrument that regulates and improves the status of stateless persons. It defines statelessness, protects stateless persons' basic human rights and needs until their nationality can be resolved, prevents discrimination, requires issuance of identity and travel documents to stateless persons, prevents expulsion save on grounds of national security or public order, and requires facilitation of naturalisation of stateless persons.

This Convention would require that South Africa establish a stateless status determination procedure and provide certain minimum protections to stateless persons. It would greatly improve the status of stateless persons in this country, given that few protections currently exist in our laws. It would help relieve the overburdened asylum system by taking stateless persons without a refugee claim away from that system. Finally, it would benefit South African civil society and promote social cohesion by providing measures of security to extremely marginalised and vulnerable persons.

b) The 1961 Convention on the Reduction of Statelessness

The 1961 Convention focuses on avoiding statelessness. It encourages granting nationality from birth. It regulates loss or renunciation of nationality, making both conditional on retention of nationality. It encourages non-discrimination against family members when one person loses nationality. It prevents deprivation of nationality on racial, ethnic, religious or political grounds and guarantees due process where deprivation is permitted. It provides that Contracting States shall confer nationality to persons who would otherwise be stateless as a result of transfer or acquisition of territory. Finally, it establishes that the UN High Commissioner for Refugees will examine stateless persons' claims and assist them in presenting claims to appropriate State authorities. The Convention allows states ample flexibility to make declarations and reservations to protect national security.

South Africa can gain critical guidance from the 1961 Convention on aligning our national policies and legislation so as to avoid creating statelessness. It should also be noted that through its provisions, this Convention would actually strengthen and protect *bona fide* South Africans' citizenship rights.

4. Summary

Ratification and signature of the two statelessness conventions will allow South Africa a framework within which to prevent future cases of statelessness and to protect the stateless, which are among the world's most vulnerable persons. Currently, a number of policies and laws work to exacerbate the situation of stateless persons, endanger South African national security and increase instances of statelessness. By adopting these treaties South Africa will draw attention to statelessness, affirm its commitment to human rights and join the minority of forward-thinking states that recognise the importance of addressing statelessness and protecting the right to nationality.

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Briefing Paper

1) Introduction

Statelessness is a human rights crisis that does not receive the attention it deserves. In Africa, a legacy of discriminatory citizenship laws during colonisation led to a scramble for power in the post-colonial era and in many instances, a continuation of exclusionary citizenship laws and policies intended to protect the perceived original occupants of the area. More recently, as African countries become more developed and access to wealth and social services become ever more dependent on administrative systems and documentation, statelessness only increases as those on the fringes of society are left outside the citizenship circle. Furthermore, today's unstable world economy, and the resulting joblessness in many nations, results in tightening of borders, xenophobia and restricted access to citizenship worldwide, in order to protect nations' limited resources.

Statelessness is underpinned by the right to a nationality. Indeed, statelessness is the logical corollary of a breach of the right to a nationality. Persons who are stateless suffer endless human rights abuses, including denial of access to education, inability to work legally, inability to move freely between and within states, inability to vote or run for political office, and lack of access to social services. Furthermore, statelessness increases societal tensions and contributes to conflict, population displacement and migration.

The South African Constitution protects the right of each child to a name and nationality from birth in Article 28. Section 2(2) of Citizenship Act (No. 88 of 1995) provides citizenship by birth to children born on the territory who have no other nationality or no right to another nationality. South Africa has signed and ratified a number of international instruments that protect the right to nationality: the Universal Declaration on Human Rights; 1957 Convention on the Nationality of Married Women; 1965 Convention on the Elimination of all Forms of Racial Discrimination; 1989 Convention on the Rights of the Child; and the International Covenant on Civil and Political Rights.

Thus, South Africa has already recognized its duty to prevent statelessness and to protect the rights of those who are stateless. This briefing paper motivates that South Africa confirm its commitment to protecting the right to nationality through signature and ratification of the two statelessness treaties: the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

2) Groups of Concern – *De Jure and De Facto Stateless*

There are two categories of stateless persons: *de jure* and *de facto*. A *de jure* stateless person is one who not recognised as a national by any State under the operation of its laws. *De facto* stateless may meet a State's legal requirements for citizenship, but are either unable to meet its administrative requirements; are otherwise denied citizenship documents or consular protection; or voluntarily renounce their country's protection. The two statelessness conventions protect *de jure* stateless persons and encourage Contracting States to extend the conventions to also protect *de facto* stateless persons.

Both *de jure* and *de facto* stateless persons exist in South Africa. Access to birth registration plays a critical role in preventing statelessness and thus has been emphasized. LHR has identified the following groups of concern.

1. Zimbabwean-Born Migrants with Foreign Parentage

In its original, post-independence Constitution, anyone born in Zimbabwe to a citizen, permanent resident or ordinary resident was a citizen by birth. In 1983, Zimbabwe amended the Constitution to prohibit dual nationality and introduced an amendment to the Citizenship Act requiring renunciation of foreign citizenship in order to retain Zimbabwean citizenship. In 2001[1] the government again required anyone with even a theoretical claim to foreign citizenship to renounce that citizenship, this time in accordance with foreign law, and to reapply for Zimbabwean citizenship by certification within a 6 month period. Critics report that this was a political measure designed to disenfranchise voters with questionable allegiances. It is estimated that several hundred thousand African migrants and their children born in Zimbabwe are currently stateless[2]; they were stripped of their citizenship by this amendment, which was advertised only in Harare and only to the white European population. If they did not access their parents' citizenship by descent, due either to their parents' death or lack of documentation or due to a conflict of laws, such persons were rendered stateless.

A 2003 amendment provided that children born in Zimbabwe prior to 1980 to migrants from a SADC country could apply for a citizenship certificate. Many Zimbabweans in South Africa will not qualify for this provision since it requires that the applicant remained in Zimbabwe from birth (with limited exceptions).

A 2009 Constitutional amendment seems to provide citizenship to persons with one Zimbabwean citizen parent and one foreign parent. However, the Zimbabwean Consulate in South Africa denies such individuals consular protection and tells them they are not citizens. In Zimbabwe, they are consistently unable to access citizenship without legal action. Even when a court orders the Registrar-General to recognise an applicant's citizenship, since 2002 the Registrar-General has consistently continued to deny individuals citizenship through (intentional) misinterpretation of the law. This has been confirmed through LHR Zimbabwe as well as other sources.[3]

2. Orphans and Vulnerable Children (OVC)

Both South African and foreign orphans, abandoned children and child-headed households are at high risk of statelessness.

UNICEF reports that there are 3.7 million orphans in South Africa. In addition, around 150,000 children are estimated to live in child headed households, where the risk of statelessness is even higher[4] (an adult ten years older than the applicant must assist in birth registration in absence of the parent). Recent changes to the Births and Deaths Registration Act and Regulations (pending) will likely mean that only a parent, legal guardian or next of kin will be able to register a birth. High rates of HIV/AIDS mean that South African citizen parents often pass away, without appointing legal guardians for their children. Informal adoptions are common in rural areas and thus births may not be registered until the child tries to apply for an ID; Home Affairs' intentions to further restrict access to late birth registration will make true citizens suffer if they cannot provide the required documentation and parent, legal guardian or next of kin.

Children of South African citizens, born and orphaned abroad, are at particular risk of statelessness. The challenge of birth registration for this group poses great barriers to citizenship. Such orphans are citizens by birth under the Citizenship Act (No.

[1] See Zimbabwe's Citizenship Amendment Act No. 12 of 2001
[2] See "Stateless Former Farm Workers in Zimbabwe," by Katinka Ridderbos of the Internal Displacement Monitoring Centre, available at http://www.fmreview.org/FMRpdfs/FMR32/73.pdf [last visited on 16 August 2011].
[3] See "Zimbabwe Citizenship Battles", by Tichona Shoria of Institute for War & Peace Reporting, available at http://iwpr.net/print/report-news/zimbabwe-citizenship-battles [last visited on 19 August 2011].
[4] See http://www.unicef.org/southafrica/protection_6633.html [last visited on 19 August 2011].

88 of 1995); however, in order to access this right, their birth must be registered with Consular authorities abroad. Births abroad are often not registered within 30 days as required by the Births and Deaths Registration Act, due to distance to travel to Consular offices as well as lack of South African missions in all foreign nations. Past 30 days after birth, a notice of birth becomes late birth registration which is a much more onerous process. South African Consular authorities in Zimbabwe report that orphaned children born in Zimbabwe to South African parents cannot undergo late birth registration through the Consulate. If the State where such an orphan was born, such as Zimbabwe, prohibits acquisition of nationality by solely birth on the territory and rather, requires a citizen parent, orphaned children who are refused late birth registration by South African authorities are at high risk of statelessness given that birth registration is the gateway for accessing South African citizenship.

Foreign children who are orphaned or abandoned on South Africa's territory are at heightened risk of statelessness. Child Welfare reports that the numbers of economic migrants and asylum seekers abandoning their babies in hospitals after birth are on the rise.[5] Foreign children born abroad are also abandoned or orphaned on our territory.

According to Department of Social Development (DSD) guidelines, where a child does not have a birth certificate from the country of origin, and the whereabouts of the parents is unknown, the child's age can be estimated by the children's court. The social worker can then request that Home Affairs allow the child to apply for a birth certificate.[6] Given a large amount of discretion in such applications, Home Affairs at the local level often does not issue birth certificates for such orphaned/abandoned foreign children, even when a social worker brings the child to DHA following a children's court proceeding as required under the Births and Deaths Registration Act. Without a birth certificate, such children have no legal identity and cannot access an immigration status in South Africa, as a birth certificate is often a prerequisite.

While section 46(h)viii) of the Children's Act states that a child protection order can include "an order instructing an organ of state to assist a child in obtaining access to a public service," most orders deal only with the social welfare of the child and do not address the child's documentation.[7] The result is that foreign children who are fortunate enough to go through the children's court and have a 'permanency plan' in place for them often do not have their immigration status regularised. Those who do not go through children's court generally languish in shelters or live on the streets. When foreign children reach adulthood, their status as a minor no longer protects them from deportation; they become 'illegal foreigners' in South Africa. They then risk deportation to a country where they may no longer be citizens or may not be able to prove their citizenship.[8]

3. Unaccompanied Foreign Minors

Unaccompanied foreign minors are most often undocumented – without legal status in South Africa and without enabling documents from their home country. While they are meant to go through the children's court and to be assisted by a social worker in obtaining an immigration document, many avoid the care and protection system. Those who are assisted by DSD and are given a permanency plan still do *not* have birth certificates issued or their immigration status regularised, for the same reasons as outlined above. LHR has clients who came to the country as unaccompanied minors who did not go through a children's court proceeding, then became adults and are now illegal in the country. Some have been here for 5-30 years, with no way to legalise their status (other than a special application to the Minister) or prove their citizenship in their home country should they be forced to return.

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[5] http://www.timeslive.co.za/local/article528163.ece/More-than-2-000-kids-abandoned-annually [last visited on 19 August 2011].
[6] See Department of Social Development, Guidelines for the Prevention and Response to Child Exploitation.
[7] LHR has obtained court orders including an instruction that Home Affairs assist a child in applying for asylum. However, such orders are rare and do not often occur without legal representation. Furthermore, many foreign children do not qualify for refugee status and thus an asylum permit is not the most appropriate immigration document for them. Such children should in fact be assisted in regularising their status in the country regardless of the appropriate immigration permit.
[8] While such persons may remember their country well enough to convince consular officials during deportation proceedings that they are citizens, upon return to their country of origin they may fail to meet the State's administrative requirements to be recognised as a national, and thus will be *de facto* stateless.

4. Victims of ID Fraud

In March 2011, Home Affairs announced that it identified nearly 600,000 cases of duplicate IDs. It stated that it has been working to rectify the situation and that around 164,000 cases remain "unresolved." For those persons unable to meet department requirements to prove that they are the true citizen, they are effectively stateless: Home Affairs does not recognise them as citizens. While Home Affairs requirements and implementation at the local level provides for discretion that robs citizens of their rights. Furthermore, some persons simply cannot provide the proof the department requires. Without legal assistance they remain stateless – they cannot access their bank accounts, buy or sell property, register their children's births or their marriages, vote, run for office and more. They are effectively non-citizens in the only country they have known.

5. Children Born in South Africa to Migrants

All children born in South Africa are entitled to birth certificates. Despite this, children born in South Africa to undocumented foreign parents are most often flatly denied birth certificates at Home Affairs and their parents are even threatened with arrest upon approaching DHA offices. Even recognised refugees and asylum seekers with valid permits are denied birth certificates for their children. Without birth certificates, these children risk becoming a lost generation – a birth certificate is required for them to access South African citizenship through section 2 of the Citizenship Act as well as to prove and access any claim to citizenship by descent through their parents' country.

In addition, children of farm workers, particularly migrants, are quite marginalised and have limited access to documentation.

The form of birth certificates offered to "foreign" children is also of concern. Regulations to the Births and Deaths Registration Act provide in section 6(2) that:

> *Where notice of birth is given to a regional representative or a district representative, and the information of the parents is not included in the population register, the birth shall be registered in terms of section 5(3) and a handwritten birth certificate may be issued to the informant in place of a written acknowledgement of receipt referred to in regulation 5(4)*.

Handwritten documents can easily be reproduced fraudulently and as such, their evidential value may be questioned; a handwritten document may not be accepted as proof of birth and parentage in all states. It is unreasonable and unfairly discriminatory that foreign children do not receive machine-printed birth certificates, as do South African children.

6. Children of Single Fathers

Confusion exists at local Home Affairs offices with regard to issuance of birth certificates to children born out of wedlock whose mothers are not present to "consent" to the father's acknowledgement of paternity (see section 10 of the Births and Deaths Registration Act and DHA Form BI-24E). Where a mother is absent by reason of death, disappearance or is unwilling to assist in birth registration, a single father attempting to register his child's birth may approach the courts for an order confirming his paternity (in terms s26(1)(b) of the Children's Act 38 of 2005). However, this relief is not well known or advertised by Home Affairs. Secondly, such paternity orders do not expressly instruct DHA to register the birth of the child and enter the child into the population register despite the absence of the mother. Section 10 and Form BI-24E thus remain a practical barrier to birth registration even in cases where the single father has pursued acknowledgement of paternity all the way to the courthouse.

7. Communities in Border Areas

The closer to an international border, such as Lesotho, Mozambique, Swaziland, Zimbabwe and Botswana, the more restrictive the local Home Affairs offices are in access to documentation. Applicants are often assumed to be migrants from

neighbouring countries and many persons in these areas are therefore unable to access citizenship in either country. In addition, in these remote rural areas, cultural practices, poverty, health issues and corruption often result in children's births not being properly registered.

8. Stateless Migrants: Victims of Conflict of Laws and State Succession

Conflict of laws can occur, for example, when a person is born to non-citizens in a country that only provides citizenship through descent, but one's parents' country only provides citizenship through birth on the territory. For example, a person born in South Africa to parents from Lesotho would be stateless if they cannot access South African citizenship because Lesotho only provides citizenship by birth on the territory. They may be able to access the law providing South African citizenship to those born on the territory who would *otherwise be stateless* – but a birth certificate is a strict requirement. As mentioned, many migrants have difficulty accessing this document.

State succession often results in loss of nationality; for example, persons who have ethnic origins in the seceding State are often excluded from the citizenship law of the former State. For example, many Ethiopians of Eritrean descent lost their Ethiopian citizenship following a series of citizenship law amendments after the succession of Eritrea, but also could not access Eritrean citizenship. This is a problem that persists today despite legislative changes in Ethiopia.

Statelessness in South Africa: Groups of Concern and Estimated Numbers		
Group of Concern	**No. of LHR Clients***	**Estimated Numbers****
Zimbabwean-Born Migrants with Foreign Parentage	27	Several hundred thousand in Zimbabwe; thousands may have come to South Africa, given the difficulty this group faces in accessing citizenship in Zimbabwe. http://www.fmreview.org/FMRpdfs/FMR32/73.pdf
Orphans and Vulnerable Children	9	3.7 million orphans; 150,000 children living in child-headed households http://www.unicef.org/southafrica/protection_6633.html Over 2,000 children are abandoned yearly in South Africa, according to Child Welfare (http://www.timeslive.co.za/local/article528163.ece/More-than-2-000-kids-abandoned-annually)
Unaccompanied Foreign Minors	23	No statistics exist capturing the number of unaccompanied foreign minors in South Africa, however many service providers and non-profits can attest to the significance of this population group.
Children of Migrants	28	Again, there are no statistics for this group in South Africa. However there are reports of 1.5-3 million foreigners in the country so this group is undeniably large.
Children of Single Fathers	3	1.3 million maternal orphans exist in South Africa as of 2011 http://allafrica.com/stories/201106010510.html
Victims of ID Fraud	5	Nearly 600,000 cases of duplicate IDs were identified by Home Affairs in March 2011. DHA states that 164,000 cases remain "unresolved."
Communities in Border Areas	4	Unknown numbers; conservative estimates may be thousands affected in border towns and regions close to Zimbabwe, Mozambique, Swaziland, Lesotho and Botswana, where migration and cross-border communities are common. This report provides detailed accounts of barriers to citizenship in border regions of South Africa: http://wits.academia.edu/TaraPolzer/Papers/83823/Local_Government_and_Migration_Management_in_Border_Areas_-_Challenges_and_Opportunities_for_Public_Service_Provision
Stateless Migrants	6	With estimates ranging from 1.5 to 3 million foreigners in South Africa, and 200,000 asylum seekers a year, there are surely many stateless migrants in South Africa. However, broader studies are required to gather accurate statistics on this group.

*Note that the clients listed are those being assisted by LHR's Statelessness Project. These numbers represent the proverbial "tip of the iceberg" for each group of concern captured, as demonstrated by the estimated numbers for each group in the third column.

**While the numbers in the third column, "Estimated Numbers" are somewhat alarming, it should be noted that these are groups *at high risk of statelessness* - further assessment must be done for *each individual* within these groups before persons can be confirmed to be stateless (although many may easily become stateless in the future if certain steps are not taken and thus fall under our mandate to prevent statelessness). Vital factors in determining statelessness include: access to enabling documents; a person's attempts and failures to access nationality; attitude/action/inaction of the States in question; and analysis of the applicable citizenship law for each individual.

3) The Statelessness Treaties

Current Mechanisms in South Africa

At present, the following are the limited mechanisms in place to protect stateless persons and resolve undetermined citizenship status in South Africa:

- *The Refugees Act*, which protects stateless persons who are also refugees (and who therefore would not need or qualify for protection under the statelessness conventions);
- *Section 31(2)(b) of the Immigration Act*, which allows a special application to the Minister for permanent residence for an individual or category of foreigners (such as stateless persons) for an indefinite or definite period;
- *Sections 15 and 16 of the Citizenship Act*, which allows the Minister to issue a certificate of citizenship to any persons whose South African citizenship is in doubt;
- *Collaboration with foreign consulates* in South Africa to obtain recognition as a national from migrants' countries of origin.

These provisions do not currently provide adequate protection to stateless persons. The Statelessness Conventions would guide South Africa in (a) identifying and protecting stateless persons; and (b) preventing the creation of statelessness in South Africa.

a) The 1954 Convention on the Status of Stateless Persons

The 1954 Convention Relating to the Status of Stateless Persons is the cornerstone of the international protection regime for stateless persons. It establishes the international legal status of "stateless persons" and directly addresses the practical concerns specific to stateless persons. While similar to the 1951 Refugee Convention, the 1954 Convention on statelessness was drafted to offer protection to those stateless persons who are not refugees.

The 1954 Convention provides a definition of a stateless person at Article 1: "For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law." This definition describes what is known as *de jure* stateless (stateless under the law).

The international community awaits a concrete definition of *de facto* stateless (stateless in fact) from UNHCR. The 1954 Convention does not explicitly define the *de facto* stateless, but it does acknowledge that they are in the same vulnerable situation as the *de jure* stateless: they lack the protection and recognition of any State. The 1954 Convention therefore strongly encourages States to extend the Convention's protection to *de facto* stateless persons, who it suggests are persons who voluntarily renounce their State's protection. However, the international community utilises a much broader understanding of *de facto* stateless and includes those who legally qualify as nationals of a State, but who: cannot prove their nationality; are denied consular protection; or are denied recognition as a national for discriminatory reasons.

The Convention addresses a variety of matters which have an important effect on day-to-day life such as gainful employment, public education, public relief, labour legislation and social security. In ensuring that such basic rights and needs are met, the Convention provides the individual with stability and improves the quality of life of the stateless person.

Article 28 provides that Contracting States should issue identity and travel documents to stateless persons on the territory. Article 31 states that stateless persons are not to be expelled save on grounds of national security or public order.

Given that no form of protection can replace actual nationality, Article 32 states that the Contracting State shall as far as possible facilitate the assimilation and naturalisation of stateless persons.

i. What the 1954 Convention Means for South Africa

Dedicated Protection Mechanisms

At present, no dedicated mechanism for the protection of stateless persons exists in South African law.

Ratification of the 1954 Convention will require that South Africa recognise and protect the *de jure* stateless. It will also require South Africa to decide whether to extend protection to *de facto* stateless, and if so, how to define this group. Should South Africa sign these conventions, it should consider including the *de facto* stateless. The mass migration, discriminatory citizenship practices and low levels of birth registration common on across Africa mean that *de facto* statelessness is not an issue which can be overlooked in our context; many migrants are unable to prove their nationality due to a combination of factors, such as deceased parents, lack of documentation and long periods of absence from countries of birth. In addition, African states often deny consular protection to political activists, resulting in *de facto* statelessness.[9]

South Africa will then need to develop a formal procedure to assess each applicant's claim to statelessness and to afford protection to stateless persons. Stateless status determination will involve examining the nationality legislation of relevant countries, contacting the authorities of the respective countries, assessing the individual's personal history and attempts to access nationality, and determining whether the applicant is indeed stateless. This process requires training and specialisation. Proving statelessness requires proving a negative: the lack of recognition as a national by any State. It is thus a difficult assessment to make, with dire consequences for the stateless applicant upon a negative decision. Applicants should be afforded the opportunity to testify in person through individual interviews, as in the refugee status determination procedure.

Given the fact that many stateless persons cannot obtain a valid travel document from their home country, and therefore cannot obtain a visa to enter South Africa legally, applicants for statelessness protection should be given an interim immigration document allowing them to stay in South Africa, pending the outcome of their application.

Section 31(2)(b) of the Immigration Act may provide the legal mechanism to protect stateless persons in its current form. It allows the Minister to:

> *Grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when circumstances exist which justify such a decision; provided that the Minister may –*
>
> *(i) Exclude one or more identified foreigners from such categories; and*
> *(ii) For good cause, withdraw such right from a foreigner or category of foreigners.*

Through this mechanism, the Minister could grant permanent residence, and its accompanying rights, to stateless individuals. The applications would be evaluated on a case by case basis, taking into account the special circumstances of each individual. Upon achieving permanent residence, the period of permanent residence could end either upon the stateless person acquiring an effective nationality in his or her country of origin or habitual residence, or by the person acquiring citizenship through fulfilling the naturalisation requirements in South Africa.

Identity and Travel Documents; Path to Naturalisation

For those who are found to be stateless, South Africa would have to develop and issue stateless identity and travel documents and would need to establish a pathway to naturalisation.

b. 1961 Convention on the Reduction of Statelessness

[9] See Struggles for Citizenship in Africa, Chapter 7: Excluding Candidates and Silencing Critics, by Bronwen Manby (2009).

The 1961 Convention on the Reduction of Statelessness provides guidance for states on how to draft nationality laws that ensure that statelessness does not occur in the future for persons under that state's jurisdiction. The treaty places certain restrictions on citizenship laws which a state may enact and prescribes certain clauses which a State *must* enact. At a minimum: persons will be granted a nationality under certain circumstances in which they might otherwise be stateless; loss and deprivation of nationality will not result in statelessness; and deprivation of nationality may not be arbitrary.

i. What the 1961 Convention Means for South Africa

The South African Citizenship Act (No. 88 of 1995), as amended, complies largely with the provisions of the Convention. Signature and ratification of the 1961 Convention would, however, necessitate the following changes.

Citizenship to persons born on the territory who would otherwise be stateless:

In line with the Convention, Section 2(2) of the Citizenship Act provides for citizenship by birth for children born in South Africa who do not have – or do not have the right to – citizenship in any other country. The qualification is that in order to access this right, one's birth must be registered in accordance with the Births and Deaths Registration Act (51/1992). While promoting birth registration and practically understandable, this strict requirement goes beyond the listed conditions in the 1961 Conventions (see Article 1(2)). In practice, it excludes many of the children who the provision is intended to protect – children of migrants, who face heightened barriers in having their births registered (see above, *Groups of Concern*). South Africa should reconsider this requirement, in light of the 1961 Convention, and should increase awareness of the right of children of migrants to birth registration and/or consider alternative methods of proof of birth in absence of formal birth registration.

Citizenship to persons otherwise stateless – born abroad to South African parents:

According to Article 1(4) and Article 4 of the Convention, South Africa would be required to provide citizenship to a child born on the territory of another State, to a South African citizen, if such a State precludes the child from citizenship.

On its face, our law is on compliance with this requirement. Under current legislation, persons born in other countries to a South African qualify for South African citizenship by birth. Again, a condition is that their births must be registered in accordance with the Births and Deaths Registration Act. It is unavoidable that some births abroad to South African citizens will go unregistered; this requirement may not be known or a particular State may not have a South African diplomatic mission. Late birth registration ("LBR") then becomes the only way to access South African citizenship.

Home Affairs exercises a great amount of discretion in LBR applications, with the result of either enabling or denying the applicant's right to citizenship. The 1961 Convention aims to remove discretion from the grant of citizenship to citizens' children who would otherwise be stateless, providing that "such application shall not be refused" (Article 1(4)).[10] Thus, birth registration requirements should also be relaxed for this group, in accordance with the Convention.

Safeguards in Loss:

Under Article 6 of the 1961 Convention, where the law of a Contracting State entails loss of nationality, such loss shall be conditional upon the person's possession or acquisition of another nationality. Article 8(4) requires that where deprivations are permitted, the person concerned must be allowed the right to a fair hearing by a court or other independent body.

At present our Citizenship Act falls short of this provision. While the Constitution states in Article 20 that "No citizen may be deprived of citizenship," loss or deprivation of nationality is permitted in several instances in the Citizenship Act and is either automatic or at the discretion of the Minister. While section 25 allows for an application to the High Court to review Ministerial

[10] Article 1(4) provides several conditions a state *may* impose on access to this provision, listed in paragraph (5): that an application is lodged within a certain period; that the applicant has lived in the Contracting State for a certain period prior to application; and that the person has always been stateless.

decisions, the Act should provide for a court hearing or independent body review as a matter of procedure *prior to deprivation* of nationality, rather than requiring individuals to go through the expense and difficulty of a High Court application.

Section 8(2)(b) gives the Minister extremely wide discretion to deprive nationality of a citizen "who also has citizenship or nationality of any other country" if "it is *in the public interest* [emphasis added] that such citizen shall cease to be a South African." While seemingly protective against statelessness by requiring the person concerned to already have another nationality, this provision is open to abuse by administrative interpretation of "having" another nationality. Again, due process must be protected.

Section 10 of the Citizenship Act allows the Minister to deprive a child of his or her citizenship in the case of a parent having lost his/hers (in accordance with the provisions of sections 6, 8 or 9 of the Act). Thus if the other parent does not retain citizenship, the child may become stateless. This section makes no reference to concerns of statelessness.

An amendment to Section 6 the Citizenship Act recently provided new grounds for loss of citizenship, providing that "Any person who obtained South African citizenship by naturalisation…**shall** [emphasis added] cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic does not support." This provision is troublesome, considering that 1) it applies seemingly automatically and yet 2) provides little detail on how it would be determined that a particular war is one which the Republic does not support, and 3) has no safeguard to prevent deprivation that would result in statelessness. Article 8(3)(a)(ii) the 1961 Convention provides that a grounds for deprivation of nationality on the basis of disloyalty involve either i) "an express prohibition by the Contracting State" or ii) conduct "seriously prejudicial to the vital interests of the State" – neither of which are detailed in the South African amendment to Section 6.

Safeguard in Renunciation:

Under Article 7 of the Convention, laws for the renunciation of a nationality must be conditional upon a person's acquisition or possession of another nationality. This is a safeguard which ensures that should a person renounce their citizenship in order to comply with the application procedure for the nationality of a second State, they will not become stateless should their application to the second State fail.

At present, there is room for improvement in South African legislation regarding renunciation.

Section 7(1) of the Citizenship Act allows a citizen to renounce South African citizenship before securing another. On its face, the Act does not provide a safeguard. Section 7(3) of the Citizenship Act prescribes that the minor children of a person renouncing their nationality will lose their South African citizenship when their parents renounce their own.

While Section 13 of the Act allows for an application to the Minister for resumption of South African citizenship, the Minister has discretion to accept or reject such applications with no mention of protection against statelessness.

In addition, South African citizens who voluntarily obtain another nationality after they reach 18, without first obtaining permission to retain South African citizenship, automatically lose their South African citizenship. Should the second-acquired nationality be deprived or lost in the future, such persons will be stateless until and if their application for resumption of South African citizenship is approved. In such cases, resumption should not be discretionary but a right of a previous citizen who has become stateless, in line with the spirit of the Convention.

Section 5(d) includes a requirement that persons who apply for naturalisation in South Africa, from countries that prohibit dual citizenship, renounce their other nationality before applying for South African nationality. This places such persons at risk of statelessness in the event that their application for naturalisation in South Africa is not successful. In addition, Article 7(1)(b) of the Convention states that:

the provisions of subparagraph (a) [which make permissible renunciation of nationality as long as the person concerned possesses or acquires another nationality] *shall not apply where their application would be inconsistent with the principles stated in articles 13 and 14 of the Universal Declaration of Human Rights…*(UNDHR)

Thus, renunciation should be not required where it would impact a person's right to freedom of movement (UNDHR Article 13) or right to seek asylum (UNDHR Article 14). South Africa would need to amend its legislation so that migrants or refugees applying for naturalisation are exempt from the requirement to renounce the nationality of their country of origin if it prohibits dual nationality. Such a requirement goes against the spirit of articles 13 and 14 of the UNDHR, as many migrants and particularly refugees cannot reasonably be expected to acquire proof that they have renounced their previous nationality – administrative authorities in their country may be non-functional or inaccessible, or they may be persona non-grata in their country of origin.

Foundlings:

Under Article 2 of the 1961 Convention, 'a foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.'

This may be occurring in practice when infants are abandoned with unknown parents in South Africa, but it is not explicitly provided for in current legislation. Although the Citizenship Act offers citizenship to children *born on the territory* who would otherwise be stateless (section 2(2)), no other legislation exists to protect children who are stateless. Section 4(3)(a) of the Citizenship Act, allowing children born here to qualify for naturalisation at age 18, requires inter alia that a child have *lived in South Africa from birth*.

Thus, young children born outside South Africa and/or who travel between countries remain unprotected, despite the fact that the Constitution in Article 28 protects every child's right to a name and a nationality. Implementing Article 2 of the 1961 Convention with regard to foundlings would be a step in the right direction for protecting children's right to a nationality.[11]

4) Summary

As has been recorded by Lawyers for Human Rights, and captured in this briefing paper, statelessness occurs for numerous reasons across Africa and within South Africa. South Africa can no longer turn a blind eye to this issue, which impacts both citizens and migrants alike. Given its strong human rights record, progressive Constitution and high numbers of migrants, South Africa must take the lead on the issue of statelessness. By adopting these treaties, South Africa will draw attention to the issue, will affirm its commitment to human rights and will join the minority of forward-thinking states worldwide who recognise the importance of addressing statelessness. South Africa will protect its own citizens, enhance national security as well as reduce statelessness in the region through signing and ratifying these conventions.

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[11] While this would go beyond the provisions of the 1961 Convention, given the high levels of youth migration, South Africa should strongly consider expanding its citizenship provisions to allow unaccompanied, orphaned and abandoned foreign children, who have no protection or right to claim protection from another state, to access South African citizenship, even if they were not born on the territory (thus unprotected by section 2(2) of the Citizenship Act), were not present in South Africa from birth (thus unprotected by section 4(3)(a) of the Citizenship Act), and/or their parents' nationality is known (thus leaving them unprotected by a foundling provision).