

**UNIVERSITY OF PRETORIA
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**THE RESPONSIVENESS OF THE SOUTH AFRICAN JUVENILE JUSTICE
SYSTEM IN PROTECTING STATELESS CHILDREN AGAINST SEXUAL
VIOLENCE**

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Declaration

I declare that the entirety of the work contained herein is my own original work that I am the author of, to the extent explicitly otherwise stated and referenced. I confirm that I have not previously, in its entirety or part, submitted it for obtaining any prior qualification.

21 October 2024

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My deepest appreciation goes to all those who assisted me differently.

I am forever grateful.

Abstract

South Africa is party to regional and international children's rights instruments that obligate the country to ensure the safety, protection and justice for all children who live within its boundaries. These laws give expression to the constitutional rights to equality, human dignity, life and freedom, and security of children. However, stateless children living in South Africa are still disproportionately affected.

To attain its objective, the study employs a qualitative legal research method, utilising the children's rights-based approach to address childhood statelessness guided by the principle of the best interest of the child. The statelessness in childhood is based on children's vulnerabilities and South Africa's obligation(s) in protecting stateless children under international, regional and domestic, South African child law.

Though important, the study does not comprehensively analyse the vulnerability of stateless children, nor does it study the merits of the effects of childhood statelessness and the impact it has on children intimately. However, it provides an in-depth analysis of the extent of responsiveness of the South African juvenile justice system in protecting stateless and undocumented children against sexual violence.

Put succinctly, this study therefore, highlights the responsibilities of the State in safeguarding and promoting holistic child protection at the domestic level, as an essential element of protecting the rights of stateless children. It then interrogates the sufficiency of South Africa's domestic child laws and critiques the responsiveness of the juvenile justice system in ensuring access to justice services and child protection mechanisms to prevent, mitigate and eliminate childhood statelessness.

Keywords: Children's rights, childhood statelessness, access to justice, sexual violence, best interest of the child, juvenile justice

Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and People's Rights
AIDS	Acquired Immune Deficiency Syndrome
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
BDRA	Births and Deaths Registration Act
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CGE	Commission of Gender Equality
CRBA	Child Rights Based Approach
CRC	Convention on the Rights of the Child
CRMW	International Convention on the Protection of the Rights of All Migrant Workers
CRPD	Convention on the Rights of Persons with Disabilities
CRVS	Civil Registration and Vital Statistics
CYCC	Children and Youth Care Centre
DBE	Department of Basic Education
DHA	Department of Home Affairs
DIRCO	Department of International Relations and Cooperation
DNA	Deoxyribonucleic Acid
DoH	Department of Health
DPME	Department of Planning, Monitoring and Evaluation
DRC	Democratic Republic of Congo
DSD	Department of Social Development
DWYPD	Department of Women, Youth and Persons with Disabilities
ECD	Early Childhood Development
ECHR	European Convention of Human Rights
ECN	European Centre on Nationality
ENS	European Network on Statelessness
GBH	Grievous Bodily Harm
GDP	Gross Domestic Product

HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil, Cultural and Political Rights
ID	Identity Document
IMC	Inter-Ministerial Committee
ISC	Institute of Statelessness and Inclusion
LMICs	Low- and middle-income countries
OSCE	Organisation for Security and Cooperation in Europe
ORC	Office of the Rights of the Child
PEP	Post Exposure Prophylaxis
PMG	Parliamentary Monitoring Group
PTSD	Post-traumatic Stress Disorder
SACA	South African Citizenship Act
SADC	Southern Africa Developing Counties
SAHO	South African History Online
SAMRC	South African Medical Research Council
SAPS	South African Police Service
SDG	Sustainable Development Goals
SGBV	Sexual and Gender Based Violence
SOAA	Sexual Offences Amendment Act
STI	Sexually Transmitted Infections
SVRI	Sexual Violence Research Initiative
UK	United Kingdom
UN	United Nations
UNCROC	United Nations Committee on the Rights to the Child
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHRC	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Foundation
USD	United States Dollar currency (\$)
ZAR	South African Rand currency (R)

Glossary of Terms

Access to justice refers to the individual right to have any dispute that can be resolved by application of the law to be heard and decided upon in a fair public hearing before a court, an independent and impartial tribunal, or an appropriate forum.

Best interest of the child refers to the primary consideration of the capacity, well-being, health and development in addressing the needs, special needs and desires of the child in all the elements involving the actions, decisions and matters involving them as individuals.

Caregiver refers to a/the person and/or person(s) responsible for exercising day-to-day care for a child. This includes biological parents and/or other guardians responsible for the child's care and well-being.

Caseworker refers to an individual tasked with the responsibility of providing case management services to child survivors of sexual violence and/or abuse.

Cautio judicatum solvi refers to a payment deposit secured for litigation costs.

Child refers to an individual under the age of 18 years.

Children's rights refer to the protection of children and their needs as vulnerable members of society. It specifically relates to the prioritisation of the best interest of the child as entrenched in section 28 in the Bill of Rights of the Constitution of the Republic of South Africa (1996) as well as regional and international that set out the rights of the child, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

Childhood Statelessness refers to a child who does not acquire any nationality (a bond between an individual and a country) at birth, or who circumstantially loses their nationality during childhood.

Citizenship refers to legal bonds and rights in domestic law, as acquired at the moment of birth. It encompasses the same definition as nationality attributed at birth. Citizenship also refers to an individual who obtains retroactive recognition of citizenship after their birth. In this report, citizenship does not refer to the broader meaning in political and

social science encompassing full participation in a community (*also see nationality at birth*).

De jure stateless refers to a basis where any or all the States an individual has a link to, do not recognise them as nationals albeit being residents.

De facto stateless refers to a basis where an individual has a nationality linked to a State but does not reside within that State and lacking State protection.

Early Childhood Development (ECD) refers to the process of emotional, mental, spiritual, moral, physical and social development of children from birth to nine years.

Early Childhood Services refer to a range of offerings provided to facilitate the emotional, intellectual, mental, spiritual, moral, physical and social development and growth of children from birth to nine years.

Health Worker refers to professionals such as nurses and doctors with specific training in the field of health care delivery and provision of health-based services.

Jus soli refer to a nationality granted to an individual solemnly on the basis of birth in a territory.

Juvenile Justice refers to the overall system of laws, policies, procedures, and regulations relating to child justice, governing the treatment of minor children under the age of 18 years, for the violation of laws and the provision of legal remedies that protect children in the case of situations involving violence, conflict, harm or neglect against them.

Modus operandi refers to a particular method in which something is undertaken

Nationality or citizenship from birth refers to nationality or citizenship status automatically attributed to an individual at birth, from the moment of their birth rather than acquired following an administrative process or acquired as an adult.

Nationality or citizenship by descent refers to an individual acquiring his/her nationality based on the nationality of his/her mother or father, regardless of the territory that the individual is born,

Nationality or citizenship by acquisition refers to an individual attaining his/her status by means of naturalisation through an administrative process after his/her birth, such as naturalisation, registration, declaration, option or via marriage.

Sexual Violence is not sexual desire. It is an aggressive act and refers to a wide range of activities including forced sex or rape, as well as indecent assault. It is a violent and hostile act utilised to degrade, dominate, humiliate, terrorise and control a person. Sexual violence is a pervasive invasion of a person's sense of self and infringes on their rights to bodily autonomy. It further violates the victim's sense of privacy, safety and well-being. Other forms of sexual violence include, and are not limited to, sexual slavery, sexual harassment, trafficking for purposes of forced prostitution, forced exposure to pornography, forced pregnancy, forced abortion, and virginity testing.

Stateless Person refers to an individual who is not considered as a national by any State. Notably, a stateless person may be an individual that may have never left their country of birth, crossed an international border and may have lived in the same country for the duration of their life, since birth. Some stateless persons may also be regarded as refugees or persons eligible for complementary protection. This study refers to both categories of stateless persons.

Undocumented Person refers to an individual without government issued proof of identity

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CHAPTER 1

INTRODUCTION

1.1 Background

Globally, millions of people are either stateless or at risk of being in a status of statelessness. The United Nations High Commissioner for Refugees (UNHCR) estimates that 70 000 stateless children are born each year,¹ making the effects of being born stateless notably severe.

As of mid-2022, 186 (out of 198) countries have a foundational system where identity records are stored in a digital format, and the World Bank Identification For Development (ID4G) Global Dataset (2021) indicates that approximately 850 million people worldwide are without an official identity document (ID).² The dataset further indicates an additional 1.1 billion people without a digital record of their identity and at least 1.25 billion people without identities that can be digitally verified. This is largely due to approximately 375 million people living in countries where identity records are predominantly paper based. Additionally, due to around 635 million people living in countries without technological systems to verify and authenticate identities through digital means. According to the Organisation for Security and Co-operation in Europe (OSCE), a further 270 million more people are living in countries where the availability of digitised services is unknown.³ This makes the effective administration of documentation in registering and issuing proof of identity, a particular a challenge contributing to prevalence of statelessness worldwide.

¹UNHCR 'I am here, I belong: The urgent need to end childhood statelessness' November 2015, https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG16.pdf (accessed 08 May 2023).

²World Bank's *ID4D Global Dataset 2021: Volume 1 - Global ID Coverage Estimates (English)*, (2022). World Bank Group https://documents1.worldbank.org/curated/en/099705012232226786/pdf/P176341132c1ef0b21adf11abad304425ef.pdf?_gl=1*11un7at*_gcl_au*MTMxMjE0MDA4My4xNzI2NDEzNjA3.

³Organisation for Security & Cooperation in Europe 'Principles on identification for sustainable development: towards the digital age' 10 February, <https://www.osce.org/odihr/principles-on-identification-for-sustainable-development-towards-the-digital-age> (accessed 08 May 2023).

In 2018, the International Organisation for Migration (IOM) report illustrated that, of the 258 million migrants in the world,⁴ an estimated 12 million people were specifically affected by statelessness. Most people without an ID live in Sub-Saharan Africa. Out of the 850 million undocumented people as estimated by the World Banks ID4D Global Dataset in 2021, approximately 60 per cent (510 million) of this figure accounts for the African region, largely owing to not having identity documents often due to challenges with birth registration.⁵ The report further states that approximately 4 million of the 12 million people, are migrants that were previously living in South Africa in 2017, and 309 000 of these migrants were either refugees or asylum seekers in South Africa. Notably, persons' who are not regarded as a national of any State are considered 'stateless persons', as defined by article 1(1) of the 1954 Convention, relating to the Status of Stateless Persons (1954 Convention). These statistical representations therefore demonstrate the state of poor national identification systems and its attribution as one of the prevailing causes of prevailing statelessness.

According to the Institute on Statelessness and Inclusion (ISI), childhood statelessness is often the convergence of varying factors. This includes discrimination, poor documentation, forced migration, displacement, denial of socio-economic rights and exclusion.⁶ Due to the invisibility that surrounds being stateless, people without nationality and identity often face continuous violations of their fundamental rights.⁷

This study emphasises on the importance of children's participation in the judicial system and their right to equality before the law. It outlines the primary sources that pivot towards child justice by upholding the best interests of the child, especially where the child is a victim of sexual violence. Both the United Nations (UN) Convention on

⁴IOM 'World migration report – update' International Organisation for Migration 2018, https://publications.iom.int/system/files/pdf/wmr_2018_update_international_migrants_a4.pdf (accessed 08 May 2023).

⁵J Clark, A Metz & C Casher '850 million people globally do not have an id – why this matters and what we can do about it' World Bank Blog (web blog) 06 February 2023, <https://blogs.worldbank.org/en/digital-development/850-million-people-globally-dont-have-id-why-matters-and-what-we-can-do-about> (accessed 14 September 2024).

⁶Institute of statelessness and Inclusion 'Childhood Statelessness and the Committee on the Rights to the Child' (2018) 4.

⁷JP George & R Elphick 'Statelessness and nationality in South Africa' (2013) 7 <https://www.refworld.org/reference/research/unhcr/2013/en/97594>.

the Rights of Children (CRC),⁸ and the African Charter on the Rights and Welfare of Children (ACRWC) address the premise of recognising children as bearers of rights rather than objects of protection.⁹ The element of sexual violence is, therefore, one that allows the research to add an updated dimension to the critical vulnerability of stateless children.

This study recognises the principle of accountability as a Constitutional mandate, in which the State has a duty to fulfil, protect, and respect its obligations. Thus, it holds the view that the State is accountable for childhood statelessness and that the government must bear the responsibility of being held accountable for its prevention and optimal eradication.¹⁰ Therefore, because the study addresses childhood statelessness in the context of child protection and sexual violence, it is related to the credible research conducted by Khan in 2020.¹¹ Khan's research recognises that both UNCRC and ACRWC instruments do not only provide for the right to a nationality, but equally endorse a human rights-based perspective. The instruments further endorse the "*children as bearers of rights*" lens, which is incorporated into the principles of the child's rights-based approach. This study emphasises that utilising a child rights-based approach to address statelessness is essential, and the best interests of the child ought to take precedence.

The first chapter introduces the research topic under study. It begins by outlining the background and context of childhood statelessness globally and provides a literature review on its prevalence at regional and country level. An analysis of statelessness in the context of sexual violence against children is then presented, particularly addressing child protection through the lens of juvenile justice in South Africa. It factors in a statement of the research problem, which provides a clear and concise explanation of the need for the study, as well as its aim and objective(s). It presents the research question with three sub-questions and highlights the overall significance of the

⁸UNCRC (1989), art 3(1) General Assembly resolution 44/25 https://www.ohchr.org/en/instruments_mechanisms/instruments/convention-rights-child (accessed 12 April 2023).

⁹ACRWC (1999), art 4 https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf (accessed on 08 May 2023).

¹⁰UNCRC (n 8), art 3(2)-(3) & art 6.

¹¹F Khan 'Exploring childhood stateless in South Africa' *Potchefstroom Electronic Law Journal* (2020) 1-34 <http://dx.doi.org/10.17159/1727-3781/2020/v23i0a6414>.

research. Finally, the methodology, research approach, study limitations, ethical considerations and research outline are articulated.

1.2 Literature review

Article 1 of the UNCRC identifies a child as any person aged below 18 years.¹²

Article 1 of the 1954 UN Convention relating to the Status of Stateless Persons (the 1954 Convention) defines a stateless person as one who is ‘not considered a citizen by any state under the operation of its law.’¹³ Therefore, childhood statelessness is generally understood as the non-acquisition of citizenship by infants and children. Statelessness is neither caused nor deserved by the individual affected,¹⁴ especially in the case of children. Children also do not have a choice when it comes to the place of birth,¹⁵ the actions of their parents,¹⁶ the identity of their parents,¹⁷ or the actions of the State.¹⁸

Stateless children are protected under article 7(1) of the UNCRC which states the right to a name from birth, to be registered immediately after birth and right to acquire a nationality.¹⁹ Additionally, they are protected under article 6(1)-(3) (right to a name from birth, to be registered immediately after birth and the right to acquire nationality) of the ACRWC.²⁰ A lack of an identity contributes to statelessness in childhood. In South Africa, a birth certificate is an essential requirement for obtaining citizenship.²¹ However, there remain substantial barriers to birth registration. These barriers include a lack of valid identity documents from unmarried parents (which is recognised as a

¹²UNCRC (n 8), art 1.

¹³1954 Convention relating to the Status of Stateless Persons, art 1.

¹⁴G De Groot ‘Children, their right to nationality and child statelessness’ in A Edwards & L Van Waas (eds) *Nationality and statelessness under international law* 144 (2014) 157-167 https://uniset.ca/fatca2/degroot_child.pdf.

¹⁵T Cockburn *Rethinking children’s citizenship* (2013) 125-231 <https://doi.org/10.1093/bjsw/bct099>.

¹⁶G Tesfaw & A Minaye ‘Impact of Parental Migration on Education and Behavioural Outcomes of Children Left Behind in Southern Wollo’ (2022) 32 *International Journal of Education and Literacy Studies* 122-124 <http://dx.doi.org/10.7575/aiac.ijels.v.10n.2p.122>.

¹⁷A Arkadas-Thibert & G Lansdown ‘Article 7: The Right to a name, nationality and to know and be cared for by parents’ in Z Vaghri and others (eds) *Monitoring State Compliance with the UN Convention on the Rights of the Child. Childrens Well-being: Indicators and research* (2022) 25 https://doi.org/10.1007/978-3-030-84647-3_6.

¹⁸MB Sherinda & J Klaaren ‘The South African Constitutional Court decides against statelessness and in favour of children: Chisuse v Director-General, Department of Home Affairs [2020] ZACC 20’ (2021) 1-9 <https://doi.org/10.31219/osf.io/y3r6p>.

¹⁹UNCRC (n 8), art 7(1).

²⁰ACRWC (n 9), art 6(1)-(3).

²¹Births and Deaths Registration Act 51 of 1992 sec 9(1)(5) & (6).

procedural need in the birth registration process).²² It also entails navigating the complexities and costs associated with birth registration,²³ such as DNA testing to meet the proof of paternity requirements.²⁴ The inability to register one's identity at birth plays a role in the challenges to certifying one's nationality and thus contributes to a threat to one's sense of belonging. Although Article 15 of the Universal Declaration provides that 'everyone has the right to a nationality.'²⁵ However, South African citizenship for children of non-South African citizens is not an automatic right, and therefore citizenship by naturalisation is equally not a legal right in South Africa.²⁶ The impacts of not having identity documents include barriers in access to justice, social protection schemes and obtaining affordable public health care. This often leads to a lifetime of obstacles and heightened chances of not accessing an education, healthcare, employment, and economic opportunities. The devastating effects of not being able to register an identity at birth is equally the difficulty in registering a death. The lack of a nationality and a status of statelessness relatively means one is undocumented and therefore, procedurally does not exist.

Khan, writing in 2020, highlights the importance of children being granted their rights as right bearers, irrespective of their age.²⁷ This means that although parents have the primary duty of care in the lives of their children, parents may not effectively be able to care for their children,²⁸ especially when their children are not recognised as right bearers by the state. Khan further states that when the state-approach is used to address the issue of childhood statelessness, it views children as objects of protection. Thus, suggesting the need to utilise a child-centred approach, as it views children as

²²T Chauke & T Mothapo 'Ending childhood statelessness and dismantling barriers to birth registration in South Africa' <https://africanlii.org/articles/2021-11-05/thandeka-chauketshegofatso-mothapo/ending-childhood-statelessness-and-dismantling-barriers-to-birth-registration-in-south-africa> (accessed 23 September 2024).

²³J Githuri 'What is the DNA cost price in South Africa?' 10 February 2023. <https://moneytoday.co.za/dna-test-price/> (accessed 24 September 2024).

²⁴Childrens Act 28 of 2005 sec 26(1) (a) & (b).

²⁵UDHR, art 15.

²⁶South African Citizenship Act 88 of 1995 (as amended by Act 69 of 1997) sec 4 & 5 & 6.

²⁷Khan (n 11) 3-8.

²⁸C Nyambu-Musembi & A Cornwall 'What is the rights-based approach all about? Perspective from international development agencies' (2004) 243 IDS Working Paper 20-24 https://opendocs.ids.ac.uk/articles/report/What_is_the_rights-based_approach_all_about_perspectives_from_international_development_agencies/26442688?file=48090673.

beings with rights and agency. This is particularly crucial in addressing issues concerning the protection of children.

The term 'child protection' is generally broad. In addressing child protection and citizenship laws, Townsend, Waterhouse and Nomdo in 2014, stressed the importance of child protection as an essential element of addressing the effects of violence globally.²⁹ Further, Songca and Karels also observed in 2016 that South Africa continuously reveals high child sexual abuse prevalence rates, which often result in an increase in the number of children who commit sexual offences against other children.³⁰ The protection of children from all forms of violence, and the various measures for responding to harm, are essential for addressing statelessness affecting children.³¹ Article 19(1) of the UNCRC states that:

State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child.³²

Johnson and Sloth-Nielsen acknowledge that child protection encompasses abuse and exploitation that occurs in all settings.³³ This refers to both within and outside the child's home and areas that may heighten children's risk of endangerment, such as children on the streets or in conflict with the law. Muller found that although South Africa has a National Child Care and Protection Policy,³⁴ as enabled by the Children's Amendment Act,³⁵ the implementation of the policy particularly informs the legislative strengthening

²⁹L Townsend, S Waterhouse & C Nomdo 'Court support workers speak out: Upholding children's rights in the criminal justice system' (2014) *South African Crime Quarterly* 118.

<http://dx.doi.org/10.4314/sacq.v48i1.7>.

³⁰R Songca & MG Karels 'Judicial and legislative responses to sexual crimes committed by and against children and the potential use of restorative justice practices' (2016) *Litnet Academies Journal* 348 <https://www.litnet.co.za/judicial-and-legislative-responses-to-sexual-crimes-committed-by-and-against-children-and-the-potential-use-of-restorative-justice-practices/>.

³¹C Whalen 'Article 19: The right to protection from all forms of violence' in Z Vaghri and others *Monitoring State compliance with the UN Convention on the rights of the child* (2022) 293-302. https://link.springer.com/chapter/10.1007/978-3-030-84647-3_30.

³²UNCRC (n 8), art 19(1).

³³AK Johnson & J Sloth-Nielsen 'Child protection, safeguarding and the role of the African Charter on the rights and welfare of the child: Looking back and looking ahead' (2020) 20 *African Human Rights Law Journal* 644 <http://dx.doi.org/10.17159/1996-2096/2020/v20n2a13>.

³⁴Department of Social Development 'National childcare and protection policy: working together to advance the rights of all children to care and protection' (2020)

https://www.gov.za/sites/default/files/gcis_document/202102/national-child-care-and-protection-policy.pdf (14 September 2024).

³⁵Act 38 of 2015.

of service delivery as it relates to protecting children. However, its optimal realisation still requires advanced attention.³⁶ Notably, South Africa still needs to increase its efforts in strengthening child protection systems. Duty bearers such as police services, the criminal justice system and relevant authorities, work collaboratively to improve their efficiency and effectiveness in responding to children affected by violence.

In 2014, George and Elphick sighted their belief that South Africa's citizenship laws are insufficient to address the issues of statelessness in the country.³⁷ They particularly recognise South Africa's lack of having neither a dedicated domestic framework nor having ratified neither one of the fundamental Conventions on Statelessness; namely the 1954 Convention,³⁸ and the 1961 UN Convention on the Reduction of Statelessness (the 1961 Convention).³⁹ By 2019, the United Nations provided clarity on the issue of statelessness, stating that the 1961 Convention aims to avoid statelessness at birth but does not prohibit the possibility of revoking nationality under certain circumstances, nor of retroactively granting citizenship to all currently stateless persons. The UN determined that in seeking to reduce the incidence of statelessness, the 1961 Convention requires States parties to adopt legislation that reflects prescribed standards relating to the acquisition or loss of nationality.⁴⁰ However, Songca argues that although constitutional development has over time introduced an approach to addressing issues of children that recognises their vulnerability, the issue of childhood statelessness remains unresolved.⁴¹

The African Committee of Experts on the Rights and Welfare of the Child (ACERWC Committee), noted that the right to birth registration is amongst one of the rights that

³⁶M Strydom, JM Orme & U Schiller 'The current landscape of child protection services in South Africa: A systemic review' (2020) *Social Work/Maatskaplike Werk* 383 – 386. <https://doi.org/10.15270/56-4-881>.

³⁷JP George & R Elphick 'Promoting citizenship and preventing statelessness in South Africa – A practitioner's guide' (2014) *Pretoria University Law Press 2* https://www.citizenshiprightsafrika.org/wp-content/uploads/2016/05/LHR_PractitionersGuide-Statelessness_2014.pdf.

³⁸1954 Convention (n 13) art 1(1).

³⁹1961 Convention on the Reduction of Statelessness.

⁴⁰UNHCR & Inter-Parliamentary Union 'Nationality and statelessness – handbook for parliamentarians No 22' (2014) 18 – 28. https://www.archive.ipu.org/PDF/publications/statelessness_en.pdf <https://www.unhcr.org/sites/default/files/legacy-pdf/5465e2cb9.pdf>

⁴¹R Songca 'Children seeking justice: safeguarding the rights of children offenders in South African criminal courts' 52 *De Jure Law Journal* (2019) 318 – 330. <https://www.saflii.org/za/journals/DEJURE/2019/16.pdf>

consistently appeared not to be fully implemented by states parties.⁴² On the contrary, South Africa's initial country report by the Department of Women, Youth and Persons with Disabilities (DWYPD) on the African Children's Charter, outlines that the country is undertaking measures to protect and promote children's rights to birth registration, a name, nationality as well as the preservation of identity.⁴³ The Department of Home Affairs (DHA) has equally made legislative changes in efforts to strengthen the legal framework for vulnerable children, including children born in South Africa as well as refugees and asylum seekers who have experienced difficulties in accessing birth certificates.⁴⁴

Some of the domestic legislative instruments on citizenship law include the Births and Deaths Registration Act,⁴⁵ read with the Identification Act,⁴⁶ and the South African Citizenship Amendment Act.⁴⁷ These instruments provide clarifications for citizenship by birth, descent and naturalisation, and mandate the immediate registration of a child at birth and the right to a name and nationality. Additionally, is the Alteration of Sex Description and Sex Status Act,⁴⁸ which caters for a dimension that makes provisions for a child who has undergone gender reconstructive surgery to preserve their identity by applying to have their birth register changed. The variety of these instruments and actions they prescribe are critical in affirming South Africa's stance in applying and domesticating its regional and international obligations.

The current mal-administration and inefficiencies in the judicial system equally led to cases involving juvenile first-time and repeat offenders committing sexual offence crimes against minors, being released on bail.⁴⁹ In 2019, Songa 2019 elaborated that their cases are also remanded continuously. This results in them having the liberty to

⁴²General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration art. 3, para.1. UN Committee on the Rights of the Child, 29 May 2013 <https://www.refworld.org/legal/general/crc/2013/en/95780> (accessed 14 September 2024).

⁴³Department of Women, Youth and Persons with Disabilities South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child: Reporting Period 2020 – 2013' (2013) 121. <https://dullahomarinate.org.za/women-and-democracy/reporting-on-childrens-rights/sa-govt-african-union-report-9-public-version.pdf>

⁴⁴Fragomen 'South Africa: White Paper on citizenship, immigration and refugee protection published for comment' 9 January 2024 <https://www.fragomen.com/insights/south-africa-white-paper-on-citizenship-immigration-and-refugee-protection-published-for-comment.html> (accessed 10 May 2024).

⁴⁵Act 51 of 1992.

⁴⁶Act 68 of 1997.

⁴⁷Act 64 of 1961.

⁴⁸Act 49 of 2003.

⁴⁹Songa (n 30) 316.

commit further public crimes, thus devastating more lives including those of children, such as in the *Ntaka v The State case*,⁵⁰ involving child sexual violence between two minors. Songa also alluded to the lack of precision on the effectiveness of the juvenile justice system when it comes to the age and number of victims or perpetrators of sexual offences. This is one of the root causes of not having accurate, disaggregated and reliable data on children and children affected by statelessness.⁵¹ These issues lead to the juvenile justice system being considered irresponsible at all levels - from the police station with a lack of competent officials, to the lack of competent magistrates preceding over Sexual and Gender-based violence (SGBV) cases in specialised courts targeting children.⁵² This study presents an opportunity to contribute to the lens of addressing childhood statelessness, factoring the element of sexual violence.

1.3 Research questions

The leading research question in this study is: How responsive is South Africa's juvenile justice system and access to justice in protecting stateless children against sexual violence?

The subsidiary questions are:

- a) What is the South African position on childhood statelessness?
- b) To what extent does South African domestic child law protect the vulnerability of stateless children?
- c) To what extent is South Africa's sexual offences legislation and case law protecting stateless children?
- d) What are the good practices that South Africa could adopt to bridge and close the gaps that exist in children's rights law?

1.4 Aims of the study

The study examines the responsiveness of South Africa's juvenile justice system in protecting stateless children against sexual violence. Furthermore, the study highlights

⁵⁰*Ntaka v The State* 2007 (30) SA 467 (SCA).

⁵¹Townsend et al (n 29) 76-77.

⁵²A Cooper 'Juvenile Justice in South Africa' in MD Krohn *A handbook of juvenile delinquency and juvenile Justice* Wiley Online library (2015) 65-75 <http://hdl.handle.net/20.500.11910/9384>.

South Africa's application and domestication of its international and regional obligations in addressing childhood statelessness.

More specifically, the study:

- a) Spotlights the growing concern of childhood statelessness in South Africa, the status and plight of stateless children in South Africa and provides a critique in the context of access to justice for victims of sexual violence.
- b) Reviews the extent of South Africa's application, domestication, implementation, to the international and regional obligations on childhood statelessness and highlights South Africa's sexual offenses legislation context of its protection of children affected by statelessness.
- c) Outlines the prevailing gaps that undermine the fulfilment of the rights of stateless children and provides recommendations for policy implementation and best practices of addressing childhood statelessness from various countries and regions.

1.5 Statement of the research problem

The country adheres to the realisation of international and regional conventions such as the UNCRC and ACRW. The domestication of these instruments through recognition of children's rights sits in its Constitution (1996) and various regulations. However, sexual crimes against children remains a grave concern.⁵³

The overarching problem is the staggering scourge of sexual violence against children in South Africa, whereby between 2015/16 and 2019/20, sexual violence emerged as the most frequently reported transgression to law enforcement against children below the age of 18. During this period, rape cases and sexual assault cases for children increased by an estimated 6.3% and 1.4%, respectively. According to Stats SA, females below the age of 18 were reportedly more highly likely to be victims of rape, sexual assault, and child abduction in the 2019/20 period.⁵⁴

⁵³A Delany & L October 'Preventing violence against children: A scoping review of interventions in low and middle-income countries' (2023) 2-55.
https://ci.uct.ac.za/sites/default/files/media/documents/ci_uct_ac_za/533/VAC%20Scoping%20Report_2607.pdf

⁵⁴Statistics South Africa 'Child Series Volume 2: Crime against children' (2022) 2-22
<https://www.statssa.gov.za/publications/92-02-02/92-02-022022.pdf>.

Children affected by statelessness are particularly more vulnerable to experiencing sexual violence in their lifetime. The study recognises the inadequacy of the responsiveness of child justice system in South Africa that specifically protects the well-being of stateless children against sexual violence. The protection of stateless children is a primary challenge. It is, therefore, equally prudent to also address access to justice, services and protection for stateless children who are victims of sexual crimes in South Africa.

1.6 Rationale of the study

The inspiration of this study first emanates from a scoping exercise of identifying child sexual violence research gaps in the low- and middle-income countries, based on a review of 109 research papers.⁵⁵ The report systematically identified research gaps that include the lack of addressing the impact of inefficient legislation, poor child protection systems, and the ineffectiveness of programmes aimed at reducing the perpetuation of child sexual violence.

Secondly, the study was motivated by the evidence that violence against children costs the global economy \$1.49 trillion and \$6.9 trillion (USD), annually.⁵⁶ Alarming, a 2012 analysis constituting of consolidated government reports, found that violence against children has since costed the South African economy \$15.81 billion (USD),⁵⁷ which is approximately 5% of the national Gross Domestic Product (GDP). By 2010, all forms of violence against children reportedly accounted for 4.5% of the country's GDP at \$135 billion (USD).⁵⁸ Fast forward to 2022, the cost was as high as 8% of the global GDP.⁵⁹ In detail, the non-fatal physical violence cost \$6.7 billion, sexual violence

⁵⁵J Njagi 'Scoping review to identify child sexual violence research gaps in low- and middle-income countries' *Sexual Violence Research Initiative (2024)* 3 – 12
https://www.svri.org/wp-content/uploads/2024/05/Final--CSV-Research-in-LMICs--Scoping-Review-Report_2024.pdf.

⁵⁶World Health Organisation Seventy-Fourth World Health Assembly 'Ending violence against children through health systems strengthening and multisectoral approaches' WHA 31 May 2021 A74/VR/7. (2021) 7 https://apps.who.int/gb/ebwha/pdf_files/WHA74/A74_R17-en.pdf.

⁵⁷C Hsiao, D Fry & CL Ward 'Violence against children in South Africa: the cost of inaction to society and the economy' (2018) 3 *BMJ Global Health* 1-5 <https://doi.org/10.1136/bmjgh-2017-000573>.

⁵⁸WHO 'Global status report on preventing violence against children 2020' (2020) 9.
<https://www.unicef.org/sites/default/files/2020-06/Global-status-report-on-preventing-violence-against-children-2020.pdf>.

⁵⁹UNICEF 'The violence prevention dividend: Why preventing violence against children makes economic sense' 2022
<https://www.unicef.org/media/123451/file/Violence%20prevention%20dividend.pdf> (accessed 15 September 2024).

accounted for \$2.1 billion and neglect cost \$537 million in 2015. Moreso, child welfare and expenditure on childcare and protection accounted for \$124 million.

Ending violence against all children therefore has health, social as well as fiscal and economic implications on the economy. This is because, the cost of violence against children has economic and lifelong social consequences to children's overall wellbeing.⁶⁰ Most concerning of these, is the recognition that despite the state having a constitutional obligation to provide access to basic services and enjoyment of fundamental rights to all children, stateless children are often not accounted for in key national data collection and reporting efforts by the South African government. This makes key basic services, child protection and justice interventions unaffordable, inaccessible and unreachable by stateless children affected by sexual crimes.⁶¹ The DPME in 2017 also found that addressing the problem holistically was inefficiently done by the government. Different government departments often lack purposeful integration and tend to implement strategies in silos through different funding streams.⁶²

The study also recognises that there are numerous impediments to equal access to juvenile justice and there is a lack of studies focusing on marginalised populations in low-and middle-income countries (LMICs). This research, thus, addresses the vulnerabilities of stateless children in the context of child sexual violence. It specifically examines the impact of the level of responsiveness of the juvenile justice system on stateless children's access to equal justice and protection, particularly as victims of sexual violence at childhood.

Lastly, this research is important as it intends to influence policy, inform decision-making, promote systemic transformation and facilitate practical change. It further seeks to contribute to the advancement of legal reasoning, in informing country-level

⁶⁰Save the Children South Africa 'Violence against children: the cost of inaction in our society and economy' July 2017 1-6 https://static.pmg.org.za/180515policy_Brief.pdf.

⁶¹K Hall & W Sambu 'Children's access to services' in K Hall and others (2018) *South African Child Gauge 2018*. 160.

https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/children%2527s%2520access%2520to%2520services.pdf

⁶²Department of Planning, Monitoring and Evaluation and Department of Social Development *Diagnostic Review of the State Response to Violence against Women and Children 2016*.

leadership of the urgency to address the plight of childhood statelessness in South Africa.

1.7 Methodology

The study employs a qualitative research method, utilising the children's rights-based approach (CRBA) to address childhood statelessness guided by the principle of the best interest of the child. The study highlights South Africa's application and implementation of its international and regional child law obligations. It acknowledges stateless children in the context of their protection as victims of sexual violence, through the juvenile justice system.

The qualitative research method is based on a doctrinal research design.⁶³ The doctrinal research method is purely theoretical work that involves the collection and analysis of a body of primary sources (statutes) such as case law and legislation. It is then supported by secondary sources (precedents) such as journal articles, case law and legislation. The leading objective is to describe the said body of law and how it applies to the topic under investigation.⁶⁴ This includes analysing child law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment.

This qualitative research method, therefore, complements the CRBA in that it provides a combined effort to address the problem, policy, and law reform with respect to childhood statelessness. It also effectively integrates the lens of the best interests of the child in articulating the extent of South Africa's responsiveness to stateless children's and the protection of their inherent rights.

1.8 Limitations

The limitation is that the research is qualitative in nature and does not gather and analyse any field data.

⁶³SI Ali, ZM Yossof & ZA Ayub 'Legal research of doctrinal and non-doctrinal' *International Journal of Trend in Research and Development* (2017) 493 – 494
https://www.researchgate.net/publication/316895684_Legal_Research_of_Doctrinal_and_Non-Doctrinal

⁶⁴M Nyathi 'Re-asserting the doctrinal legal research methodology in South African academy navigating the Maze' *Sabinet South African Journals* (2023) https://hdl.handle.net/10520/ejc-ilc_salj_v140_n2_a5

Secondly, the study does not address statelessness broadly and limits its focus to childhood statelessness. The study does not focus on the consequences of the limitations of childhood statelessness, such as addressing the impact of lack of documents, access to education and health care services and others. Instead, it specifically interrogates the issue of childhood statelessness within the context of sexual violence. What is critical to mention, is that difficulty in availability of information and thus limitation of existing literature on access to justice and sexual violence concerning children. This is largely due to a lack of sufficient statistical analysis on the proportion of all complaints received on behalf of child victims as it relates to the violation of their rights, with law enforcement reports. More so, is the lack of provision of recommendations nor effective remedies on addressing the plight of stateless children from domestic human rights institutions.

Thirdly, the study does not provide an in-depth interrogation of the provisions of regional and international instruments, however, outlines specific provisions and their relationship with the topic under investigation.

Lastly, the paper discusses juvenile justice system sufficiently, but with a deeper focus on elements such as access to justice, protection and services for stateless children.

1.9 Chapter outline

The study comprises of five chapters. The first chapter constitutes the introduction and contextualises the critical focus areas of the study, further detailing the methodology and limitations of the study. The second chapter provides an overview of existing domestic child laws in South Africa. The third chapter addresses sexual violence against children by addressing the limitations of the juvenile judicial system. and further reviews the sufficiency of the child justice laws. The fourth chapter highlights the best practices for improved mitigation and prevention of childhood statelessness. The final chapter presents the way forward by means of a recommendation and conclusion.

CHAPTER 2

OVERVIEW OF THE LEGAL FRAMEWORK, GOVERNING STATELESSNESS AND CHILDREN IN CONFLICT WITH THE LAW IN SOUTH AFRICA

2.1 Introduction

This chapter first provides a contextual understanding of the regulation of citizenship in South Africa. It is followed by an overview of existing domestic child laws governing statelessness in South Africa. The sub-headings in this chapter include an outline of the international law, an interpretation of regional obligations and the observations of the prevailing gaps and loopholes in the application, domestication and implementation of these existing laws. Lastly, the chapter highlights recent relevant case law involving stateless children in South Africa.

2.2 The politics of belonging: A historical context on the regulation of citizenship and statelessness in South Africa

Apartheid, which loosely translates 'to live apart' or 'apartness', was inceptioned in 1948, led by white settlers and descendants of colonisers who imposed restrictive laws and inhumanely degrading practices that exacerbated racial divisiveness across all of the country's diverse races. The harsh regime fostered mass social, economic and political exclusion and participation, as well as limitations to self-determination and restrictions to movement across ethnic populations until its abolition in 1993.⁶⁵ Prior to South Africa's democratic transition in 1994, the regime enforced the emphasis of citizenship determination on ethnicity, thus establishing a racial-segregationist rule. Verily, the white supremacist rule impacted citizenship attainment for many decades that followed.

The resultant effort declared Black people as illegal foreigners in South Africa, most particularly obligating them to obtain special official permission to enter urban areas

⁶⁵M Mariotti & F Johan 'The economics of apartheid: An introduction' (2014) 29 *Economic History of Developing Regions* 114, available at <https://www.tandfonline.com/doi/epdf/10.1080/20780389.2014.958298?needAccess=true> (accessed 18 September 2024).

that were ring-fenced and classified as 'white only' zones.⁶⁶ Although the Bantu Homeland Citizenship Act enforced the revoking of one's South African citizenship to that of their designated territory, it was later repealed by the Constitution of South Africa Act of 1993.⁶⁷ Much of the change resulted in citizenship woes,⁶⁸ that deemed people stateless and others who were later affected by statelessness at birth. Observantly, the arbitrary deprivation of nationality for Black South Africans resulted in the denaturalisation of over 8 million people.⁶⁹ Travelling between territories and cities was equally a challenge, as the right to freedom of unrestricted movement was solemnly reserved for people identified as White.⁷⁰ Judicially, this meant that people of Black descent enjoyed limited rights in comparison to their white counterparts.

On the other hand, ahead of the democratic transition, between 1948-1994, some individuals rebelled against the racist municipal laws and draconian regulations instituted by the apartheid regime.⁷¹ Those who refused to ascribe to the prescribed citizenship procedures, through their designated ethnic territories, were found to lack in the attainment of citizenship documentation. Additionally, the lack of compliance with administrative systems that recognised individuals by virtue of proof official-granted documentation meant that the absence of territory and ethnicity-based proof of documentation resulted in being deemed neither a citizen of the Republic nor of the Bantu homelands or 'Bantustans'. This therefore rendered oneself stateless. Statelessness deepened barriers to Black peoples accessing social services, social security and protections, economic opportunities and education. The disenfranchising citizenship laws were deemed grossly contrary to article 15 of the 1948 Universal Declaration of Human Rights (Universal Declaration), and it was later characterised by

⁶⁶SAHO 'The Black homeland Citizenship Act of 1970 (2014) *South African History Online* <https://www.sahistory.org.za/article/black-homeland-citizenship-act-1970> (accessed 24 May 2024).

⁶⁷Act 200 of 1993.

⁶⁸DJ Treiman 'The Legacy of Apartheid: Racial Inequalities in the New South Africa' in AF Heath & SY Chueng (eds) *Unequal Chances: Ethnic Minorities in Western Labour Markets* (2007) 420.

<https://www.semanticscholar.org/paper/The-Legacy-of-Apartheid%3A-Racial-Inequalities-in-the-Treiman/b8c891c9a2606e1730b75915c8f0839eb76c6360>.

⁶⁹B Manby 'Citizenship law in Africa: A Comparative study' *British Academy Scholarship Online* (2016) <https://doi.org/10.5871/bacad/9780197263860.003.0010>

⁷⁰K Breckenridge 'From Hubris to Chaos: the makings of the dompas and the end of documentary government' *History and African Studies Seminar* (2002)

<https://phambo.wiser.org.za/files/seminars/Breckenridge2002.pdf> (accessed 24 May 2024).

⁷¹T Lodge 'From Apartheid to democracy in South Africa. Democratic Transitions: Perspectives & Case Studies in O Grech *Democratic Transitions: Perspectives and Case Studies* (2012) 57

https://www.um.edu.mt/library/oar/bitstream/123456789/46691/1/From_apartheid_to_democracy_in_South_Africa_2012.pdf (accessed 24 May 2024).

the General Assembly resolution 37/69 A of 9 December 1982 as 'an international crime'.

Two years after the transition into the democratic dispensation in 1996.⁷² Black South Africans no longer had to carry their identity documents and, thus, were entitled to move freely within their communities and the Republic, without needing to validate their nationality and citizenship status. The principle of child protection was also adopted, whereby any child born in the country who would otherwise be deemed stateless, would be conferred South African citizenship at birth.⁷³

The outcomes of the historic injustices that were premised on the dehumanising segregation of Black people through means of holistic systematic oppression, cemented on discriminative laws and practices, still linger across South Africa today.⁷⁴ The domineering white supremacist regime ended in 1994. South Africa then adopted the democratic model underpinned by developmental principles in its claim for liberation and societal transformation. However, the country remains a paradox - still plagued by poverty, inequalities, inequities and vulnerability to discrimination and systemic violence.⁷⁵ These issues have contributed to the challenges by Black people, their families and descendants in accessing justice and protection services.⁷⁶

In the period from the late 1950s and 1970s to the early 1990s, more specifically, children were subject to an inordinate incidence of sexual violence. Sexual violence against children was not well problematised as a social issue warranting attention by the white government in townships and homelands, albeit it being considered a

⁷²H Giliomee 'Democratisation in South Africa' *Political Science Quarterly* (1995) 83 – 104 <https://doi.org/10.2307/2152052>.

⁷³ES Schmidt 'African Women's resistance to the pass laws in South Africa 1950 – 1960' *South African History Online* <https://www.sahistory.org.za/archive/african-womens-resistance-pass-laws-south-africa-1950-1960-elizabeth-s-schmidt> (accessed 24 May 2024).

⁷⁴UNHCR '30 years on, South Africa still dismantling racism and apartheid's legacy' (web blog) 17 April 2024 <https://www.ohchr.org/en/stories/2024/04/30-years-south-africa-still-dismantling-racism-and-apartheids-legacy> (accessed 18 September 2024).

⁷⁵D Francis & E Webster 'Poverty and inequality in South Africa: critical reflections' *Development Southern Africa Routledge Taylor & Francis Group* (2019) 788 <https://doi.org/10.1080/0376835X.2019.1666703>.

⁷⁶ME Montle 'Unmasking the enduring legacies of apartheid in South Africa through Phaswane Mpe's *Welcome to Out Hillbrow*' *International Journal of Applied Linguistics & English Literature* (2021) 80-83 https://www.researchgate.net/publication/357616923_Unmasking_the_enduring_legacy_of_apartheid_in_South_Africa_through_Phaswane_Mpe's_Welcome_to_Our_Hillbrow.

substantial issue in the affected communities.⁷⁷ The lack of necessary research and social welfare in apartheid homelands and townships, meant rape culture and the plight of children was not substantively documented and interventions to address the issues were not adequately put in place.⁷⁸ Thus leaving child victims vulnerable and children least unprotected.⁷⁹ By the year 2005, an estimated 400 – 500 children were being sexually abused each year. Owing to the colonial contexts, sexual violence was racialised and gendered, and racist attitudes solemnly casted Black men as perpetrators.⁸⁰ Considering that sexual violence was not a concern of the apartheid government nor the police, and the archived barriers to reporting such crimes,⁸¹ there is neither easily accessible nor readily available statistical data that can assist with determining the number of stateless children affected by sexual violence during and pre and post-apartheid era. This historical reference to South Africa has left children in a severe state of deprivation,⁸² and the effects of this impact has had compounded effects on generations of children.

Child protection legislation in post-apartheid South Africa has since been largely aimed at addressing the impact of discriminatory laws, which were propagated by a punitive welfare system.⁸³ Today, the protection of all children is safeguarded by section 28 of the Constitution (Bill of Child Rights),⁸⁴ and the government's commitment to reinforcing the promotion of children's rights has found expression in subsequent legislation, policies and related programmes.

⁷⁷E Bridger & E Hazan 'Surfeit and silence: sexual violence in the apartheid archive' *Routledge Taylor & Francis Group* (2022) 286 – 305.

<https://www.tandfonline.com/doi/epdf/10.1080/00020184.2023.2212606?needAccess=true>

⁷⁸DEH Russel 'Rape and child sexual abuse in Soweto: An interview with community leader Mary Mabaso' *South African Sociological Review* (1990) 62 – 83

<https://www.jstor.org/stable/44461184?read-now=1>.

⁷⁹S Armstrong 'Rape in South Africa: an invisible part of apartheid's legacy' *Focus on Gender* (1994) 3-5 <https://www.tandfonline.com/doi/epdf/10.1080/09682869308520009?needAccess=true>

⁸⁰E Bridger 'Apartheid's "rape crisis": understanding and addressing sexual violence in South Africa, 1970s – 1990s' *Women's History Review* (2024) 269.

<https://www.tandfonline.com/doi/epdf/10.1080/09612025.2023.2219535?needAccess=true>

⁸¹As above, (n 80) 268.

⁸²R Burger 'South Africa has made progress but deprivation still bears apartheid scars' 31 October 2016 <https://theconversation.com/south-africa-has-made-progress-but-deprivation-still-bears-apartheid-scars-66813> (accessed 18 September 2024).

⁸³M Strydom, U Schiller & J Orme (n 36) 384.

⁸⁴Childline Gauteng The South African Constitution (1996): Section 28 – Bill of Child Rights https://www.childlinegauteng.co.za/wp-content/uploads/2019/02/Legislation_Childrens_rights_Section28.pdf (accessed 12 September 2024).

Although South Africa's national government remains committed to the implementation of the provisions contained in the international and regional instruments it ratified,⁸⁵ there remains various actions that have transpired, which have found the country to be either ill-prepared in addressing injustices and harmful practices imposed on children.⁸⁶ This has resulted in a broad church of elements of the Constitution being brought to question through judgements such as the *Centre for Child Law v Minister for Home Affairs* (concerning the interests of migrant children in detention),⁸⁷ *Centre for Child Law v MEC for Education*,⁸⁸ *S v M* with Centre for Child Law as Amicus Curiae (concerning the best interests of children),⁸⁹ and *Du Toit v Ntshinghila and others case* (concerning the reasonable protection of children's privacy interests and the prevention of sexual exploitation of children).⁹⁰

2.3 No birth certificate, No future: The statistical status and analysis of statelessness amongst children

The lack of effective application of nationality laws is a contributing factor to the heightened risk of statelessness at childhood.⁹¹ Many rights of children are violated, and the undermining of stateless children's rights is a matter of critical concern.⁹² In 2019, the Scalabrini Centre in its Foreign Children in Care (South Africa) study found that 7 out of every 10 foreign children in state care in the country were unaccompanied and undocumented, lacking birth certificates, identification papers or passport.⁹³ In the following year in 2020, Save the Children estimated that at least 30% of refugees and migrants entering South Africa were unaccompanied and undocumented children. Of the 3.5 million stateless children living in South Africa, UNICEF, in its 2021 report

⁸⁵Republic of South Africa, Department of International Relations and Cooperation *South Africa Yearbook 2018/19*. (2019) <https://www.gov.za/documents/south-africa-yearbook-201819> (accessed 10 July 2023).

⁸⁶J Sloth-Nielsen 'Children's rights jurisprudence in South Africa – a 20-year retrospective' *De Juree Law Journal* (2019) 507 - 515 <https://scielo.org.za/pdf/dejure/v52nspe/04.pdf> (accessed 24 May 2024).

⁸⁷As above (n 86) 501 – 512; *Center for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T).

⁸⁸*Center for Child Law v MEC for Education Gauteng* 2008 1 SA 223 (T).

⁸⁹*S v M* 2008 (3) SA 232 (CC).

⁹⁰*Du Toit v Ntshinghila* 2016 2 All SA 328 (SCA).

⁹¹CA Batchelor 'Statelessness and the problem of resolving nationality status' *International Journal of Refugee Law* 3 (1998) 157 & 181.

⁹²J Boyden & J Hart 'The statelessness of the World's Children' *Children and Society* 239 (2007) 237- – 248 <https://doi.org/10.1111/j.1099-0860.2007.00105.x>.

⁹³Scalabrini Center of Cape Town 'Foreign Children in Care Comparative Research Report South Africa 2019' 2 July 2019 https://scalabrini.org.za/wp-content/uploads/2019/07/Scalabrini_Centre_Cape_Town_Foreign_Children_in_Care_Comparative_Report_South_Africa_2019.pdf (accessed 10 May 2024).

also established that a majority of these children were unaccompanied, abandoned and separated migrant children from various countries.⁹⁴ In the same period, the Department of Social Development (DSD) reported more than 2000 children being abandoned yearly.⁹⁵ This data highlights that the lack of and poor documentation of identities is one of the leading factors of childhood statelessness in the country.

Equal to the evident problematic global phenomenon of childhood statelessness is the staggering incidence and prevalence of sexual violence in South Africa, in which stateless children are particularly most vulnerable.⁹⁶ According to the South African Police Services (SAPS) Annual Crime Statistics for the 2019/2020 period, there were 53 293 counts of sexual offences reported, and approximately 24,000 children were reportedly sexually assaulted, nationally.⁹⁷ This data, alike data on abandoned, undocumented and unaccompanied children, does not provide information on sexual offences against children affected by statelessness.

Ultimately, one of the critical problems lies in the lack of effective implementation of applicable laws, policies and commitments at the national level. Comprehensive and optimal resourcing of national strategies to coordinate efforts to address the issues of stateless children as victims of sexual violence is currently considered lacking.⁹⁸

2.4 South Africa's application and domestication of international and regional laws on stateless children

⁹⁴UNICEF South Africa. *Annual Report 2021*.

<https://www.unicef.org/southafrica/reports/annual-report-2021>

⁹⁵Department of social development Republic of South Africa 'Revised White Paper on Families in South Africa' 18 June 2021.

https://www.gov.za/sites/default/files/gcis_document/202106/44724gon540.pdf.

⁹⁶LD Malefo 'Asylum Seekers' and Refugees' Right to Education in South Africa from 2010 to 2018' Master's thesis, University of Johannesburg, 2020 50-88 available at <https://ujcontent.uj.ac.za/esploro/outputs/graduate/Asylum-seekers-and-refugees-right-to/9912051507691#file-0> (accessed 10 May 2023).

⁹⁷South African Police Services *Annual crime report in Republic of South Africa in 12 months, April to March 2019/2020: 2020*.

https://www.saps.gov.za/about/stratframework/annual_report/2019_2020/annual_crime_report_2019_2020.pdf (accessed 24 May 2024).

⁹⁸E Pittaway, C Bell & LA Bartolomei 'Refugee women and girls in the comprehensive refugee response framework' (2017) 4-19 <http://dx.doi.org/https://doi.org/10.26190/unsworks/26399>. (accessed 18 September 2024).

South Africa has ratified several key international instruments that address every child's right to an identity and a nationality, as well as their protection against sexual violence. In essence, article 6 of the Universal Declaration specifically protects the personal identity of stateless children through its provision that 'everybody has the right to a legal identity'.⁹⁹ Additionally, article 15 (right to nationality) and article 2 (everyone's entitlement to all rights and freedoms, without discrimination) of the Declaration bear reference. The Resolution 20/4 on The Right to a Nationality: Women and Children, as adopted by the Human Rights Council on 16 July 2012, also emphasises the prevention and reduction of statelessness as responsibilities of the state.¹⁰⁰ Though not legally binding, the Universal Declaration is celebrated as the foundation of all human rights instruments. The Universal Declaration further recognises the equality of all persons before the law and their entitlement to equal protection of the law, without discrimination under article 6 and article 7.¹⁰¹

In addition to the Universal Declaration, is the reference to article 9 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW);¹⁰² article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD);¹⁰³ article 24 of the International Covenant on Civil, Cultural and Political Rights (ICCPR);¹⁰⁴ article 29 of the International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW)¹⁰⁵ and article 19 of the Convention on the Rights of Persons with Disabilities (CRPD).¹⁰⁶ This includes regional

⁹⁹UDHR (1948) art 6.

¹⁰⁰United Nations General Assembly, 16 July 2012. 20/4 The Right to a Nationality: Women and Children Human Rights Council, 20th Session. A/HRC/20/2, Chap, 1.

¹⁰¹UDHR (n 110), art 6 & art 7.

¹⁰²Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979) <https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article9> (accessed 25 May 2024).

¹⁰³International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial> (accessed 24 May 2024).

¹⁰⁴International Covenant on Civil and Political Rights (ICCPR) (1966). <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed 24 May 2024).

¹⁰⁵International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) (1990) <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers> (accessed 28 June 2024).

¹⁰⁶Convention on the Rights of Persons with Disabilities (CRPD) (2006) Retrieved from <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (accessed 28 June 2024).

conventions such as article 6 (right to a name at birth, birth registration and acquiring a nationality) of the ACRWC, which South Africa is all party to.

The recognition of personal identity under international law is a crucial milestone in enabling individuals to enjoy further protection for fundamental rights of dignity, autonomy and privacy.¹⁰⁷ This means that every individual, including children, has the right to an identity, from birth, as a means of not only asserting their existence in society but also of recognising their individuality, and selfhood. Recognising identity and nationality also plays a fundamental role in the promotion of transparency in data collection efforts and equitable access to services, facilities, and protection in their countries of residence.¹⁰⁸ Observably, the South African Human Rights Commission's (SAHRC) annual reports – to date - do not indicate sufficient statistical analysis on the proportion of all complaints received on behalf of child victims as it relates to the violation of their rights, more so, neither provides recommendations nor effective remedies on addressing the plight of stateless children.

2.4.1 The deafening silence: The 1954 Convention and the 1961 Convention

South Africa's lacking in neither signing nor ratifying either of the UN Conventions on Statelessness has impacted the adequate response to statelessness and the protection of stateless children. Both instruments serve to protect the Constitutional rights of children to a name and identity from birth, as well as rights to not be deprived of a nationality.¹⁰⁹ In particular, the 1954 Convention includes a strictly legal definition of a stateless person as a person who is not considered as a national by any state under the operation of its law. In this case, the decisions as to whether someone is entitled to the benefits of the Convention is made by each state party in accordance with its own established procedures, as with refugee status determination. Such procedures should then be age- and gender-sensitive and adjudicators should be

¹⁰⁷Child Identity Protection & Centre for Child Law 'Childrens right to identity' (infographic) <https://child-identity.org/images/countryreports/south-africa.pdf> (accessed 24 August 2024)

¹⁰⁸L Taylor 'What is data justice? The case for connecting digital rights and freedoms globally' *Big Data and Society* 4 (2017) 2-11 <https://journals.sagepub.com/doi/epub/10.1177/2053951717736335>.

¹⁰⁹Act 108 of 1996 sec 28(1)(a).

aware of causes of statelessness that particularly impact children.¹¹⁰ The 1954 Convention, is the primary international instrument that regulates statelessness and ensures that persons affected by (and at risk of) being stateless are accorded their fundamental rights and freedoms without discrimination. The 1954 Convention contains provisions that are in many respects very similar to those of the 1951 Refugee Convention, however, it excludes certain categories that are considered for an individual not be deserving or needing of protection.¹¹¹ A state acceding to the 1954 Convention is not a substitute for granting nationality to those born and habitually resident in a state's territory and therefore, no matter how extensive the rights granted to a stateless person may be, they are not the equivalent of acquiring citizenship.¹¹²

On the other hand, although the 1961 Convention aimed to avoid statelessness at birth, it does not prohibit the possibility of revoking nationality under certain circumstances, nor of retroactively granting citizenship to all currently stateless persons.¹¹³ In seeking to reduce the incidence of statelessness, rather, the 1961 Convention requires that state parties adopt legislation that reflects prescribed standards relating to the acquisition or loss of nationality.¹¹⁴ The Final Act of the 1961 Convention equally includes a recommendation, similar to the one contained in the Final Act of the 1954 Convention, encouraging state parties to extend the provisions of the Convention to *de facto* stateless persons whenever possible.¹¹⁵ In this case, *de facto* statelessness concerns persons lacking in effective nationality, whereby a person is a national under the operation of a country's laws but do not receive the rights and

¹¹⁰UNHCR *Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person* (2012). <https://www.refworld.org/docid/4f7dafb52.html> (accessed on 28 June 2024).

¹¹¹GS Goodwin-Gill 'Convention relating to the Status of Stateless Persons – 28 September 1954' (2023) <https://legal.un.org/avl/ha/cssp/cssp.html> .

¹¹²UNHCR *Nationality and Statelessness – A handbook for Parliamentarians No 22: 2005* <https://www.unhcr.org/media/nationality-and-statelessness-handbook-parliamentarians-no-22> (accessed 18 September 2024).

¹¹³UNHCR *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness: 2012* <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/105120> (accessed 18 September 2024)

¹¹⁴GR de Groot 'Children, their right to a nationality and child statelessness' *Nationality and statelessness under international law* (2014)144.

¹¹⁵UNHCR 'Objectives and key provisions of the 1954 Convention relating to the Status of Stateless Persons' 1 October 2001 <https://www.unhcr.org/publications/objectives-and-key-provisions-1954-convention-relating-status-stateless-persons#:~:text=The%20Final%20Act%20of%20the%20Convention%20recommends%20that,treatm ent%20which%20the%20convention%20accords%20to%20stateless%20persons.> (accessed 18 September 2024).

benefits of such a legal status. This includes contexts where a person is either deprived of their rights associated with their nationality or a person is unable to prove their nationality. Notably, a person is considered at risk of statelessness when they are unable to prove their nationality or have their citizenship disputed or contested. To address this, Resolution 1 of the Final Act therefore provides that *de jure* statelessness status should be provided to persons who are classified as *de facto* stateless, to ensure they have effective nationality. *De jure* statelessness is defined by the 1954 Convention as a person that is 'not considered a national of any State under the operation of its law'. However, although *de facto* statelessness affiliates an individual to a State, both statuses have their intricate challenges concerning statelessness determination processes and thus are both in need protection.

As South Africa is neither a signatory to the 1954 Convention nor to the 1961 Convention, the country has been called to accede to the conventions by the respective Committees. Namely, the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination, who have recommended that the country works towards preventing the continued occurrence of childhood statelessness and its impact on children.¹¹⁶ Observantly, there remains a heightened need to reform relevant legislation and policies towards universal birth registration and ultimately realise the elimination of the causes of childhood statelessness.

2.4.2 The missing link: The UN Convention on the Rights of the Child (UNCRC) (1989)

On 16 June 1995, South Africa ratified the UNCRC. So its obligations under article 7 of the UNCRC are such that all children in the country who would otherwise be stateless, should have the right to acquire a nationality, and that no child should be left stateless.¹¹⁷ The UNCRC further prioritises the best interests of the child, and places the responsibility of ensuring child protection services on national governments, and emphasises their duties in protecting the rights of children and safeguarding them against sexual exploitation and providing them with access to health services and

¹¹⁶UNHCR Universal Periodic Review 3rd Cycle 27th Session of South Africa

¹¹⁷UNCRC (n 8) art 7.

facilities.¹¹⁸ Most critically, the UNCRC Committee in its 2016 concluding observations, expressed deep concern regarding the state of vulnerable and stateless children in South Africa, providing recommendations to address the challenge in the country and the accumulative impact of multiple discrimination that they are subjected to.¹¹⁹

The UNCRC Committee recommended South Africa to not only eradicate structural inequality to advance rights of stateless children, but also grant nationality to all children at risk of statelessness, and pay attention to stateless children as they are at heightened exposure of violence and sexual violence.¹²⁰ The Committee recognised the lack of accurate and disaggregated data on migrant, asylum-seeking and refugee children – including unaccompanied and undocumented children, sighting the ineffective implementation of domestic laws and policies. The recommendations therefore advised on the expedition of timeous delivery of child protection services to such children and ensuring the development and implementation of protocols to ensure their registration and issuance of identity documents as well as access to basic services and protection from violence.¹²¹ Notably, The Committee, further encouraged civil society and non-profit organisations be provided adequate resources to support by national government to fulfil its responsibilities in statutory service delivery for child protection and welfare.¹²² Therefore, this means South Africa has a standing obligation to ensure that no child is subjected to the risks of being stateless.

The country does not have a mechanism for the coordination, collaboration and mainstreaming of children's rights through such a holistic framework. This makes monitoring of the effective implementation of South Africa's obligations under the UNCRC and implementing general recommendations slightly challenging. Therefore,

¹¹⁸UNICEF 'Summary of the UN Convention on the rights of the child'. https://www.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_summary-1.pdf (accessed 10 May 2024).

¹¹⁹Concluding observations on the second report of South Africa, CRC Committee (30 September 2016), UN Doc CRC/C/ZAF/CO/2 (2016) https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2019/03/UNCRC_Concluding_Observations_7Oct2016.pdf .

¹²⁰As above (n 120) 6-9.

¹²¹As above (n121) 19.

¹²²As above (n 122) 4.

there rests a need for improved monitoring of the complaint's mechanisms for children-related issues in the country.¹²³

2.4.3 Best interest of the Child and The African Charter on the Rights and Welfare of the Child (ACRWC) (1990)

Apart from the UNCRC, South Africa ratified and adopted the ACRWC in 2000. Both the UNCRC and the ACRWC provide for the right of every child to 'acquire a nationality' and urge state parties, including South Africa, to grant children who would otherwise be considered stateless the right to obtain the nationality of their country of birth, irrespective of the nationality of their parents.

In 2018, roughly eight years after South Africa ratified the ACRWC in 2000, the African Committee of Experts on the Rights and Welfare of the Child (ACRWC Committee) issued General Comment Number 5 on state party obligations under article 1 of the ACRWC, which addressed the strengthening of systems for child protection by institutionalising measures to holistically address the needs of children at risk of statelessness and their adequate protection against sexual violence.¹²⁴ As such, the ACRWC Committee in its Concluding Recommendations report advised that South Africa grant nationality to migrant children as well as remove barriers to birth registration and requirements for documents to register. This being having learnt that foreign children born to undocumented migrant women and unaccompanied foreign children without asylum claims do not have birth certificates, thus making the children stateless when they attain majority. The Committee also advised the country to extend fathers and families that have custody of a child to make a declaration of birth and

¹²³UNICEF 'National human rights institutions (NHRIs) Series: Tools to support child friendly practices: Child friendly complaint mechanisms' https://www.unicef.org/eca/sites/unicef.org/eca/files/2019-02/NHRI_ComplaintMechanisms.pdf (accessed 15 August 2024).

¹²⁴African Committee of Experts on the Rights and Welfare of the Child 'General Comment No. 5 on State Party Obligations under Article 1 of the African Charter on the Rights and Welfare of the Child (ACRWC) on Strengthening Systems for Child Protection' (2018) <https://africanlii.org/akn/aa-au/doc/general-comment/acerwc/2018/general-comment-no-5-acerwc/eng@2018-10-01> (accessed 23 September 2024).

make birth registration free, having found that only mothers could make a declaration of birth and there were penalties and fees applied to birth registration in South Africa.¹²⁵

Rightfully, the effective implementation of article 6 (right to a name and nationality) of the ACRWC, rests on the optimal realisation of observing the UNCRC cardinal principles of children's rights, such as non-discrimination, the best interests of the child, the right to life and the right to be heard and participation. Moreso, article 4(1) of the ACRWC makes provision for the best interest of the child as being of primary consideration in all actions concerning the child. The ACRWC Committee found that the attribution, change and regulation of the name of a child should always be within the confines of respecting the best interests of the child. South Africa's serving in the best interests of the child is a constitutional imperative, under section 28(2) of the Constitution, and its domestication and applications of the ACRWC and the implementation of the recommendations the ACRWC Committee, signify the country's commitment to optimally addressing the needs of vulnerable children. Although a lot more transformation-centric actions and legislative reforms are tris needed and creating a conducive legal environment for children affected by Statelessness to thrive.

2.5 The right to an identity and nationality: South Africa's domestic child laws on stateless children

South Africa's legal framework addresses violence against children and the prevention, protection and redress for victims of violence.¹²⁶ It also makes provisions for punishment, prosecution and conviction for perpetrators and perpetrators of violence against children.¹²⁷ However, it is critical to note that procedures relating to stateless children are not explicitly addressed across these frameworks. This leaves stateless children at a loss of reference for a single legal instrument that guides the adequate

¹²⁵African Union 'Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Report on the Status of implementation of the African Charter on the Rights and Welfare of the Child'

<https://www.acerwc.africa/sites/default/files/2022-06/South-Africa-concluding-Observations.pdf>

¹²⁶L Jamieson & S Matthews 'Laws and policies to respond to violence against women and children in South Africa' (policy brief) Childrens Institute University of Cape Town, 2022 1-6 https://ci.uct.ac.za/sites/default/files/media/documents/ci_uct_ac_za/533/laws_and_policies_policy_brief_a4.pdf.

¹²⁷Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; Criminal Procedures Act 51 of 1977.

procedures and resolve in *all* matters pertaining to them. This also results in the uptake of strategic litigation by civil society and law clinics representing stateless children and an emergence of new relevant case law, to assist in addressing the critical matters affecting stateless children.

Moreso, South Africa is found wanting in the setting of a regulating framework on childhood statelessness. This said, three key domestic laws governing citizenship are reviewed below and interrogated with respect to their sufficiency in promoting access to justice for children affected by childhood statelessness as well as protecting stateless children against sexual violence. Namely, the Constitution (1996), the Children's Act,¹²⁸ as well as the South African Citizenship Act.¹²⁹ These will be reviewed in the context of the Children's Justice Act,¹³⁰ the Refugees Amendment Act,¹³¹ and the Immigration Amendment Act¹³²

2.5.1 The Constitution of the Republic of South Africa Act 108 of 1996

Section 28(3) of the Constitution (1996) defines a child as 'any person under the age of 18 years' and South Africa has a constitutional obligation to protect all children, by virtue of its ratified International Treaties and Conventions.¹³³ More specifically, the Constitution promotes the protection of stateless children, through the recognition of universal rights to an identity, acquiring a nationality, and not being left stateless. It realises this through its provision on the right to common citizenship to 'everyone' living within the territory of the Republic, under section 28 (1) (which provides for protections to the rights of children to a name and a nationality from birth, access to basic social services, and protection from abuse and maltreatment).¹³⁴ The Constitution ascribes its rights to 'everyone', with the condition of some of its privileges being reserved only for its citizens. As a citizen, one is therefore, entitled to live in any area of the country, choosing a trade and profession, as well as entering and exiting the country freely, with the possession of a valid South African birth certificate, identity document and passport. However, full enjoyment of a majority of these rights is still only enjoyed by

¹²⁸Act 38 of 2005 (as amended in 2010).

¹²⁹Act 88 of 1995 (as amended by Act 17 of 2010).

¹³⁰Act 75 of 2008.

¹³¹Act 130 of 1998.

¹³²Immigration Amendment Act 3 of 2007 (as amended 2014).

¹³³Act 108 of 1996, sec 28(3).

¹³⁴Act 108 of 1996, sec 28(1).

individuals with valid citizenship status, and those possessing applicable identity documentation.

Section 28(2) of the Constitution extends to the best interests of the child and makes no distinction between a child that is undocumented and a child that has a valid name assigned at birth and the legal certification of nationality and citizenship.¹³⁵ In the context of access to justice, section 9 of the Constitution equally recognises equality before the law,¹³⁶ and section 28(2)(h) specifically makes provision for the assignment of a legal practitioner to the child, at the expense of the State in civil proceedings involving a child.¹³⁷ Section 170A of the Constitution, further facilitates and encourages children's participation in the justice system by giving evidence freely,¹³⁸ whereby the Childrens Act under section 28 protects the view points of the child in their participation,¹³⁹ and the right to a fair trial as provided for under section 28(2) of the Criminal Procedure Act as it concerns child justice.¹⁴⁰ These legislative provisions further applied in alignment with the Children's Justice Act.¹⁴¹

2.5.2 South African Citizenship Act 88 of 1995 and the Births and Deaths Registration Act 51 of 1992

There are various ways in which a child can become stateless, such as through loss of birth registration records and certification linking a child to a particular country. This can cause them to be considered undocumented and, thus, become at risk of childhood statelessness. The South African citizenship and migration legislation is considered to being multilayered and likened by government to being conflicting with each other and weighted as relics of the colonial era— thus making its implementation complicated and often challenging.¹⁴²

¹³⁵Act 108 of 1996, sec 28(2).

¹³⁶Act 108 of 1996, sec 9.

¹³⁷Act 108 of 1996 of sec 28(1)(h); T Boezaart & DW de Bruin 'Section 14 of the Children's Act 38 of 2005 and the child's capacity to litigate' De Jure Law Journal (2011).

<https://www.saflii.org/za/journals/DEJURE/2011/25.pdf>

¹³⁸Act 108 of 1996, sec 107A.

¹³⁹Act 32 of 2005, sec 28.

¹⁴⁰Act 51 of 1977, sec 28(2).

¹⁴¹Act 75 of 2008.

¹⁴²Government of South Africa 'Minister Aaron Motsoaledi: Release of Final White Paper on Citizenship, Migration and Refugee Protection' 17 April 2024 <https://www.gov.za/news/media-statements/minister-aaron-motsoaledi-release-final-white-paper-citizenship-immigration> (accessed 10 May 2024).

According to the South Africa's Immigration Regulations (2014),¹⁴³ and the SACA, there are two key cases considered in granting citizenship at birth, to migrant children. Firstly, a child that is born in South Africa to a South African parent and a non-South African parent obtains South African citizenship at birth. Secondly, a child born in South Africa to non-South African parents also qualifies for a South African citizenship at birth.¹⁴⁴ Both cases have not always been the case,¹⁴⁵ and the legal reform particularly follows the Constitutional Court Ruling on the *Nandatu* case,¹⁴⁶ that recognises the vulnerabilities that migrant children are exposed to and the rights of migrant children to a family life in South Africa. Positively, the SACA currently contains progressive provisions aimed at assisting stateless children, in that such children may be issued South African citizenship in the absence of any other nationality or upon reaching 18 years.¹⁴⁷ Above all an individual can be recognised as a citizen by birth, descent and naturalisation. However, citizenship by birth and descent are legal rights reliant on proof of birth and parentage, whereas birth by naturalisation is considered a privilege and not a legal right, and it may, therefore be granted or refused by the Minister of Home Affairs. This often requires a fee for certification of citizenship to be issued.

There are some pitfalls that remain, however. In the absence of regulations on the application of the aforementioned progressive provisions, implementation of the SACA is impacted.¹⁴⁸ Moreso, the SACA fails to address unaccompanied migrant children who are deemed stateless, in that it does not provide them any explicit protections.¹⁴⁹ The SACA also does not adequately address the issue of discrimination, whereby

¹⁴³Immigration Amendment Act 3 of 2007;

https://www.dha.gov.za/images/final_Immigration_Regulations_2014_1.pdf (accessed 10 May 2024)

¹⁴⁴South African Citizenship Act, sec 2; <https://chrisfick.co.za/new-deal-for-children-for-foreign-parents-born-in-south-africa/#:~:text=The%20Constitutional%20Court%20recently%20ruled%20that%20children%20born,S,ection%20of%20the%20South%20African%20Citizenship%20Act.> (accessed 10 May 2024)

¹⁴⁵E Fokala 'The Adverse Effect of Immigration laws on a migrant child's right to family life: A reminder of the South African Nandutu Case' (2022) *Nordic Journal of Human Rights* 568-583 <https://repository.up.ac.za/handle/2263/91523?show=full>.

¹⁴⁶*Nandatu v Minister of Home Affairs* 5 2019 SA 325 CC.

¹⁴⁷Act 88 of 1995, sec 2(2) & sec 4(2).

¹⁴⁸Scalabrini Institute for Human Mobility in Africa 'Statelessness of migrant children in South Africa and the impact and opportunity for social workers' (web blog) 1 September 2024

<https://sihma.org.za/Blog-on-the-move/stateless-of-migrant-children-in-south-africa-and-the-impact-and-opportunity-for-social-workers> (accessed 23 September 2024).

¹⁴⁹National Inter-Agency Working on Separated and Unaccompanied Minors 'Submissions on the Publication of the White Paper on citizenship, immigration and refugee protection: Towards a complete overhaul of the migration system in South Africa' <https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2024/02/National-Inter-agency-working-group-NIAWG-Submissions-on-the-White-Paper.pdf> (accessed 23 September 2024).

favourable provisions are constrained by restrictive birth registration requirements of the BDRA which can lead to statelessness.

Alarming, despite the notable legislative gaps and implementation bottlenecks, the recent 2023 White Paper,¹⁵⁰ sought to repeal the SACA, outlining claims that more stringent criteria for citizenship is required, despite the existing sections 2(2), 2(3) and 4(3) safe guarding stateless children born in South Africa to refugee, migrant or stateless parents.¹⁵¹ The White Paper further recommended the repealing of the BDRA, as it sights the interpretation of section 28 of the Constitution, being extended to *all* children born in South Africa and thus this broach reach being considered “*too wide*”. Verily, these changes would further exacerbate statelessness and deepen exclusion thus further perpetuating the marginalisation of *all* vulnerable children. Critically, the evident gaps in the said legal instruments can be considered problematic as they affect progressive policy implementation and overall domestication of regional obligations.

Arguably, it can be alluded, to some extent, that the South African legislative framework perpetuates childhood statelessness. There lies a noticeable need for a regulation that provides a clear guide, most particularly on matters pertaining to unaccompanied migrant children and all vulnerable children affected by statelessness. By doing so, the Act would enable the South African government to comply with the obligations of the UNCRC, and the recommendation in General Comment 6 of the Committee on the Rights of the Child.

2.5.3 The Refugees Amendment Act 11 of 2017

The Refugees Amendment Act has had significant implications for child statelessness, yet it has been critiqued for its insufficiencies in addressing the issue comprehensively. Arguably, while the Amendment Act has introduced specific measures to streamline the asylum process and offer some protection to undocumented migrants, it still falls short in specifically safeguarding the rights of stateless children. The Act also does not provide clear procedures or protections for children who are born in South Africa to undocumented or stateless parents, thereby leaving these children at risk of remaining

¹⁵⁰White Paper on Citizenship, Immigration and Refugee Protection (2023).

¹⁵¹Act 88 of 1995, sec 2(2), 2(3) & 4(3).

stateless. Additionally, the lack of specific provisions for the registration and naturalisation of stateless children perpetuates their marginalisation and exclusion from essential services such as education and healthcare. As a result, there is a pressing need for further amendments to the legislation that explicitly address the unique vulnerabilities of stateless children, ensuring their right to nationality and protection under international human rights standards.

2.6 No nationality, no rights and no protection: A reflection of case law highlighting stateless children

2.6.1 *Mulowayi v Minister of Home Affairs, 2020*

The *Mulowayi* case addressed emerging issues pertaining to the country's citizenship regime, particularly with respect to the manner that it addressed people affected by statelessness. People affected by childhood statelessness are required to navigate complex administrative processes that prevent them from enjoying their rights. Access to obtaining healthcare, medical services, and education become difficult in the absence of an identity document. The court found that not only was regulation 3(2)(a) a resultant error, but was equally considered *ultra vires*, irrational, and that its promulgation was inconsistent with section 238(a) (an executive organ of state in any sphere of government may, delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed) of the Constitution (1996) and the Promotion of Just Administrative Justice Act,¹⁵² therefore deeming it invalid.

Furthermore, the interplay between section 2(2) of the SACA was observed through the amendment of the SACA in 2010, which restricted the right to citizenship under its section 2(3) to those who have reached the age of majority.¹⁵³ Prior to 2010, South African citizenship by birth would be immediately granted to any child born of a permanent resident. This particular route to citizenship was deemed to be in breach of one's constitutional right to nationality, as it was considered not being in accordance with the right of the child to a nationality as set out under section 28 (2)(a) of the

¹⁵²Act 3 of 2000.

¹⁵³Act 88 of 1995, sec 2(2) & sec 2(3).

Constitution.¹⁵⁴ Additionally, the regulation contradicted with article 7 of the UNCRC, and the affirmations General Comment 2 of the ACRWC Committee on article 6 of the ACRWC,¹⁵⁵ regarding State parties not making children wait until reaching the age of majority (18 years) to obtain citizenship, where the General Comment is not only limited to the application of the recommendation to stateless children, but equally to children at risk of statelessness.

Presently, the SACA permits this and goes against the recommendations of the ACRWC Committee. Therefore, the act of denying children immediate right to citizenship and nationality at birth goes against the spirit and purpose of article 6 of the ACERWC and it does not promote the best interest of the child, thus constituting a violation of the Charter and the infringement of children's rights. Indeed, if a child must wait until reaching the age of majority, in order to be conferred citizenship by application, they would no longer be a child. This goes against the provisions of the definition of a child as provided by the UNCRC and the Constitution (1996), in respect to every child's right to registration of birth as well as acquisition of identity and nationality.

2.6.2 *Minister of Home Affairs v DGLR*

In 2012, the ACRWC Committee specifically recognised the heightened risk of the vulnerability of stateless children and their susceptibility to sexual exploitation, sexual assault and sexual violence, including being subjected to precarious experiences such as human trafficking and harmful cultural practices and abuses such as early and forced child marriage.¹⁵⁶ It further recognised scenarios like those observed in the Khoza case. The Khoza case, in respect of the late registration of birth and in the same case at the

¹⁵⁴Act 108 of 1996, sec 28(2)(a).

¹⁵⁵General Comment No 2 on Article 6 of the African Charter on the Rights and Welfare of the Child: a right to a Name, Registration at Birth and to Acquire a nationality. Doc no ACERWC/GC/02 (2014) 16 April 2012 [92]; African Committee of Experts on the Rights and Welfare of the Child, Institute for Human Rights and Development in Africa (IHIDRA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent Kenya v The Government of Kenya, Decision No, 002/Com/2009, 22 March 2011 [42].

¹⁵⁶UNHCR Experts of the Committee on the Rights of the Child congratulate South Africa on significant progress made on birth registration, ask about efforts to solve child mortality and nutrition and forced marriage' 25 January 2024 <https://www.ohchr.org/en/news/2024/01/experts-committee-rights-child-congratulate-south-africa-significant-progress-made> (accessed 23 September 2024).

Mulowayi case, the Nubian Childrens case,¹⁵⁷ set the precedence on the way State parties ought to address issues of acquisition of nationality at birth. It noted the strong and direct relations between birth registration and nationality, in particular ruling against domestic customs that require children to wait until the age of 18 years, before being granted citizenship.¹⁵⁸ Section 2 of the Births and Deaths Registration Act (BDRA) 51 of 1992 is applicable to South African citizens and extends to those who sojourn permanently or temporarily in the country. Section 9 of the BDRA refers to any child born alive, irrespective of the nationality of the parents, where notice of birth is legally required to be documented within 30 days of the birth having taken place.

The ACRWC Committee also affirmed this position through General Comment 2 on article 6. In 2014, the Committee recognised the way State parties are not fully implementing the recommendations addressing children's right to birth registration and expressed their concern over the low rate of birth registration, citing the millions of children that go unregistered each year. In the previous year, the UNICEF report in 2013, revealed that Sub-Saharan Africa has the lowest rates of birth registration, stating that an estimated 230 million children under the age of five do not have their birth registered, and an approximate 20 million children in the region are without a birth certificate. Despite South Africa having a slightly more advanced civil registration system to record births, its birth certification rate was projected at 90% by age five (5) by 2011,¹⁵⁹ and children born in rural and remote areas, abandoned infants, children separated from their parents and children of migrants are specifically at heightened risk of being born stateless.

South Africa's responsibility to delivering on the provisions of the ACERWC, fall short in fully committing to the prevention of statelessness, particularly in its implementation of article 6(3) (which mandates the registration of every child immediately after birth) and article 6(4) (which ensures that children acquire the nationality of the state in which they

¹⁵⁷E Fokala & L Chenwi 'Statelessness and Rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' *African Journal of Legal Studies* 6 (2014) 357 -373 https://brill.com/view/journals/ajls/6/2-3/article-p357_10.xml.

¹⁵⁸Scalabrini Institute (n 148).

¹⁵⁹N Nannan, R Dorrington & D Bradshaw 'Completeness of birth registration in South Africa 1994 – 2011' (2019) 468 <https://iris.who.int/bitstream/handle/10665/325758/PMC6593331.pdf?sequence=1> (accessed 18 September 2024).

are born if they are otherwise stateless) of the ACERWC.¹⁶⁰ In observation of the *DGLR case*, as in the *Mulowayi case*,¹⁶¹ there exists a clear dis-harmonisation of the basic principles enshrined in the ACERWC and other human right treaties in respect of the contrasts and conflicts in domestic nationality laws. Of importance also is the observation that there are no regulations that set out how a stateless person or one such at risk of statelessness can go about making an application for citizenship under section 2(2) of the SACA.

The judgement also passed in *N and Others v Director General: Department of Home Affairs and Another* by the Supreme Court of Appeal held that the DHA had to avail regulations providing for how stateless persons can make an application under section 2(2) of the SACA. Since the order passed over five years ago, the DHA has not complied with the Court order.¹⁶² This is a lack of consideration of the Committee on RWCs General Comment 2 recommendation, particularly in its expectations to State parties to address outdated and deficient laws and ensure that they are not only aligned to the required standards through adequate legislative reform, but equally in attaining inspiration from the best practices of other State parties in addressing stateless children through observation of the best interests of the child and challenges to accessing rights, including the right to access to justice and adequately optimal child protection

¹⁶⁰ACERWC, art 6(3) & 6(4).

¹⁶¹*Mulowayi v Minister of Home Affairs* 11 [2020] ZACC.

<https://www.saflii.org/za/cases/ZACC/2020/11.html> (accessed 26 June 2024).

¹⁶²*Minister of Home Affairs v DGLR* [2016] 1051/2015 (Supreme Court of Appeal of South Africa).
Registrars Myburgh.

CHAPTER 3

ACCESS TO JUSTICE FOR SEXUALLY VOILATED STATELESS CHILDREN

3.1 Introduction

The chapter focuses on sexual violence and access to justice as it concerns stateless children. It first highlights the state of sexual violence and its effect on children affected by statelessness. It then explores the juvenile justice system and child protection of stateless children affected by sexual violence in South Africa. Lastly, the chapter addresses the challenges and limitations stateless children face in accessing justice. The chapter concludes with a critical review on the sufficiency of the juvenile justice system and its laws in responding to the plight of stateless children in South Africa.

3.2 Sexual violence and the vulnerability of stateless children and children at risk of being stateless in South Africa

In many cases, sexual violence begins at childhood or adolescence, and it often takes place within a variety of settings, including the home, community, and in schools. In 2013/14, an estimated 29% of all sexual offence cases reported to law enforcement agents involved children below the age of 18 years, with approximately 51 cases of child sexual victimisation reported each day.¹⁶³ Almost a decade ago, in 2015, there were an estimated national total of 355 000 sexual abuse cases reported amongst 15 – 17 year old minors, where girls were found more likely than boys to be victims of coerced penetrative sexual intercourse,¹⁶⁴ and more boys than girls to being affected by non-penetrative sexual abuse such as pornography, unwanted touching and coerced oral penetration.¹⁶⁵ The perpetuation of sexual violence against children was further substantiated by Meinck and others, who found that approximately 56% of children report physical abuse and almost 14,8% report sexual abuse and harassment

¹⁶³South African Police Services: Crime Statistics April 2023 – March 2014. Pretoria: SAPS 2014

¹⁶⁴R Jewkes et al 'Relationship between single and multiple perpetrator rape perpetration in South Africa: A comparison of risk factors in population-based sample' BMC Public Health Journal (2015) 4-8 <https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-015-1889-9> .

¹⁶⁵LM Ritche et al 'A longitudinal perspective on boys as victims of childhood sexual abuse in South Africa: Consequences for adult mental health' in *Child Abuse & Neglect - ELSEVIER Journal* (2018) 2-10 <https://doi.org/10.1016/j.chiabu.2018.07.016> .

by their care givers, teachers or relatives in their lifetime.¹⁶⁶ Jewkes and others had also earlier in 2010 found that 39% of girls compared to 16% of boys have experienced sexual violence before the age of 18 years,¹⁶⁷ making violence against children a topical issue of grave concern irrespective of the sex and gender of the child.

Between 2015/16 and 2019/20, sexual violence emerged as the most frequently reported transgression against children. During this period, rape and sexual assault cases for children increased by an estimated 6.3% and sexual assault cases by 1.4% respectively.¹⁶⁸ The Optimus study by the South African Medical Research Council (SAMRC) in 2018 found that of the 9 717 adolescents aged 15 – 17 years interviewed in select schools nationally, approximately 34% (3303) of girls and 37% (3595) of boys have reported to having experienced sexual violence by the age of 18.¹⁶⁹

According to the World Health Organization in 2021, at least one (1) out of two (2) children (or one billion children) aged 2-17 years are affected by violence each year.¹⁷⁰ Tragically, every five minutes a child dies as a result of violence.¹⁷¹ Moreso, approximately one (1) in three (3) girls globally (around 736 million) devastatingly experience sexual abuse before the age of 18 years.¹⁷² Observantly, sexual violence in the lives of adolescent girls remains pervasive worldwide.¹⁷³ Statistics South Africa in 2024, reflected that females below the age of majority (18 years), were reportedly

¹⁶⁶F Meinck et al 'Physical, emotional and sexual adolescent abuse and victimisation in South Africa: Prevalence, incidence, perpetrators and locations' *National Library of Journal of Epidemiology and Community Health* 912 <https://jech.bmj.com/content/jech/70/9/910.full.pdf>.

¹⁶⁷RK Jewkes, K Dunkle & M Nduna et al 'Associations between childhood adversity and depression, substance abuse and HIV2 incident infections in rural South African youth' (2010) 34 *Child Abuse & Neglect - ELSEVIER Journal* <https://doi.org/10.1016/j.chiabu.2010.05.002> .

¹⁶⁸SAPS (n 163).

¹⁶⁹CL Ward et al 'Sexual violence against children in South Africa: A nationally representative cross-sectional study of prevalence and correlates' *Lancet Club Health Journal* (2018) 791 <https://journals.co.za/doi/epdf/10.7196/SAMJ.2018.v108i10.13533> .

¹⁷⁰WHO 'May 2021 at the 74th World Health Assembly Member states adopted the Resolution WHA74.17 on Ending violence against children through health systems strengthening and multisectoral approaches'(infographic) https://cdn.who.int/media/docs/default-source/documents/child-maltreatment/infographic-web.pdf?sfvrsn=d14901c0_3 (accessed 10 September 2024).

¹⁷¹R Kranenburg 'Preventing violence against children' <https://www.who.int/activities/preventing-violence-against-children> (accessed 10 September 2024).

¹⁷²WHO 'Violence Against Children' 22 November 2022 <https://www.who.int/news-room/fact-sheets/detail/violence-against-children> (accessed 10 September 2024).

¹⁷³WHO 'Violence against women prevalence estimates, 2018' (2021) 17-39. <https://iris.who.int/bitstream/handle/10665/341337/9789240022256-eng.pdf?sequence=1> (accessed 10 September 2024).

more likely to having been victims of rape, sexual assault, and child abduction in the 2019/20 period.¹⁷⁴

Sexual violence has a significant negative impact on the overall health of children. The risk of a child being coerced into non-consensual sexual intercourse or relations increases the risk of their exposure to danger.¹⁷⁵ In the case of a girl-child, the potential reproductive and sexual health consequences and risk factors are tripled.¹⁷⁶ This includes unwanted pregnancy, sexually transmitted infections (STIs), HIV/AIDS, early or increased sexual involvement, and exposure to multiple mental health consequences of sexual violence with long-lasting psychosocial effects.¹⁷⁷ In order to cope with the physical and mental consequences of their experiences, child victims of sexual violence need to be provided with comprehensive, gender-sensitive health services and responsive care to aid their recovery.¹⁷⁸

In addition to immediate health care, there is need for child-focused and rights based support that includes a cocktail of early intervention, prevention, statutory and casework-orientated services that are not limited to psychosocial services, treatment for injuries, free legal aid to ensure efficient access to justice, holistic child protection and after-care services in child welfare.¹⁷⁹ In the cases of stateless girl children who are victims and survivors of sexual violence, moreover, is the added need of including comprehensive paediatric care and integrated treatment services such as HIV, STI and pregnancy testing, free access to hormonal contraceptives and abortion services, as

¹⁷⁴South African Police Service Annual Crime Report 2018/2019.

<https://www.saps.gov.za/services/crimestats.php> (accessed 12 May 2024).

¹⁷⁵Ward et al (n 169) 66-69.

¹⁷⁶KM Devries & F Meink 'Sexual violence against children and adolescents in South Africa: making the invisible visible' (2018) 118. [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(18\)30106-2/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(18)30106-2/fulltext) .

¹⁷⁷Al Ajayi & HC Ezegebe 'Association between sexual violence and unintended pregnancy among adolescent girls and young women in South Africa' *BMC Public Health* (2020) 2-6 <https://doi.org/10.1186/s12889-020-09488-6>.

¹⁷⁸A Diallo, MV Uribe & D Vapore 'How can gender-sensitive and responsive care measurement improve health care?' (World Bank web blog) 06 November 2023 <https://blogs.worldbank.org/en/health/how-can-gender-sensitive-and-responsive-measurement-improve-primary-health-care#:~:text=Gender-sensitive%20and%20responsive%20care%20is%20part%20of%20person-centered,and%20support%20for%20participating%20in%20health%20care%20decisions.> (accessed 10 September 2024).

¹⁷⁹Strydom, Schiller & Orme (n 30) 384.

well as early diagnostic, prevention and treatment (for example, pre-exposure prophylaxis, anti-retroviral therapy and post-exposure prophylaxis).¹⁸⁰

In 2014, UNICEF reported that children are particularly vulnerable to sexual violence, especially those who are unaccompanied, undocumented, from child-headed households, asylum seekers or refugees, have physical or mental disabilities, are stateless and detained, have a history of rape or sexual abuse, are involved in prostitution, or are homeless or impoverished from destitute families and communities.¹⁸¹ Unaccompanied children are at higher risk of being victims to drug-facilitated sexual violence, where perpetrators often use drugs and equally toxic substances to facilitate sexual assault.¹⁸² Section 150(1)(a-h) and 150(2)(a-b) of the Children's Act,¹⁸³ makes provision for instances where children would require care and protection, which includes children without any visible support, with addiction to drug dependency and victims of exploitation, neglect and exposure to various forms of harm.¹⁸⁴

The underreporting of sexual violence and abuse is significant and widespread,¹⁸⁵ making it difficult to access accurate information to measure the true scale of the issue of sexual violence amongst stateless children. Chaing and others in 2024, highlighted that statistics concerning the prevalence of childhood sexual violence and epidemiological patterns of violence against children around the world is limited,¹⁸⁶ and the disaggregation of data according to citizenship or the provision of data specific to stateless children in national administrative registries, databases and population

¹⁸⁰WHO 'Continuity and coordination of care – A practice brief to support the implementation of the WHO Framework on Integrated people-centered health services' (2018) 18-38 <https://iris.who.int/bitstream/handle/10665/274628/9789241514033-eng.pdf?ua=1>

¹⁸¹UNICEF 'Hidden in Plain Sight: A statistical analysis of violence against children' (2014) 3-8 <https://www.unicef.org/reports/hidden-plain-sight> (accessed 12 July 2023).

¹⁸²FP Busardò, MR Vari & A Di Trana et al 'Drug-facilitated sexual assaults (DFSA): a serious underestimated issue' (2019) 23 *European Review for Medical and Pharmacological Sciences* 10577 - 10589 https://doi.org/10.26355/eurev_201912_19753

¹⁸³Act 38 of 2005, sec 150(1) (a-h) & sec 150(2) (a-b).

¹⁸⁴Childrens Act, sec 150.

¹⁸⁵L Artz et al 'The prevalence of child sexual abuse in South Africa: The Optimus Study South Africa' *South African Medicine Journal* (2018) 791 <https://hdl.handle.net/10520/EJC-115ea44241> .

¹⁸⁶L Chiang et al 'Successful child sexual violence prevention with data: how the violence against children and youth survey helped curb the tide of sexual violence in 20 countries' *BMJ Paediatrics Open* (2024) 1-3 <https://doi.org/10.1136/bmjpo-2024-002497>.

censuses is even more limited.¹⁸⁷ This is despite that both international and domestic child laws guarantee *all* children (including stateless children) protection against all forms of violence and respect to their human dignity. However, although the Constitution is explicit in its protection of children against violence, legislative instruments such as the Childrens Act and Childrens Justice Act, both do not make specific provision on how children affected by statelessness can apply and obtain protection orders against their perpetrators, especially in cases where they not only live in the same household but are known to them. This further means that the South African government is not upholding its implied obligation to protecting stateless children, therefore infringing on the constitutional rights of children at risk of - and affected - by statelessness.

In fulfilling its express obligations, the South African government is mandated to realise children's rights to equal access to justice and services.¹⁸⁸ This entails the government having the responsibility of initiating relevant interventions to prevent and curb violence against children. The establishment of the Inter-Ministerial Committee (IMC) in 2012, aimed at tackling violence against children, led to the formation of a multi-sectorial intervention in the form of an Integrated Programme of Action on Addressing Violence Against Women and Children.¹⁸⁹ The Action Plan not only lacked addressing issues pertaining to stateless children, but it was further found to have contained numerous inefficiencies.¹⁹⁰

¹⁸⁷A Warria 'Stateless transnational migrant children in South Africa: implications and opportunities for social work intervention' *African Human Mobility Review* (2020) 10 <https://sihma.org.za/journals/01%20Stateless%20Transnational%20Migrant%20Children%20in%20South%20Africa.pdf> .

¹⁸⁸A Friedman, A Pantazis & A Skelton 'Chapter 47: Children's Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa – January 2013: Revision Service 5* (2018) 47 <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Closa-Consolidation.pdf> .

¹⁸⁹Department of Social Development 'South African integrated programme of action addressing violence against women and children (2013-2018)'. (2014) 14-32. <https://www.svri.org/sites/default/files/attachments/2016-07-20/South%20africa%20Violence%20Against%20Women%20and%20Children-Low%20Resolution.pdf> ; Parliament of Republic of South Africa 'Background Information for MPWC Meeting with Department of Social Development and the Department of Women on the Integrated Programme of Action Addressing Violence against Women and Children (2013 – 2018)' 1 March 2024 [.https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fstatic.pmg.org.za%2F180301background.doc&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fstatic.pmg.org.za%2F180301background.doc&wdOrigin=BROWSELINK) (accessed 15 September 2024).

¹⁹⁰Department of Planning, Monitoring and Evaluation and Department of Social Development 'Diagnostic Review of the State Response to Violence against Women and Children' 23 September 2017 <https://evaluations.dpme.gov.za/evaluations/2014-02> (accessed 15 September 2024).

Of the 2.8 million orphaned children in 2022 and approximately 58 000 child-headed households in South Africa,¹⁹¹ many are susceptible to risk of statelessness and need to make citizenship claims to attain access to rights and services.¹⁹² The challenge of proving one's nationality owing to a lack of documentation, heightens the risk of statelessness, where the challenge is exacerbated for individuals from indigent households. In particular, attaining a nationality comes at a staggering cost, where Lawyers for Human Rights claims that DNA tests are required in cases of a person needing to prove South African citizenship, specifically in cases pertaining to obtaining a birth certificate or an identity document, at an individual cost of up to R1400 – R2100.¹⁹³ In other unique cases, a relevant visa has been a standing requirement for undocumented children for them to access school at a cost of R1350.00,¹⁹⁴ excluding additional costs for litigation and legal representation, which was often an added feature, before the requirement being deemed by the High Court as unconstitutional.¹⁹⁵

Progressively, the processes of establishing guidelines for investigations which adopted the six standards of behaviour to be integrated into the UN and NGO codes of conduct, were initiated by the Inter-Agency Standing Committee Task Force on the Protection from Sexual Exploitation and Abuse in Humanitarian Crisis in 2002.¹⁹⁶ In 2003, the inter-agency monitoring the implementation standards later launched the

¹⁹¹K Hall 'Orphaning' August 2024

<http://www.childrencount.uct.ac.za/indicator.php?domain=1&indicator=4> (accessed 15 September 2024).

¹⁹²M Bennett 'The bleak plight of stateless children in South Africa' 30 November 2020

<https://gga.org/no-country-no-future-the-bleak-plight-of-stateless-children-in-south-africa/> (accessed 15 September 2024).

¹⁹³T Malesele 'Home affairs urged to ensure indigent South African citizens get free DNA tests to prove citizenship' 28 February 2023 <https://www.sabcnews.com/sabcnews/home-affairs-urged-to-ensure-indigent-south-africans-get-free-dna-tests-to-prove-citizenship/> (accessed 18 September 2024).

¹⁹⁴Lawyers for Human Rights 'Triumph for undocumented learners as high court confirms right to education for every child' <https://www.lhr.org.za/archive/news/2019/press-release-triumph-undocumented-learners-high-court-confirms-right-education-every-child.html> (accessed 18 September 2024).

¹⁹⁵A Maistry 'Filling the gaps – challenges faced by unaccompanied foreign children'

<https://www.lhr.org.za/archive/blog/2015/2/filling-gaps-%E2%80%93-challenges-faced-unaccompanied-foreign-children.html> (accessed 15 September 2024).

¹⁹⁶IASC 'Inter-Agency Standing Committee Task Force on the Protection from Sexual Exploitation and Abuse in Humanitarian Crisis - Six Core Principles Relating to Sexual Exploitation and Abuse' 23 September 2019 <https://interagencystandingcommittee.org/inter-agency-standing-committee/iasc-six-core-principles-relating-sexual-exploitation-and-abuse-2019> (accessed 18 September 2024).

UNHCR Guidelines for Prevention of and Response to Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced.¹⁹⁷

3.3 Access to juvenile justice and legal protection services for stateless children as victims and survivors of sexual violence

Violence against children is a universal and global issue, with an estimated one billion children in the world (accounting for only half of all the children in the world), being victims of violence each year.¹⁹⁸ Of these children, a third are deemed stateless.¹⁹⁹ The recognition of the best interest of the child and fundamental principles of access to justice for children,²⁰⁰ are of paramount importance.²⁰¹ Children being registered at birth means they stand a chance at enjoying their inherent child rights and guaranteed protections.²⁰² An absence of citizenship or nationality as well as being undocumented and deemed stateless means that affected persons' do not have the adequate means to accessible protective measures, including protection from all forms of violence and access to justice.

The lack of provision of social assistance and relevant means of protection to stateless persons increases their susceptibility to aggravated marginalisation and discrimination where they are subjected to deepened inequality, inequity as well as exposure to risks of long-term detention.²⁰³ This further exacerbates their vulnerability to violence, exploitation and exposure to varying forms of harm.

Domestic laws establish the age at which a child can be held responsible for a crime or related criminal act, such as the Child Justice Act which sets the minimum age for criminal capacity of children at seven (7) to ten (10) years of age.²⁰⁴ Therefore, the existence of a birth certificate is crucial as it provides primary documentation proving

¹⁹⁷UNHCR 'Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced: Guidelines for Prevention of and Response' (2003) 3-168. <https://www.unhcr.org/sites/default/files/legacy-pdf/3f696bcc4.pdf>

¹⁹⁸SAPS (n 163).

¹⁹⁹UNICEF 'A Familiar Face: Violence in the Lives of Children and Adolescents' 1 November 2017 <https://data.unicef.org/resources/a-familiar-face/> (accessed 15 September 2024).

²⁰⁰Children's Act, sec 64(1)(a).

²⁰¹Child Justice Act, sec 80(1)(d).

²⁰²M Couzens 'The best interests of the child and the Constitutional Court' (2019) 364 <https://doi.org/10.2989/CCR.20190014>.

²⁰³PS Pinheiro 'Violence against children in care and justice institutions' (.2006) 202 https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document_files/world_report_on_violence_against_children.pdf .

²⁰⁴Act 75 of 2008 (n 141) sub-sec s4-6; sec 87(1)(a)(ii).

a child's attainment of the minimum age for criminal responsibility. However, stateless children lack this essential documentation and do not have access to necessary services. As a result, they face multiple risk factors, including human trafficking, arbitrary arrest, sexual abuse, exploitation, forced conception, and unlawful detention. Sexual violence, particularly through acts linked to the human trafficking of children, is a growing international criminal activity.²⁰⁵

Children, especially unaccompanied children, often face acute challenges when communicating basic facts in respect to their nationality. Those particularly without birth certificates, identities and nationalities are at heightened risk of forced domestic servitude, sexual exploitation and going missing.²⁰⁶ Official figures from 2018 – 2019 indicated that 143 824 protection orders were requested against perpetrators of violence and related domestic abuse in South Africa. However, only 22 211 of these orders were granted, and many of them imposed lenient conditions, such as allowing reported abusers to remain in the same house as the applicant but sleep in a different room. Notably, these figures are based on reported incidents with documented victims, meaning that stateless children from undocumented families would likely not have the opportunity to be recognised or receive the necessary protection.²⁰⁷ Therefore, stateless children are more susceptible to various forms of harm and harassment. Although sexual offences legislation applies to all children, and thus its extension to stateless children is implied, there resists a limitation of sufficient research addressing this element. Equally, case law deals primarily with childhood statelessness in the context of birth registration and documentation.

The rights of juveniles are rights that are underpinned by the rule of law and a key provision of major international law and regional instruments ratified by South Africa, such as, the UDHR,²⁰⁸ ICCPR,²⁰⁹ CERD,²¹⁰ ICESER,²¹¹ UNCRC, ACRWC.²¹² Just as

²⁰⁵J Aransiola & C Zarowski 'Human trafficking and human right violations in South Africa: Stakeholders perceptions and the critical role of legislation' 14 *African Human Rights Law Journal* 510 <https://www.saflii.org/za/journals/AHRLJ/2014/26.pdf> .

²⁰⁶I Brantl et al 'Towards examining and addressing the danger of unaccompanied migrant minors going missing' (2021) 8 *Humanities and Social Sciences Communications Journal* 6-7 <https://doi.org/10.1057/s41599-021-00958-9> .

²⁰⁷UNHCR (n 197).

²⁰⁸Universal Declaration for Human Rights art 7 & art 8.

²⁰⁹International Covenant on Civil and Political Rights art 2(3)(a), 9(4) & 14(1).

²¹⁰International Convention on the Elimination of All Forms of Racial Discrimination art 5 & 6.

²¹¹International Covenant on Economic, Social and Cultural Rights ratified 12 January 2015.

²¹²African Charter on the Rights and the Welfare of the Child (ratified on 1 December 2000)

human rights are also migrants rights,²¹³ the right to access to justice is a prerequisite for the protection and promotion of all other human rights and applies to everyone, without discrimination, including migrants.²¹⁴ The adjudicatory process is guaranteed by the UN Convention on the Rights of the Child (UNCRC).²¹⁵ The CRC obligates States to establish legislative and administrative measures to reduce and eliminate barriers that restrict children's rights and their enjoyment of protected freedoms, including the right to counsel, right to jury, burden of proof and access to justice.²¹⁶ It mandates States to consider the best interests of the child in all actions concerning (vulnerable) children, such as children at risk of statelessness, unaccompanied children, child victims of exploitation, maltreatment, neglect and sexual crimes.²¹⁷

Although South Africa is neither party to the 1954 Convention nor the 1961 Convention, it is however party to the UN 1951 Convention relating to the Status of Refugees (1951 Refugee Convention), its 1967 Protocol,²¹⁸ as well as the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 AU Refugee Convention).²¹⁹ Observantly, neither the 1951 Refugee Convention, its Protocol 1967 nor the 1969 AU Refugee Convention have any provisions on the protection of refugees against sexual violations. Despite article 16 of the 1951 Refugee Convention, providing that refugee be afforded the same services as its citizens, including equal access to the justice through the Courts, legal assistance and exemption from *cautio*

²¹³UN Human Rights Committee (CCPR) General Comment 31, The nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para 10.

²¹⁴IOM 'Information note on access to justice: A migrants right' (2019) 3-17

https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/ICP/IML/june-17-access-to-justice-info-note-publisher-format-newest.pdf .

²¹⁵Report of the United Nations High Commissioner for Human Rights, Access to justice for children (16 December 2013), UNGA UN Doc. A/HRC/25/35, para. 5.

https://www.ohchr.org/sites/default/files/Documents/Issues/Children/ReportAccesstoJustice_Dec2013.pdf.

²¹⁶S Rama 'Monitoring the implementation of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' 16 August 2000.

<https://www.statssa.gov.za/publications/DiscussImpChildRights/DiscussImpChildRights.pdf> (accessed 23 September 2024).

²¹⁷UNCRC, art 7, art 8, art 18, art 19, art 20, art 21, art 34, art 37 & art 40.

²¹⁸UNHCR 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' <https://www.unhcr.org/sites/default/files/legacy-pdf/3b73b0d63.pdf> (accessed 23 September 2024).

²¹⁹African Union 'Convention Governing the Specific Aspects of Refugee Problems in Africa'

https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf (accessed 23 September 2024).

judicatum solvi, most host States do not effectively and efficiently realise the obligation to extend such protection, including South Africa.

Arguably, section 34 of the South African Constitution states that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.²²⁰

However, the context of article 16 of the 1951 Refugee Convention is considered general and ambiguous to all refugees to require access to courts as it does not contain a clear definition of what 'access to court' is. Additionally, it has been argued that the concept was not conceptualised to capture the needs of refugees who are victims of crimes, specifically female and child victims of sexual violence. This is largely because in the South African criminal proceedings, the state has the *locus standi* to prosecute the case and its victims are used as witnesses. Consequently, victims of crime lack the legal standing to sue, and this therefore places a constraint on the access to courts whereby seeking the services of a private prosecutor may be costly and this effort would still not grant them legal standing to pursue their rights, as the private prosecutor would still represent the interests to the public or State.²²¹

This brings into question the context of article 16(1) of the 1951 Refugee Convention in its provision that 'a refugee shall have 'free' access to the courts of law on the territory of all Contracting states'. The term 'free' is equally ambiguous and subjective, in that it can be applied in varying forms and degrees of interpretation by host states, without the obligation of extending the exemption from *cautio judicatum solvi*, for example a host state can apply 'free' to being 'access without obstacles, restrictions or systemic barriers but not necessarily 'access without cost'. Moreso, the Refugees Amendment Act, does not make provision for access to courts, however, provides for appeals to the Refugees Appeals Authority and Refugee Status Determination Officer,²²² which apply different routes to addressing issues of sexual violence and related crimes perpetuated against refugees and their children. A report by Eberechi

²²⁰Constitution of the Republic of South Africa (1996) sec 34.

²²¹GP Stevens & OE Eberechi 'A critical analysis of article 16 of the UN refugee convention in relation to victims of sexual violence in refugee camps in Africa' *De Jure Law Journal* (2019) 166 – 177.

<https://www.saflii.org/za/journals/DEJURE/2019/5.pdf>

²²² Act 11 of 2017, sec 22(1).

in 2020 found that there are no documented prosecuted cases of sexual violence against refugees in South Africa, and this remains a gross issue as poor documentation also makes it difficult to find records.²²³

The ambiguity in the application of international law and domestication of regional obligations concerning vulnerable refugee and migrant children in respect to access to courts and protection for child victims of sexual violence, leaves room for the need of an International legal framework that enables the obligatory protection of refugee, migrant and stateless children against sexual violence and equivalent human right violations and sexual crimes, by enabling them adequate and tailored legal protection and full access to justice. Equally, rests the need for a one-stop centre, within existing reporting mechanisms in host countries that cater to assisting children affected by statelessness to access justice as well as legal aid and comprehensive social protection services. These being services that they would otherwise not be able to get without the required documents when reporting cases through traditional means that are most effective and accessible by ordinary citizens.

3.4A critical review on the sufficiency of domestic laws on access to justice and the protection of stateless children against sexual violence

Regional and international instruments that are ratified by South Africa, in commitment to protecting children from sexual crimes, violence, harm and promote their inherent freedoms, such as the ACHPR (African Children's Charter), the Protocol to the African Charter on Human and Peoples Rights of Women in Africa (Maputo Protocol), the Southern African Development Community Protocol on Gender and Development (SADC Protocol) and the CEDAW, lay a foundation for the protection of children's rights and their welfare. The domestic mechanisms on the other hand, such as the South African Constitution,²²⁴ and applicable legislation such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act,²²⁵ Child Care Act,²²⁶ protect the rights of stateless children against sexual violence in the following respects:

²²³ OE Eberechi 'A comparative analysis of the application of the 1951 Refugee Convention to Victims of Sexual Violence in South Africa, Tanzania and Uganda' *Pioneer in Peer Reviewed Journal* (2020) 3-23 <http://dx.doi.org/10.17159/1727-3781/2020/v23i0a6225>.

²²⁴Act 108 of 1996.

²²⁵Act 32 of 2007.

²²⁶Act 74 of 1983.

3.4.1 The right to equality and non-discrimination

Article 2 of the ACHPR recognises all persons' entitlement to the enjoyment of rights and freedoms recognised in the African Charter, irrespective of any status. It affirms the equality of all people before the law and the entitlement to unconditional protection from discrimination.²²⁷ Domestically, the right to equality and the right not to be unfairly discriminated against are enshrined under section 9 of the Constitution, which makes provision for non-discrimination based on sex, gender or any other reason.²²⁸ Section 34 of the Constitution includes protections on equality, and provides all people living in the country with equal access to the law, being treated fairly and the right to the same protections and benefits of the law, as would any other freedoms that South African citizens have.²²⁹ Children victims of sexual violence and other sexually-related crimes are protected by the Criminal Law Act. Although it protects child victims of sexual violence and requires criminal justice officials such as the police, prosecutors, magistrates and court clerks to address reported sexual crimes without discrimination on any grounds, the Act does not make specific mention of the procedures to be followed in cases involving stateless children as victims.

Furthermore, section 34 of the Constitution provides everyone with the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, in another independent and impartial tribunal or forum. Section 35 then makes provision for the right to legal representation guaranteed, subject to availability of State resources.²³⁰ Since crime is a challenge to rule of law, victims of crime, including sexual violations are thus generally involved as prosecution witnesses. However, in this current *modus operandi* of how domestic law is instituted means that victims do not have the required *locus standi* to enable their access to courts as an affected party in a lawsuit.²³¹ Therefore, the incorporation of a *locus standi* clause in the Criminal Procedures Act is critical in enabling foreign and

²²⁷ACHPR, art2.

²²⁸Constitution (1996) sec 9(1)-(2).

²²⁹As above, sec 34.

²³⁰Constitution (1996) sec 35.

²³¹Eberechi (n 223) 171.

non-foreign stateless child victims of sexual violence and related crimes to have access to courts and become parties to litigation as co-prosecutors against their offenders.²³²

3.4.2 The right to life and human dignity

Article 4 of the ACHPR provides for the entitlement to respect for life and integrity. It safeguards the right to the respect of one's dignity and the recognition of their legal status, prohibiting all forms of exploitation and degradation.²³³ Article 3 of the Maputo Protocol can also be interpreted to extend to the rights of stateless children, despite not being explicitly ascribed in its provision of the right to the recognition and protection of their human and legal rights as well as provisions mandating State parties to implement appropriate measures to protect women against all forms of violence, especially sexual violence.²³⁴ Article 19 of the General Recommendations of the CEDAW Committee also recognises the right to life and the States responsibility to prevent their violation thereof.²³⁵

The SADC Protocol on Gender and Development (SADC Protocol) obligates state parties, including South Africa, to protect the girl and the boy child, particularly against all forms of violence, including sexual abuses and ensuring they have equal access to service and facilities.²³⁶ It further recognises violence against children in the context of unequal power relations among women, men and children, and particularly stresses its concerns over the ineffectiveness, inadequacy and prejudicial measures put in place aimed at addressing the prevention and mitigation of violence against child victims article 20(1)(a) and (c) of the SADC Protocol legally mandates State parties to deal with gender based violence systematically and condemns violence against children, submits for the creation of laws by State parties, to criminalise violence, set penalties and ensure perpetrators are punished. Article 20(2)(a) -(c), 20(7) and article 23(1-5) of the SADC Protocol makes provision on access to comprehensive services for victims, to include contraception, post-exposure prophylaxis, STI prevention as well as counselling, legal aid and responsive police services. These further include placing

²³²Act 51 of 1977.

²³³ACHPR, art 4.

²³⁴Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Art 3.

²³⁵CEDAW Committee General Recommendation 19.

²³⁶SADC Protocol art 11.

relevant measures to resolve disputes as well as providing accessible and affordable social services that empower child victims of violence.²³⁷

Section 10 of the Constitution provides for the protection and respect of the inherent dignity of all people, and the right to human life and to live life as part of humanity and being treated with dignity.²³⁸ The Constitution includes the recognition of the right to bodily and psychological integrity and control, which are linked to the right to dignity, and section 9 of the Constitution provides for the respect of one's body and mind against harm.

In the provision of services, section 9 of the Children's Act stipulates that the child's best interest is of paramount importance in all matters concerning the care, protection and well-being of a child.²³⁹ The section also provides for factors to be taken in consideration in determining the extent that the best interests of the child are to be protected. The principle of the best interest of the child is primarily centred on ensuring that the child takes top priority in all decisions and actions that affect the children and young people; whereby, decisions that relate to individual children involves their engagement to determine the outcome to a cause. However, stateless children are not afforded the opportunity to benefit from the integrated intersectoral collaboration by the government entities. This contributes to the non-provision of all children with the services they require to ensure their holistic care, protection, development and overall wellbeing.

The South African government has an obligation to ensure the protection, development and well-being of every child, particularly to ensure that all sectors and departments play a critical and meaningful role in facilitating holistic and comprehensive childcare services at different stages of their development, particularly from birth to nine years.²⁴⁰ This includes ensuring that their births are registered. The DSD has a responsibility to ensure the development and implementation of national policies concerning childhood development services as stipulated by the 1997 White Paper for Social Welfare.²⁴¹ The

²³⁷SADC Protocol art 20, & art 23.

²³⁸Constitution (1996), sec 10.

²³⁹Act 38 of 2005 sec 9.

²⁴⁰Act 38 of 2005.

²⁴¹Republic of South Africa Department of Social Development 'Revised White Paper on Families In South Africa' 18 June 2021

..https://www.gov.za/sites/default/files/gcis_document/202106/44724gon540.pdf (accessed 10 September 2024).

Department established national legislation such as the Child Care Act, and its Regulations;²⁴² the Children's Amendment Act,²⁴³ and the Social Assistant Act,²⁴⁴ which makes provision for the social protection schemes for children. Unfortunately, none of these instruments addresses the issue of access to services for stateless children.

3.4.3 The Right to freedom and security and free from all forms of violence

Article 6 of the ACHPR makes provision for the right to liberty and security of the person. It provides for the non-deprivation of freedom from anyone, except in respect of reasons and conditions provided by law.²⁴⁵ Article 4 of the Maputo Protocol is applicable in the case of stateless children in its obligations to State parties to take effective measures to not only identify causes and consequences of violence against women (and children) and take action to prevent and eliminate such violence, but equally punish perpetrators of violence against women, as well as provide adequate rehabilitation and access to services to victims of violence.²⁴⁶ The right to be free from all forms of violence is enshrined under section 12 of the Constitution and extends this to not being forced to do anything against one's will, implying the right to be safe, protected and not being harmed. This right protects children against being subjected to violence.²⁴⁷ Moreso, the DSD has a duty to ensure that all children living in the territory of the Republic, enjoy all privileges to care and protection as they are assured of in section 28(1) and 28(2) of the Constitution, the Childrens Act and General Comment 6 the UN Guidelines for the Treatment of Unaccompanied and Separated Children outside their Country of Origin.

The Child Care Act equally applies to unaccompanied foreign children, in which a child is to be legally protected by the law by being placed in a place of safety and have

²⁴²Act 74 of 1983.

²⁴³Act 17 of 2022.

²⁴⁴Act 13 of 2004.

²⁴⁵ACHPR, art 6.

²⁴⁶Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), art 4.

²⁴⁷Act 109 of 1996, sec 12.

his/her case investigated by the relevant authorities.²⁴⁸ The *Child Law v Minister of Home Affairs* case emerged from the countless number of unaccompanied foreign children that were left at the borders of Zimbabwe, Mozambique and other bordering countries without being united with their families.²⁴⁹ This placed children at risk of many forms of violence and harm. Additionally, South Africa is currently lacking policy addressing the procedural deportation of children and appropriate safeguarding measures, specifically in the case of unaccompanied stateless children.²⁵⁰

In 2023, the SAPS reported an approximate 245 deaths of children, as well as the physical and emotional impact of a further 2 291 children, showcasing the magnitude of violence perpetuated against children and the impact it has on the social development of all of society.²⁵¹ In the same year, the annual Child Protection Week campaign reported an estimated 28 children that are violently attacked each day, where three (3) do not survive.²⁵² South Africa has been found by the CEDAW Committee to have failed to comply with its obligations to effectively report, investigate, prosecute, and punish cases of domestic violence.²⁵³ Children, particularly girls, had been previously found by CEDAW Committee to be suffering from substantive exposure to domestic violence, including sexual violence, rape, and various other grotesque and inhumane acts against children.²⁵⁴ Additionally, the Committee found that the country lacked the provision of minimum systems to ensure effective capacity building for the judiciary and law enforcement bodies, therefore violating the rights of victims.

²⁴⁸Republic of South Africa Department of Social Development 'Unaccompanied and separated foreign children found in South Africa – Presentation to PACCA Meeting' 19 May 2016 <https://www.socdev.fs.gov.za/wp-content/uploads/2012/07/Unaccompanied-Separated-Children.pdf> (accessed 18 September 2024).

²⁴⁹Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50(T).

²⁵⁰Lawyers for Human Rights 'Status of immigration detention in South Africa' (2023) 53-56 https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2023/12/11122023-LHR-Status-of-Immigration-Detention-in-South-Africa_Final-Report.pdf

²⁵¹South African Police Service *Annual Crime Report 2023*.

<https://www.saps.gov.za/services/crimestats.php>

²⁵²Child Protection Week. *Annual Child Protection Week Campaign Report*

<https://www.gov.za/childprotectionweek> .

²⁵³Concluding observations on the fifth report of South Africa, CEDAW Committee (23 November 2021), UN Doc CEEDAW/C/ZAF/CO/5 (2021).

<https://documents.un.org/doc/undoc/gen/n21/352/34/pdf/n2135234.pdf> .

²⁵⁴Concluding observations on the fourth report of South Africa (5 April 2011), UN Doc CEDAW/C/ZAF/CO/4(2011) <https://www.icj.org/wp-content/uploads/2011/04/Concluding-Observations-CEDAW-South-Africa-2011-eng.pdf> .

To this effect, the Committee has made 34 recommendations to South Africa, ranging from effective law enforcement, victim support services, measures to dismantle patriarchal attitudes and discriminative stereotypes that contribute to the legitimisation of violence against children, as well as putting in place policies to ensure adequate access to justice and protection for victims of violence.

Arguably, all violence against children can be prevented, provided there is sufficient political will to invest in purposefully designed, evidence-based interventions that are fit for their intended purpose and can be extended to resource-poor settings. This, being with the intent to create the needed foundations for the eventual eradication of statelessness at childhood and mitigation of risks to childhood statelessness.

CHAPTER 4

BEST PRACTICES TO PREVENT CHILDHOOD STATELESSNESS

4.1 Introduction

This chapter focuses on best practices for mitigating and preventing childhood statelessness. These practices offer practical solutions for South Africa to address and bridge the legislative loopholes and policy implementation gaps identified in Chapters two (2) and three (3).

The chapter begins by highlighting successful interventions and reforms in various countries. It then presents examples that illustrate how these best practices have been implemented effectively. By examining these international and regional efforts, the chapter presents actionable insights and strategies that can guide policymakers and stakeholders in developing robust legal and policy frameworks to prevent childhood statelessness and uphold the protection and rights of all children.

4.2 Global overview of best practices on mitigating and preventing childhood statelessness

Childhood statelessness remains a significant global challenge. In 2018, UNHCR recognised that despite some progress being made in some regions worldwide since 2004.²⁵⁵ Many countries still have discriminatory nationality laws against children who can't acquire their mothers or fathers nationality, which contributes to childhood statelessness.²⁵⁶ At least twenty-seven countries worldwide prevent mothers from conferring their nationality to their children on an equal basis with fathers,²⁵⁷ and sixty countries do not allow mothers to change, acquire, or retain their nationality on the

²⁵⁵UNHCR 'Background note on gender, equality, nationality laws and statelessness 2018' 7 (2018) <https://www.refworld.org/reference/themreport/unhcr/2018/en/120612> (accessed 15 September 2024).

²⁵⁶Global Coalition on Equal Nationality Rights and Coalition on every child's right to nationality rights 'Gender discrimination and childhood statelessness' (2019) 7-12 <https://www.unhcr.org/ibelong/wp-content/uploads/Gender-discrimination-childhood-statelessness-web.pdf>.

²⁵⁷AE Theodorou '27 countries limit a woman's ability to pass citizenship to her child or spouse' 5 August 2014 <https://www.pewresearch.org/short-reads/2014/08/05/27-countries-limit-a-womans-ability-to-pass-citizenship-to-her-child-or-spouse/#:~:text=Today%20there%20are%2027%20countries%20in%20which%20men,pass%20citizenship%20to%20their%20non-citizen%20spouse%20and%20children> .(accessed 15 September 2024).

same basis as men.²⁵⁸ These discriminatory practices contribute to the perpetuation of childhood statelessness.

Twelve countries have reformed their laws to allow mothers to confer nationality to their children similarly to fathers since 2018.²⁵⁹ This shift is crucial in reducing statelessness, yet much more remains to be done. Statistics South Africa in its 2023 Recorded Live Births report, shows that significant attention is drawn to ensuring that births are registered within 30 days of occurrence – with exceptions for late birth registrations,²⁶⁰ to ensure that no child is left without a nationality.

In South Africa, the situation is particularly pressing. A quarter of households are headed by women, and a significant number are child-headed households. Historically, children were required to acquire nationality through both parents, a policy that heightened the risk of statelessness, especially in cases where paternal recognition was absent. Recent reforms in South Africa now allow women and unmarried fathers to register the birth of their children independently, providing a vital pathway to preventing statelessness.²⁶¹ The Institute for Security Studies further elaborates that statelessness is a sensitive issue, intersecting with national sovereignty and human rights.²⁶²

While statelessness might appear to be a matter of national law, it has profound implications for human rights and social stability. Stateless individuals often face severe human rights violations, including lack of access to education, healthcare, and protection from abuse and exploitation.²⁶³ Children are

²⁵⁸<https://www.equalnationalityrights.org/the-problem/> (accessed 15 September 2024).

²⁵⁹C Richard 'When women can't confer nationality to their children equally with men, problems of statelessness grow – UNHCR' 4 November 2022 <https://buffalocity.openbylaws.org.za/articles/2022-11-04/carmel-rickard/when-women-cant-confer-nationality-on-their-children-equally-with-men-problems-of-statelessness-grow-unhcr> (accessed 15 September 2024).

²⁶⁰ Statistics South Africa 'Statistical release P0305: Recorded live births' (2023) 3-4 <https://www.statssa.gov.za/publications/P0305/P03052023.pdf> .

²⁶¹Lawyers for Human Rights 'High court rules unmarried fathers can register children's births' 25 May 2020 <https://www.lhr.org.za/lhr-news/high-court-rules-unmarried-fathers-can-register-childrens-births/> (accessed 15 September 2024).

²⁶²Institute for Security Studies 'Statelessness: an old problem with new threats' 13 November 2019 <https://issafrica.org/iss-today/statelessness-an-old-problem-with-new-threats> (accessed 15 September 2024).

²⁶³United Nations 'Issue Brief #1: Human rights of all migrants, social inclusion, cohesion, and all forms of discrimination, including racism, xenophobia and intolerance' 1-7. https://refugeemigrants.un.org/sites/default/files/issue_brief_for_first_thematic_session.pdf .

disproportionately affected,²⁶⁴ with one-third of the world's stateless population being children.²⁶⁵

Several countries have demonstrated best practices in addressing childhood statelessness and child protection, in the context of access to justice for child victims and survivors of sexual violence that South Africa can emulate. For instance, Thailand has made significant strides in reducing statelessness through legal reforms and inclusive policies.²⁶⁶ Moreso, Thailand recognises the plight of stateless persons and their susceptibility to injustice, and has since, in July 2024, announced its withdrawal of their reservations on article 22 of the CRC, which specifically guarantees the rights of refugee children.²⁶⁷ It also considers the fact that children are faced with high risk of sexual violence in childhood, with or without citizenship. It thus prioritises the right to access to justice as crucial in preventing and protecting the rights of stateless persons, especially vulnerable children.²⁶⁸

In another example, the Philippines Republic Act No. 9225, also known as the Citizenship Retention and Re-acquisition Act of 2003, allows former Filipino citizens who have become naturalized citizens of other countries to retain or re-acquire their Filipino citizenship.²⁶⁹ This law helps reduce the incidence of statelessness among children born to Filipino parents abroad. Additionally, with over 80% of children in the Philippines being exposed to violence and the issue of violence against children being

²⁶⁴Institute on Statelessness and Inclusion 'Statelessness In numbers 2018: An overview and analyses of global statistics' June 2028.

https://files.institutesi.org/ISI_statistics_analysis_2018.pdf?fbclid=IwAR3TBW95zaZaL-TQotrFk9O091UCGkplNeloas_X9zrEPWp4swKKa6ribs (accessed 15 September 2024).

²⁶⁵Council on Foreign Relations 'Statelessness around the world: without a country to call their own, millions of people experience discrimination and persecution' 10 January 2023.

<https://education.cfr.org/learn/reading/statelessness-around-world#:~:text=The%20United%20Nations%20counts%204.3%20million%20stateless%20people%E2%80%94of,that%20the%20actual%20total%20is%20likely%20significantly%20higher> (accessed 15 September 2024).

²⁶⁶Amnesty International 'Joint Statement: Thailand – Implement commitments to protect migrant rights end detention, forcible returns of refugees' 6 July 2017.

<https://www.amnesty.org/en/documents/asa39/6677/2017/en/> (accessed 15 September 2024).

²⁶⁷UNICEF 'Statement on Royal Thai Government's announcement that it will withdraw its reservation on Article 22 of the Convention on the Rights of the Child' 15 July 2024

<https://www.unicef.org/thailand/press-releases/statement-royal-thai-governments-announcement-it-will-withdraw-its-reservation> (accessed 12 September 2024).

²⁶⁸S Kulshrestha 'Delving into struggles: ensuring access to justice for stateless persons' (2023) *Jus Corpus Law Journal* 311 <https://www.juscorpus.com/wp-content/uploads/2023/09/46.-Sarthak-Kulshrestha.pdf> .

²⁶⁹Republic Act (R.A) No. 9225 or the Citizenship Retention and Re-acquisition Act of 2003 21 September 2024 Respcio & co (web blog) <https://www.respcio.ph/bar/2025/political-law-and-public-international-law/citizenship/loss-and-re-acquisition-of-philippine-citizenship/republic-act-ra-no-9225-or-the-citizenship-retention-and-re-acquisition-act-of-2003> (accessed 23 September 2024).

of international concern, the Philippines government has been commended by the CRC Committee in its efforts to combat violence against children through increased children's rights protection and child participation legislation.²⁷⁰

In the North and South American context, statelessness affecting children impacts their ease of access to fundamental rights and services. In the United States, the issue is exacerbated by racial discrimination and immigration policies that do not always account for the complexities of statelessness, leading to situations where children born to undocumented immigrants face uncertain legal status.²⁷¹ On the latter side of the Americas, is the Dominican Republic which has faced significant challenges related to statelessness, particularly affecting children of Haitian descent.²⁷² Haitian children crossing the border, were at risk of trafficking for the purpose of sexual exploitation and the normalisation of violence against girls through child prostitution,²⁷³ child marriages and early unions were common order.²⁷⁴ Moreso, is the exemplary establishment of a Cabinet for Children and Adolescents in 2021, which acts as an intra-government body that coordinates child-centric policies.

Argentina has implemented comprehensive birth registration campaigns and effective legal reforms that grant nationality to all children born on its territory, thus efficiently reducing the number of stateless children.²⁷⁵ These campaigns were linked to local child protection agencies aimed at supporting children's rights through strengthened juvenile justice systems and comprehensive child protection measures. Furthermore, Argentina has an integrated information system, where the vital statistics and civil

²⁷⁰UNHCR 'Hailing the Philippines as a Pioneer in children's participation, experts of the Committee on the Rights of the Child also talk about levels of violence in the country' 14 September 2022 <https://www.ohchr.org/en/press-releases/2022/09/hailing-philippines-pioneer-childrens-participation-experts-committee-rights> (accessed 28 August 2023).

²⁷¹M Foster & TR Baker 'Racial discrimination in nationality laws: A doctrinal blind spot of international law' *Colombia Journal of Race and Law* (2021) 83-219 <https://journals.library.columbia.edu/index.php/cjrl/issue/view/752/155> .

²⁷²N Jain 'Manufacturing Statelessness' (2022) *American Journal of International Law* 256 – 259 <https://doi.org/10.1017/ajil.2022.2>.

²⁷³Human Rights Council 'Report on the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, on her visit to Dominican Republic' 5 January 2018. A/HRC/37/60/Add.1.29.

²⁷⁴UNHCR 'Experts of the Committee on the Rights of the Child praise the Dominican Republic's progress in promoting birth registration, ask about high levels of de facto child marriage and support for asylum-seeking children in Haiti' 6 September 2023 <https://www.ohchr.org/en/news/2023/09/experts-committee-rights-child-praise-dominican-republics-progress-promoting-birth> (accessed 28 August 2024) .

²⁷⁵PP Quinones 'Breaking the presumption that applicants of statelessness determination procedures are foreign' (2021) *Statelessness & Citizenship Review Journal* 64-83 <https://search.informit.org/doi/epdf/10.3316/informit.667725490445173> .

registration is decentralised,²⁷⁶ therefore being instrumental in addressing the protection of the rights of child victims of sexual abuse amongst children in alternative care, children without parental care and children living in the streets with and without citizenship. Most profoundly is Argentina's Public Prosecution Service that has developed protocols and guidelines on investigating sexual offences committed against children and taking of statements from child victims.²⁷⁷ Argentina's National Civil and Commercial Code makes clear provisions for the best interest of the child, in decision making processes as well as in family proceedings cases involving access to justice for children.²⁷⁸

Similarly, Brazil has recently begun the undertaking of significant steps to recognizing the nationality of children born to Brazilian parents abroad, regardless of whether the birth was registered within the country, thereby preventing statelessness among children of expatriates.²⁷⁹ This example highlights the importance of inclusive nationality laws and robust birth registration systems in mitigating childhood statelessness. Despite these efforts, however, scholars emphasize the need for continuous legal reforms and international cooperation to address the root causes of statelessness and ensure that every child has a recognized nationality.²⁸⁰

In Europe, childhood statelessness remains a significant challenge despite the continent's strong legal frameworks designed to protect human rights. Numerous European countries have taken proactive steps to address the issue, despite the disparities and gaps in implementation that persist. There have, however, been exemplary initiatives aimed at addressing childhood statelessness and the

²⁷⁶UNICEF 'Birth registration – right from the start' (2002) 19 https://civilsociety-centre.org/sites/default/files/resources/birthregistration_Digestenglish.pdf (accessed 28 August 2024)

²⁷⁷UNHCR 'Committee on Rights of Child reviews the reports of Argentina under Convention and Optional Protocols' 3 July 2010 <https://www.ohchr.org/en/2010/06/committee-rights-child-reviews-reports-argentina-under-convention-and-optional-protocols> (accessed 15 September 2024).

²⁷⁸Child Rights International Network 'Access to justice for children: Argentina' November 2013 https://archive.crin.org/sites/default/files/argentina_access_to_justice.pdf (accessed 28 August 2023).

²⁷⁹A Lima 'The citizen Constitution, the Hoerig case and the loss of Brazilian citizenship: The need for the approval of PEC 16/21' 14 July 2023 <https://www.braziloffice.org/en/articles/the-citizen-constitution-the-hoerig-case-and-the-loss-of-brazilian-citizenship-the-need-for-the-approval-of-pec-1621> (accessed 22 September 2024).

²⁸⁰A Avelino & L Cuoto 'Brief comment about PEC 16/21: Possible changes in the loss of Brazilian nationality' *Academic Mobility and Innovation Acinnet Journal*, (2024) 84-100 <https://periodicos.unis.edu.br/index.php/acinnet/article/view/857> ; JE de Oliveria & DMT de Araujo 'PEC 16/21 and its amendments on the rules for Brazilian nationality loss' *Research, Society and Development Journal* (2022) 15 <https://rsdjournal.org/index.php/rsd/article/view/37549> .

vulnerabilities of children at risk of statelessness, for example, the #StatelessKids Campaign by the European Network on Statelessness (ENS).

Norway has had a steady reputation for having the most restrictive asylum policies in Europe and detaining children for unreasonable amounts of time, it has since introduced policies that grant automatic nationality to children born stateless within its territory.²⁸¹ Through this policy, Norway, has effectively prevented, on paper, the intergenerational transmission of statelessness. Moreso, in recognising the scourge of sexual violence and exploitation of girl children in the country, with moreover 1 364 allegations of rape being reported to police in 2015,²⁸² the Norwegian government launched a 2019 – 2022 National Plan of Action to Prevent and Combat Rape in March 2019.²⁸³

Germany on the other hand, has signed and ratified both the 1954 Convention and the 1961 Convention albeit with reservations on article 27 (travel documents) and article 23 (access to social security).²⁸⁴ Interestingly, however, is that an estimated 29 455 people are registered as being stateless at the end of 2022, indicating that statelessness has since doubled in Germany since 2014 with one in four of the stateless are children.²⁸⁵ Although the country does not yet have a regulated and standardised statelessness determination procedure,²⁸⁶ the state has an obligation to

²⁸¹UNHCR 'Human Rights Committee examines civil and political rights in Norway' 15 March 2018 <https://www.ohchr.org/en/press-releases/2018/03/human-rights-committee-examines-civil-and-political-rights-norway#:~:text=Norway%20had%20a%20reputation%20for%20having%20one%20of,returns%20to%20countries%20such%20as%20Afghanistan%20or%20Russia> . (accessed 15 September 2024).

²⁸² Covenant on Civil and Political Rights Committee (28 September 2017) CCPR/C/NOR/7 (2017).

²⁸³UN Women 'Norway Report on A/RES/73/148 and A/RES/73/146' 3-4.

<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/A-75-274-Submission-Norway-en.pdf> (accessed 15 September 2024); Council of Europe Portal 'Childrens Rights' 22 August 2019 https://www.coe.int/en/web/children/resource-centre/-/asset_publisher/ICGym75EBhwG/content/national-action-plan-to-prevent-and-combat-rape-2019-2022-norway (accessed (15 September 2024).

²⁸⁴Stateless Index 'Germany delivers some positive practices on statelessness but areas for reform still remain' 30 January 2019 <https://index.statelessness.eu/news/germany-delivers-some-positive-practices-statelessness-areas-reform-still-remain> (accessed 15 September 2024).

²⁸⁵https://www.destatis.de/EN/Press/2023/03/PE23_091_125.html (accessed 15 September 2024)

²⁸⁶Expert Council on Integration and Migration 'No passport, no rights? Statelessness in Germany' 05 May 2023 <https://www.svr-migration.de/en/press/staatelessness-in-germany/> (accessed 15 September 2024).

provide the rights enshrined in the 1954 Convention and protect the right to a nationality, facilitate naturalisation and to prevent statelessness.²⁸⁷

Despite some gaps in domestic legislation,²⁸⁸ the Netherlands implemented a holistic approach by combining legal reforms with public awareness campaigns, following the establishment of statelessness determination procedures and showcasing the importance of birth registration and the rights of stateless individuals, with the aim to reduce the stigma associated with statelessness and encourage proactive birth registration.²⁸⁹ Additionally, in 2023 the Dutch government introduced legislative measures to facilitate the naturalization process for stateless children,²⁹⁰ intended at providing children with a clear pathway to citizenship and access to functioning justice system – despite public criticism on the efficacy of the newly adopted and approved legislative instruments.²⁹¹

These examples from Italy, Norway, Germany, the Netherlands, and France highlight the diverse and successful strategies employed in some countries in Europe to combat childhood statelessness. They also outline the importance of legal reforms, inclusive policies, and the usefulness of comprehensive birth registration systems in ensuring that every child has the right to nationality. By learning from these regional efforts, other countries – like South Africa - can develop best practices and implement effective strategies from lessons learnt to prevent and address childhood statelessness.

4.3 Africa Regional overview of lessons learnt in preventing childhood statelessness

The African continent presents valuable lessons in combating childhood statelessness. The AU has been actively involved in addressing statelessness through the adoption of the African Charter on the Rights and Welfare of the Child (African Children's

²⁸⁷Stateless Index 'Country Briefing – Germany' January 2019 https://index.statelessness.eu/sites/statelessness.eu/files/Country%20Briefing%20Germany%20ENG_FINAL.pdf (accessed 15 September 2024).

²⁸⁸<https://index.statelessness.eu/country/netherlands> (accessed 23 September 2024).

²⁸⁹Summary report of the Standing Committee on Statelessness, Executive Committee of the High Commissioners Programme (23 May 2023), UN Doc EC/74/SC/CRP.12 (2023). <https://www.unhcr.org/sites/default/files/2023-05/CRP-12-Statelessness-87-SC-English.pdf>

²⁹⁰C Vlieks & K Swider 'New stateless legislation in the Netherlands: worth the wait?' European Statelessness Network (web blog) 21 June 2023, <https://www.statelessness.eu/updates/blog/new-statelessness-legislation-netherlands-worth-wait> (accessed 15 September 2024).

²⁹¹Statelessness Index 'Netherlands passes new Bills on statelessness, but concerns remain' 23 June 2023 <https://index.statelessness.eu/news/netherlands-passes-new-bills-statelessness-concerns-remain> (accessed 18 September 2024).

Charter) and the subsequent Draft Protocol on the Specific Aspects of Right to a Nationality and the Eradication of Statelessness in Africa.²⁹²

The AU has also been encouraging member states to implement birth registration systems by digitizing civil-registration systems and services as well as steering reform to discriminatory nationality laws and accelerating children's access to justice.²⁹³ ECOWAS member states have made bold commitments towards the ambitious eradication of statelessness in the region by 2024, leading with the endorsement of a declaration of 24 concrete measures to ending statelessness by its Heads of States in 2015,²⁹⁴ to affirming Article 24 of the Abidjan Declaration in developing National Action Plans in accordance with the UNHCR Global Action Plan to End Statelessness,²⁹⁵ and adopting the Guidelines on the Development and Implementation of National Action Plans on UNSCR 13 and Related Resolutions,²⁹⁶ which addresses issues of sexual violence against vulnerable children in conflict settings.

Countries like Nigeria and Côte d'Ivoire, have begun implementing these recommendations, leading to increased birth registration rates and reduced statelessness among children.²⁹⁷ Côte d'Ivoire, for example, has made progressive trajectories in acceding to the international conventions on statelessness since

²⁹²African Union 'Protocol on the right to a nationality and the eradication of statelessness in Africa' June 2018 https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22526_e_original.pdf (accessed 18 October 2023).
<https://au.int/en/pressreleases/20230904/training-workshop-and-steering-meeting-draft-protocol-specific-aspects-right> (accessed 15 September 2024)

²⁹³Africa Programme for Accelerated Improvement of Civil Registration and Vital Statistics Costed Strategic Plan 2017 – 2021 https://archive.uneca.org/sites/default/files/uploaded-documents/ACS/4th-CoM-on-CRVS/en-africa_programme_for_accelerated_improvement_of_civil_registration_.pdf (accessed 18 September 2024).

²⁹⁴ BM Djeugoue 'ECOWAS Heads of State and Government approve the Abidjan Declaration on the Eradication of Statelessness' 27 May 2015 <https://www.ihrda.org/2015/05/ecowas-heads-of-state-and-government-approve-the-abidjan-declaration-on-the-eradication-of-statelessness/> (accessed 10 October 2023).

²⁹⁵UNHCR 'Economic Community of West African States (ECOWAS) Plan of Action on Eradication of Statelessness 2017 – 2024' The Refworld Blog (web blog) <https://www.refworld.org/reference/regionalreport/ecowas/2017/en/116661> (accessed 28 September 2024).

²⁹⁶West Africa Network for Peacebuilding 'Development and implementation of National Action Plans on UNSCR 13 and Related Resolutions' (2012) 4-48 https://wanep.org/wanep/files/pub/1325_guideline/1325_guideline_en.pdf (accessed 18 October 2023).

²⁹⁷Creating a sustainable birth registration process for sub-Saharan Africa: the Nigeria case study (2022) Utwente Essay https://essay.utwente.nl/90636/1/Idowu_MA_BMS.pdf; Federal Ministry of Humanitarian Affairs 'National Action Plan on Statelessness in Nigeria' 2 September 2022 <https://citizenshiprightsafrika.org/national-action-plan-to-eradicate-statelessness-in-nigeria/> (accessed 18 October 2023).

2011,²⁹⁸ implemented extensive legal reforms,²⁹⁹ and nationwide birth registration campaigns to successfully reduce the number of stateless individuals. The government's initiative to issue birth certificates to children born in remote areas, often through mobile registration units, has been particularly effective in ensuring that no child is left undocumented and reducing statelessness.³⁰⁰

Interestingly, in East Africa, the Kenyan government has been faced with hurdles in addressing children's rights, citizenship and statelessness among the Nubian community, a historically marginalized group.³⁰¹ As evidenced, the governments implementation of the decisions by the AU Commission and the African Children's Committee on the Nubian Community case,³⁰² are contrary to the provisions of article 2 (enjoyment of rights and freedoms without distinction), article 3 (equality before the law and access to equal protection), article 5 (discriminatory deprivation of nationality and exposure to degrading treatment and marginalisation of Nubians violates their right to dignity) and article 19 (right to dignity) of the African Charter.³⁰³ They are also inconsistent with the recognition of article 6 (protecting children's the right to a nationality) of the African Children's Charter which, which I also legally premised by the 1954 Convention, albeit Kenya not being party to it. Despite Kenya being a multi-ethnic State, the non-border Nubian ethnic group is amongst the select key populations

²⁹⁸F Lejuene-Kabi 'Cote d'ivoire takes big step to end statelessness by acceding to conventions' 4 October 2013 <https://www.unhcr.org/news/stories/cote-divoire-takes-big-step-end-statelessness-acceding-conventions> (accessed 18 September 2024); Operational Data Portal 'Ivory coast accedes to international Convention on Statelessness' 04 October 2013 <https://data.unhcr.org/en/news/10826#:~:text=Ivory%20Coast%20is%20the%20th%20state%20to%20accede.stateless%20people%20and%20now%20has%2079%20states%20parties>. (accessed 23 September 2024).

²⁹⁹Devdiscourse 'UNHCR welcomes Cote D'ivoire's adoption of Statelessness Determination Procedure' 04 September 2020 <https://www.devdiscourse.com/article/headlines/1198246-unhcr-welcomes-cote-divoires-adoption-of-statelessness-determination-procedure> (accessed 18 September 2024).

³⁰⁰M Adjami 'Statelessness and nationality in Cote d'Ivoire – a study for UNHCR' (2016) 7-50 <https://www.refworld.org/reference/research/unhcr/2016/en/114420>.

³⁰¹E Fokala 'Editorial introduction: compliance with regional and human rights – Focus on East and West Africa' *De Jure Law Journal* (2021) 402. <https://www.dejure.up.ac.za/images/files/vol54-2021/1%20Editorial%20introduction%20Compliance%20with%20Regional%20Human%20Rights.pdf>

³⁰²Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of the children of Nubian descent in Kenya vs Republic of Kenya Communication 317/2006 ACHPR (2015) <https://www.justiceinitiative.org/litigation/nubian-community-kenya-v-kenya> (accessed 23 September 2024).

³⁰³E Fokala 'Do not forget the Nubians: Kenya's compliance with the decision of African regional treaty bodies on the plight and rights of Nubians' *De Jure Law Journal* (2021) 477 – 479 <https://www.dejure.up.ac.za/images/files/vol54-2021/5%20Do%20not%20forget%20the%20Nubians.pdf>.

that have been treated as 'ambiguous citizens' since its independence,³⁰⁴ and treated differently by Kenyan authorities without justification. The ill treatment includes being subjected to complex vetting processes in attempts to secure birth certificates and essential identity documentation needed for the recognition of Kenyan citizenship.³⁰⁵

Uganda presents as a similar country case that requires holistic reform in respect to protecting indigenous communities and vulnerable children affected by statelessness. Uganda currently hosts the highest number of forcibly displaced persons' in the African continent, with an estimated 1.5 million refugees and asylum seekers in 2024.³⁰⁶ Despite Uganda having ratified both the 1961 Convention and 1954 Convention and has domesticated most of the provisions of the Conventions in its Constitution Amendment Act under Chapter three (3) and subsidiary national legislation on citizenship,³⁰⁷ there are still prevailing legal challenges to refugees obtaining citizenship and therefore country level hurdles to the country's Constitutional aspirations to effectively reducing and mitigating statelessness.³⁰⁸

Although Tanzania, alike South Africa, is neither party to the 1954 Convention nor the 1961 Convention, the government launched a National Human Rights Action Plan in 2013 – which was a recommendation made by South Africa at the first cycle of Universal Periodic Review in 2011.³⁰⁹ However, Tanzania still needs to increase its birth registration of children born within its territory as well as amplify its awareness raising campaigns on citizenship acquisition procedures and nationality laws. Additionally, remains the opportunity to undertake effective measures to address issues of sexual violence,³¹⁰ abuse and exploitation of children affected by statelessness by adopting a costed national programme addressing the prevention of

³⁰⁴T Scharrer 'Ambiguous citizens: Kenyan Somalis and the question of belonging' *Journal of Eastern African Studies* (2018) 494 – 513. <https://doi.org/10.1080/17531055.2018.1483864>

³⁰⁵Fokala (n 303) 488.

³⁰⁶ReliefWeb 'ECHO Factsheet – Uganda (last updated 27 February 2024)' (infographic) <https://reliefweb.int/report/uganda/echo-factsheet-uganda-last-updated-27022024> (accessed 23 September 2024).

³⁰⁷Amendment Act 11 Of 2005 ch 3, secs 10, 12, 13, 14, 15, 19.

³⁰⁸Decolonising Education for Peace in Africa 'Refugees in Uganda reflecting on home and the condition of statelessness using photovoice' 1 July 2024 <https://www.decolonising-education-for-peace-africa.org/blog/refugees-uganda-reflecting-home-and-condition-statelessness-using-photovoice> (accessed 26 September 2024).

³⁰⁹Linked to 1st cycle of UPR Recommendation no. 85.2.

³¹⁰Concluding Observations, 13 December 2012, Committee on Economic Social and Cultural Rights, E/C.12/TZA/CO/1-3 (2012), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolNo=E/C.12/TZA/CO/1-3&Lang=En

sexual crimes against children, as well as outlines the procedures for the rehabilitation of child victims and the prosecution of perpetrators.³¹¹

In the Southern Africa region, have been equally positive efforts towards advancing the eradication of statelessness championed by member states and civil society alike, most prominent being the ongoing development and ultimate adoption of the Draft SADC Ministerial Declaration and Regional Action Plan on Statelessness and the Draft CSO Action Plan on Statelessness in Southern Africa.³¹² In Zimbabwe for example, although there isn't sufficient official data on the number of stateless people in the country - the issue of citizenship acquisition and childhood statelessness remain a long standing struggle since its independence in 1980's,³¹³ owing to its discriminatory and arbitrary nationality laws have left generations of migrants and their children at heightened risk of vulnerabilities and deepened marginalisation.³¹⁴

These examples from Côte d'Ivoire, Kenya, Uganda, Tanzania, and Zimbabwe highlight the diverse approaches and successful strategies that can be adopted to combat childhood statelessness in South Africa. They emphasise the importance of legal reforms, inclusive policies, and comprehensive birth registration systems in ensuring that every child has the right to nationality. By learning from these regional efforts, other countries can develop and implement effective strategies to prevent and address childhood statelessness.

³¹¹Linked to 1st cycle of UPR Recommendation 85.62 & 85.63 by Malaysia and Mexico to the Republic of Tanzania; Tanzania Gender Networking Programme 'Financing for National Plan of Action towards Ending Violence Against Women and Children in Tanzania: A Gender budget analysis brief' <https://tgnp.or.tz/wp-content/uploads/NPA-English-booklet-Editted.pdf> (accessed 28 September 2024).

³¹²UNHCR & Southern African Nationality Network 'Regional civil society engagement on the eradication of statelessness in Africa' 1-11 <https://sann.africa/wp-content/uploads/2021/11/Regional-civil-society-engagement-on-statelessness-in-SADC-02.11.21.pdf> (accessed 10 September 2024).

³¹³Amnesty International 'We are like "stray animals" – Thousands living on the margins due to statelessness in Zimbabwe' (2021 9-39 <https://www.amnesty.org/en/documents/afr46/3932/2021/en/>).

³¹⁴Amnesty International 'Zimbabwe: Statelessness crisis traps hundreds of thousands in limbo' 16 April 2021 <https://www.amnesty.org/en/latest/news/2021/04/zimbabwe-statelessness-crisis-traps-hundreds-of-thousands-in-limbo-2/> (accessed 13 July 2024).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter concludes the study on childhood statelessness in South Africa, focusing on the responsiveness of the South African justice system in protecting stateless children against sexual violence. The study has highlighted the multifaceted challenges faced by stateless children, who are particularly vulnerable to various forms of sexual violence, abuse and exploitation due to their lack of legal recognition and protection.

Addressing childhood statelessness is not only a legal and moral imperative, but also a critical component of ensuring the rights and well-being of all children. ‘

The final chapter provides a conclusion and actionable recommendations at both the regional and national levels. The recommendations are informed by best practices and lessons learned from various countries that have successfully implemented measures to prevent and address childhood statelessness.

The fundamental goal is to propose a comprehensive framework that South Africa can adopt to protect stateless children, ensuring their right to a nationality, access to justice and holistic child protection services.

5.2 Recommendations for addressing childhood statelessness

Addressing the multifaceted issue of childhood statelessness in South Africa requires a dual approach, encompassing both regional and national strategies.

Effective solutions must integrate regional frameworks and directives while also implementing comprehensive national policies and practices. This section provides a detailed set of recommendations at both the regional and national levels, aimed at eradicating childhood statelessness and protecting the rights and well-being of stateless children

To effectively address childhood statelessness in South Africa, it is essential to consider the broader regional context and leverage the collective efforts and frameworks established by regional bodies such as the African Union. The

recommendations at the regional level focus on adopting and implementing key protocols and model laws that can harmonise efforts across African nations, ensuring a consistent and robust approach to eradicating statelessness. By aligning South Africa's policies with regional directives and collaborating with neighbouring countries, the nation can enhance its strategies to protect stateless children and prevent further occurrences of statelessness. This section outlines several critical actions that South Africa should take at the regional level, drawing on successful examples and scholarly insights from across the continent.

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

The African Union plays a pivotal role in setting the normative framework for addressing statelessness on the continent. The Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa was formally adopted by the Assembly of Heads of State and Government of the AU in early 2024. This new treaty provides clear guidelines and standards for member states to follow, ensuring that the right to nationality is upheld and that measures are in place to eradicate statelessness.³¹⁵ For instance, the protocol contributes to the harmonisation of nationality laws across African countries, thus reducing discrepancies that often lead to statelessness.

b) Adoption, domestication, and country-level implementation of the Draft Regional Model Law on the Determination of Statelessness, the Protection of Stateless Persons, and the Facilitation of their Naturalization

The Regional Model Law on the Determination of Statelessness, the Protection of Stateless Persons and the Facilitation of their Naturalization, remains an exemplary regional guideline for addressing the gaps in nationality laws and standardizing the identification, protection, and naturalization of stateless persons across the Regional Economic Communities (RECs) in Africa. By adopting a model law, South Africa stands

³¹⁵African Union 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 African: explanatory Memorandum June 2018 https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_original_explanatory_memorandum.pdf (accessed 15 September 2024).

to be guided in its development of a legal framework that ensures consistent and fair treatment of stateless children and persons' and the envisioned prevention of statelessness. The desirable adaptation of the model law should ensure the provision of clear guidelines for determining and addressing childhood statelessness, granting of nationality and legal status, as well as ensuring access to justice, sexual and reproductive health services and overall fundamental rights. The Draft Regional Model Law is a comprehensive framework designed to assist African countries in determining statelessness, protecting stateless persons, and facilitating their naturalization.³¹⁶ Domestication and implementation of this model law at the country level can provide a consistent approach to addressing statelessness across the region.³¹⁷ For example, Kenya's adoption of similar principles in its legal framework has led to significant improvements in the protection and naturalization of stateless persons, particularly among the Nubian,³¹⁸ and Pemba communities.³¹⁹

c) Evaluation of South Africa's implementation of Action 6 of the Global Action Plan to End Statelessness

South Africa should assess its progress in implementing Action 6 of the Global Action Plan to End Statelessness, which focuses on granting protection status to stateless migrants, including children, and fast-tracking mechanisms to facilitate their naturalization. This evaluation can help identify gaps and areas for improvement in the current system. For instance, Action 6 emphasises the importance of establishing efficient and accessible procedures for the determination of statelessness and the provision of legal status to stateless individuals.³²⁰ By learning from best practices in countries like the Philippines, which has streamlined its naturalization processes for

³¹⁶UNHCR 'Regional Model Law on the determination of statelessness and protection of stateless persons and the facilitation of their naturalization' (2023) 4 – 19
<https://www.refworld.org/sites/default/files/legacy-pdf/en/2023-5/64e5c8184.pdf> .

³¹⁷Pan-African Parliament 'Resolutions on the formulation of a model law on statelessness: First Ordinary Session' 11 November 2022 https://citizenshiprightsafrika.org/wp-content/uploads/PAP-Resolution_Model-Law-on-Statelessness_Nov-2022.pdf (accessed 15 September 2024).

³¹⁸E Fokala & L Chenwi 'Statelessness and Rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2013) *African Journal of Legal Studies* 6 357-373
https://brill.com/view/journals/ajls/6/2-3/article-p357_10.xml .

³¹⁹UNHCR 'Hope for Pemba community as they gain recognition as Kenyan citizens' 23 August 2023
<https://www.unhcr.org/news/stories/hope-pemba-community-they-gain-recognition-kenyan-citizens>.

³²⁰UNHCR 'Good practice papers Action 6: Establishing statelessness Determination Procedures for the protection of stateless persons' July 2020
<https://www.refworld.org/policy/opguidance/unhcr/2020/en/123292> (accessed 15 September 2024).

stateless individuals, South Africa can enhance its own procedures to better protect stateless children.³²¹

Addressing childhood statelessness within South Africa requires a comprehensive and coordinated national strategy. The recommendations at the national level are designed to strengthen the legal, institutional, and social frameworks necessary to protect stateless children and prevent statelessness from occurring.

These recommendations emphasise the need for legal reforms, improved data collection, capacity building, and enhanced coordination among various government departments and service providers. By implementing these measures, South Africa can ensure that all children have access to nationality, legal protection, and essential services. This section outlines specific actions that the South African government should take, drawing on best practices and successful examples from other countries to inform and guide these efforts.

d) Provision of technical advice to improve citizen-related legislation

South Africa should prioritise seeking technical advice to enhance its citizenship-related legislation and other relevant laws, such as retaining progressive provisions aimed at preventing statelessness under section 2(2), 2(3) and 4(3) of the SACA, as well as establishing regulations to operationalise them. This improvement aims to ensure the adoption and implementation of safeguards consistent with international laws and regional directives. By doing so, South Africa can fast-track the prevention of childhood statelessness and curb preventable sexual violence against stateless children.

d) Incorporation of evidence-based practices in integrated social and early childhood development programs

Existing integrated social and early childhood development programs need to incorporate evidence-based practices to ensure the prevention of all forms of violence against children. Leveraging opportunities for concurrent benefits can enhance these programs' effectiveness. For example, Ethiopia's social protection programs include

³²¹S Netipatalachoochote 'The human rights protection system in Southeast Asia and ASEAN: towards a regional human rights court' Thesis fully internal, University of Groningen, 2020 159-171 https://pure.rug.nl/ws/portalfiles/portal/126344370/Chapter_5.pdf .

components for birth registration and violence prevention, demonstrating the multifaceted benefits of integrated approaches.³²² By adopting similar strategies, South Africa can enhance its efforts to protect stateless children and promote their well-being.

e) Tracking of child protection and violence prevention spending

Child protection and violence prevention spending in national budgets should be meticulously tracked. Implementing an accounting system across all government departments responsible for early childhood development, child protection, and violence prevention will improve accountability, monitoring, and reporting. Countries like Australia have successfully implemented such tracking systems, ensuring that funds allocated for child protection are effectively utilized and transparently reported.³²³ This level of accountability can help South Africa ensure that resources are dedicated to protecting stateless children and preventing violence against them.

f) Strengthening of country-level data collection on childhood statelessness

Data collection on childhood statelessness and registration of nationality at birth should be significantly strengthened. Strengthening civil registration and vital statistics systems (CRVS) is imperative to prevent statelessness. The UN Regional Guidelines on Civil Registration,³²⁴ and African Union's recommendations for improving CRVS systems underline the importance of robust civil registration mechanisms. The government should work with data-capturing institutions to develop indicators to effectively assess investments in child protection and violence prevention against children, particularly those affected by statelessness. In Canada, comprehensive data collection systems have been established to monitor child welfare outcomes, providing

³²²Ethiopia Ministry of Labour and Social Affairs 'National social protection strategy of Ethiopia' (2016) 54 – 57 <https://faolex.fao.org/docs/pdf/eth199860.pdf> ; UNHCR 'Child protection factsheet' 12 March 2021 <https://reliefweb.int/report/ethiopia/unhcr-ethiopia-child-protection-factsheet-february-2021> (accessed 15 September 2024).

³²³S Wise 'Development to strengthen systems for child protection across Australia' CFCA Paper No 44, University of Melbourne and the Berry Street Childhood Institute, 2017 10-44 https://aifs.gov.au/sites/default/files/publication-documents/44_child_protection_reforms_0_0.pdf

³²⁴UNECA Africa Centre for Statistics 'Regional guidelines on civil registration' https://archive.uneca.org/sites/default/files/uploaded-documents/Statistics/CRVS/improving_national_civil_registration_systems_-_operational_guidelines_en.pdf (accessed 15 September 2024).; UNICEF WCARO 'Civil registration in humanitarian contexts recommendations and operational guidelines for member states of the African Union' <https://www.unicef.org/wca/media/8976/file/CRVS%20Humanitarian%20final.pdf> (accessed 15 September 2024).

valuable insights that guide policy and funding decisions.³²⁵ By adopting similar practices, South Africa can enhance its understanding of the scope and impact of statelessness on children and tailor its interventions accordingly.

g) Development of a national framework on childhood statelessness

South Africa's current lack of a regulatory framework addressing childhood statelessness is a significant barrier to recognizing and protecting the diverse demographics of children in the country

h) Ratification of international conventions on statelessness

It is imperative that South Africa fosters the ratification of the two international conventions on statelessness, namely, the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Ratifying these conventions would reinforce South Africa's commitment to aligning national practices to international laws and standards. Countries like Brazil and Argentina have ratified these conventions, resulting in more robust legal frameworks, action plans and measurable progress in addressing childhood statelessness.

5.3 Recommendations for addressing sexual violence legislation

a) Strengthen of investments in building the capacity of health and psychosocial service providers

The capacity of health and psychosocial service providers needs to be built, targeting foundational knowledge and skills to work with child survivors of sexual violence and abuse. Ensuring that caseworkers have the capability to apply child sexual abuse concepts in case management and provide appropriate care and treatment is crucial for the recovery and healing of affected children. Programs like those in Sweden, which offer specialized training for professionals dealing with child abuse, have shown significant improvements in the quality of care provided to child survivors.³²⁶ South

³²⁵T Esposito et al 'Canadian child warfare administrative data knowledge exchange summary report' (2020) 5-30.

<https://cwrp.ca/sites/default/files/publications/Esposito%20et%20al%20%282020%29%20Canadian%20Child%20Welfare%20Administrative%20Data%20Exchange%20Summary%20Report.pdf>.

³²⁶ <https://childsafeguarding.com/child-protection-training-in-english> (accessed 15 September 2024).

Africa can implement similar training programs to enhance the competencies of its service providers.

b) Improving the coordination of care across service providers

The coordination of care across multiple service providers, within cross-cutting sectors led by the main government departments responsible for child welfare and wellbeing, needs to be strengthened and improved. Ensuring effective information sharing, monitoring, as well as legal and reporting systems, will support other established processes. The UK's integrated children's services model, which promotes interagency collaboration and a holistic approach to child welfare, has been effective in addressing the complex needs of vulnerable children.³²⁷ South Africa can adopt and adapt such models to ensure a cohesive and comprehensive approach to supporting stateless children and protecting them from violence.

c) Monitoring the quality of services provided to stateless child victims and survivors of sexual violence

The quality of services provided to stateless children who are survivors of sexual violence needs to be rigorously monitored to ensure that targeted psychosocial interventions are effectively implemented. Comprehensive case management for child survivors should be adopted and adequately monitored. The UNICEF Child Protection Section Programme Division developed a framework for monitoring and evaluating the quality of services provided to child abuse victims and survivors, ensuring that interventions are tailored to the specific needs of each child.³²⁸ The UK also has a Tackling Child Sexual Abuse Strategy that addresses investments in specialised support services for child victims and survivors.³²⁹ South Africa can implement similar monitoring frameworks to ensure that stateless child survivors receive the necessary support and care.

³²⁷R Hood 'Complexity and integrated children's services in the UK' (2010) International Journal of Social Sciences and Humanity Studies

123. https://sobiad.org/eJOURNALS/journal_IJSS/archieves/2010_1/14rick_hood.pdf .

³²⁸UNICEF and International Rescue Committee 'Caring for child survivors of sexual abuse guidelines – second edition' (2023) 23-65 <https://www.unicef.org/media/151776/file/CCS%20Guidelines%20-%20FINAL.pdf> .

³²⁹Government of United Kingdom 'Tackling Child Sexual Abuse Strategy' (2021) 48-82 https://assets.publishing.service.gov.uk/media/605c82328fa8f545dca2c643/Tackling_Child_Sexual_Abuse_Strategy_2021.pdf .

d) Provision of comprehensive, age-appropriate gender-sensitive health services

Child victims of sexual violence that are affected by statelessness, should equally be provided with comprehensive, age-appropriate gender-sensitive health services to cope with the associated physical and mental trauma. This approach should include medical care, psychological support, legal assistance and tailored access to justice. For example, in Canada, the Gender-Based Violence Strategy includes specific provisions for the health and well-being of sexual violence survivors, ensuring that they receive holistic and gender-sensitive care.³³⁰ South Africa can develop similar strategies to address the complex needs of stateless children who are survivors of sexual violence.

e) Establishment of provincial focal points on the Rights of the Child

The SAHRC should establish provincial focal points on the rights of the child in premiers' and mayors' offices. These focal points would work with Provincial Children's Parliaments, local government, and young people through Municipal Youth Development Councils across various districts. The aim is to coordinate, monitor, and advocate for the rights of children at these levels, ensuring accountability to the SAHRC through the Sub-Committee on Children's Rights. These structures should aim to achieve targets set by a National Children's Rights and Development Programme, ensuring holistic child protection interventions that promote comprehensive development and realize the optimal human potential of children. For instance, India's National Commission for Protection of Child Rights (NCPCR),³³¹ which is established by its Commission for Protection of Child Rights Act of 2005, collaborates with state and local governments to monitor and advocate for child rights. The modalities, functions, administration and financing present a unique approach, that South Africa could contextually adopt and model.

³³⁰Status of Women Canada 'Its time: Canada's strategy to prevent and address gender based violence' (2017) 1-3 https://publications.gc.ca/collections/collection_2017/cfc-swc/SW21-172-2017-5-eng.pdf (accessed 15 September 2024).

³³¹Government of India 'National Commission for Protection of Child Rights' 15 March 2024 <https://ncpcr.gov.in/about-commission> (accessed 15 September 2024).

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