

LEGAL IDENTITY FOR ALL - ENDING STATELESSNESS IN SADC

*Liesl H. Muller*¹

Introduction

In the past year significant progress has been made towards ending statelessness in the Southern African Development Community (SADC) region. Most notably, parliamentarians, who ultimately make the laws which prevent or aggravate statelessness, have committed to addressing statelessness in SADC. On 13 November 2016 SADC parliamentarians at the 40th plenary assembly of the SADC Parliamentary Forum adopted a resolution towards this end. This development, along with other similar resolutions and developing jurisprudence, will go a long way towards ensuring legal identity for all by 2030 as set out in Goal 16 of the United Nations Development Programme (UNDP) Sustainable Development Goals.²

According to a study done by the African Commission on Human and Peoples' Rights (ACHPR) hundreds of thousands, possibly millions, of Africans do not have access to a nationality and may be stateless.³ Being stateless means that a person's legal identity is compromised. It causes barriers to many other human rights such as the right to education, the right to healthcare and public services, as well as the right to vote and the right to freedom of movement. Basically, citizenship is the right to have other rights. Often, stateless persons cannot transfer nationality to their spouses and children, nor register the births of their children causing generational statelessness.⁴

Statelessness in Africa can be linked to a State's colonial history as well as migration, changes in State borders and discrimination based on gender, ethnicity or religion. Withdrawal of nationality or refusal to grant nationality has led to conflicts which have caused severe human rights violations on the continent.⁵

In the SADC region statelessness can be ascribed to large scale labour migration over generations; protracted displacement caused by conflict; the migration of unaccompanied minors; systematic discrimination against certain population groups; modernisation of the civil registry systems without proper access to administrative justice and poverty. One of the most prominent causes of statelessness in the SADC region is the lack of birth registration. UNDP notes that the birth registration in the SADC region is disappointingly low and more than half of children are still unregistered by the age of five.⁶ Without a birth certificate it is impossible to prove one's claim to nationality.

1 Head of the Statelessness Project, Lawyers for Human Rights; LL.B (University of Pretoria).

2 Target 16.9. "Goal 16: Promote just, peaceful and inclusive societies" *United Nations* (2016) available at <http://www.un.org/sustainabledevelopment/peace-justice/> (last accessed: 19 November 2016).

3 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa* (2015) 5.

4 *Id.*

5 *Id.*

6 Sustainable Development Knowledge Platform, "Sustainable Development Goal 16", available at <https://sustainabledevelopment.un.org/sdg16> (last accessed: 13 December 2016).

The right to a nationality is implicit in the African Charter (the Charter) even though it was not included in the list of rights specifically protected under the Charter. This is evident from the interpretation of the Charter by the African Commission when deciding cases related to the right to nationality. The African Commission has linked the right to nationality to specific principles enshrined in the Charter, such as the prohibition of discrimination (article 2); equality before the law (article 3); respect for human dignity (article 5); the right to a fair trial (article 7); the right to freedom of movement (article 12); the right to participate in the government of the country (article 13); and the protection of the family and of the rights of women and children (article 18).⁷

African leaders have sought to address the lack of a specific provision on nationality through the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on the Rights of Women in Africa (the Protocol on the Rights of Women). The ACRWC specifically includes the child's right to a nationality.⁸ African States have been urged to ensure that children acquire the nationality of the State in which they are born if they are not granted nationality by any other State.⁹ The Protocol on the Rights of Women confirms that women in Africa have the right to acquire a nationality and to acquire their husband's nationality.¹⁰ These measures confirm the determination of African leaders to ensure that Africans have access to the right to nationality in Africa.¹¹

The African Commission study finds that despite these initiatives, the impact of these provisions is limited by the lack of infusion of these treaties into national legislation and their limited application in national and regional courts. The complexity of the right to a nationality in Africa is further complicated by factors such as the practice of African pastoralism, borders inherited from the colonial period and the African diaspora.¹²

Accordingly, parliamentarians have a fundamental role to play in ending statelessness through legislative reform. There is a need to redesign laws to allow individuals to access their right to a nationality. These laws should meet the existing international law standards for access to nationality in international treaties to which many SADC States are signatories. These include, amongst others, the African Charter on Human and Peoples' Rights (ACHPR); the African Charter on the Rights and Welfare of the Child (ACRWC); the UN Convention on the Rights of the Child (UNCRC); the Universal Declaration of Human Rights (UDHR); and the International Covenant on Civil and Political Rights (ICCPR).

Ideally all SADC States should also accede to the 1954 UN Convention on the Status of Stateless Persons (the 1951 convention)¹³ and the 1961 UN Convention on the Reduction of Statelessness (the 1961 convention)¹⁴ which set out the definition of statelessness, protects the basic rights of

7 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa*, (2015) 5 and 6.

8 Article 6(3) of the African Charter on the Rights and Welfare of the Child.

9 *Id* article 6(4).

10 Article 6(g) of the Protocol on the Rights of Women in Africa, available at http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (last accessed: 15 December 2016).

11 *Id* 6 and 7.

12 *Id* 7.

13 Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 in pursuance of Economic and Social Council resolution 526 A (XVII) of 26 April 1954, entry into force: 6 June 1960, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatelessPersons.aspx> (last accessed: 15 December 2016).

14 Convention on the Reduction of Statelessness, adopted on 30 August 1961 in pursuance of General Assembly resolution 896

stateless persons and provides legislative standards for the prevention and reduction of statelessness. Unfortunately, only seven SADC States have acceded to the 1954 convention (Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe) and only three SADC States have acceded to the 1961 convention (Lesotho, Swaziland and Mozambique). In order to ensure full protection of the right to a nationality in SADC laws, all SADC states should sign these two treaties to ensure that loopholes in legislation which lead to statelessness are avoided and that countries do not create statelessness in their neighbouring States. It is a problem which can only be effectively solved with the cooperation of all States in the region.

Policy Developments at SADC Level

Recent policy developments in the SADC region seek to address statelessness and change the fate of its stateless inhabitants. These include resolutions by the SADC Parliamentary Forum, the SADC Migration Dialogue for Southern Africa (MIDSA) and the International Parliamentary Union (IPU).

On 13 November 2016, the plenary assembly of the SADC Parliamentary Forum called upon national parliaments and governments in the SADC Region to:

- i. “Resolve any existing situations of statelessness within our own countries;
- ii. Review the legislative frameworks and administrative practices in nationality matters with a view to ensure their consistency with international standards on the prevention and resolution of statelessness, as well as on protection of stateless persons;
- iii. Initiate legislative reforms that addresses any identified gaps or challenges, including any discrimination on the basis of race, ethnicity, religion, or gender, thereby helping to prevent statelessness;
- iv. Ensure gender equality as regards the equal right of men and women to pass on their nationality to their children and spouses, and to change or retain their nationality;
- v. Expedite the implementation of article 6(4) of the African Charter on the Rights and Welfare of the Child, thereby preventing childhood statelessness;
- vi. Establish and maintain comprehensive birth registration and civil registration systems within Member States with a view to prevent statelessness;
- vii. Accede to the 1954 UN Convention relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1990 UN Convention on the Rights of all Migrant Workers and Members of their Families;
- viii. Support the drafting, adoption and ratification of a Protocol to the African Charter on Human and Peoples’ Rights on the Right to Nationality and the Eradication of Statelessness in Africa; and
- ix. Work towards the development and adoption of a SADC Ministerial Declaration and Action Plan on Statelessness.”¹⁵

(IX) of 4 December 1954, entry into force: 13 December 1975, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Statelessness.aspx> (last accessed: 15 December 2016).

15 SADC Parliamentary Forum 40th Plenary Assembly Session, 3-15 November 2016, Harare, Zimbabwe.

Leading up to this event, parliamentarians in the SADC region attended an event in Cape Town in November 2015, hosted by the Parliament of South Africa, the International Parliamentary Union (IPU) and the United Nations High Commissioner for Refugees (UNHCR). At this event the members of parliaments agreed to advocate for the resolution of existing situations of statelessness and the prevention of statelessness through legislative reform and strengthened parliamentary oversight of implementation. They also committed to raising awareness and encouraging States to accede to the two UN conventions on statelessness.

In August 2016, the SADC Migration Dialogue for Southern Africa (MIDSA) produced conclusions and recommendations on statelessness including the following:

1. "Continue to advocate for the adoption and ratification of the African Charter on the Rights and Welfare of the Child, the domestication and implementation of, and adherence to the reporting obligations of the UN Convention on the Rights of the Child by SADC Member States.
2. Member States are encouraged to strengthen their capacity to enhance birth registrations and national identification systems, as well as to develop and maintain a well-functioning Population Register.
3. Ensure equality between men and women to pass on their nationality to their spouse and children.
4. Work towards the development and adoption of a SADC Ministerial Declaration/Action Plan on Statelessness.
5. Member States are encouraged to ratify and domesticate the 1954 UN Convention relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1990 UN Convention on the rights of all Migrant Workers and Members of their Families."¹⁶

A follow up to these recommendations such as a MIDSA resolution at ministerial level in 2017 to end statelessness in SADC would further strengthen these commitments.

Three follow up workshops at national level have been conducted to explore ways that parliamentarians and other branches of government can prevent statelessness through legislative reform and establishment of statelessness determination procedures. Such workshops were held in Malawi, Swaziland and Mozambique during 2016 hosted jointly by UNHCR and Lawyers for Human Rights. In all three of these countries gender parity in nationality laws is still not a reality. Despite having signed both the statelessness conventions, Swaziland does not allow married mothers to pass their nationality to their children nor to their foreign spouses. In Malawi women cannot pass their nationality to their foreign spouses and there are discriminatory requirements for foreign spouses to acquire citizenship from their spouses.¹⁷ In all three of these countries birth registration is still worryingly low despite efforts to increase it. Hopefully, their recent commitments to meet international standards will reform these laws and practices.

16 International Organisation for Migration, "Conclusions and Recommendations" Technical Migration Dialogue for Southern Africa Addressing Mixed Migration in Southern Africa: Linking Protection, Immigration, Border Management and Labour Migration, Gaborone, Botswana, 16-18 August 2016, available at <https://ropretoria.iom.int/news/technical-migration-dialogue-southern-africa-addressing-mixed-migration-southern-africa-linking> (last accessed: 15 December 2016).

17 Bronwen Manby for Open Society Foundations *Citizenship Law in Africa: A comparative Study* 2nd ed (2010) 5.

Goal 16 of the Sustainable Development Goals

Sustainable Development Goal 16 stresses the importance of birth registration of children concerning legal identity and ensuring access to individual rights.¹⁸ Birth registration is a crucial step in preventing statelessness as most States require proof of place of birth and identity of the parent(s) to establish nationality. Ensuring birth registration is therefore crucial toward ending statelessness in SADC. Lawyers for Human Rights has conducted an in-depth study¹⁹ of the legislative framework in South Africa which creates barriers to birth registration and may lead to childhood statelessness and have made recommendations toward legal reform. Research of this kind is rare in the SADC region and more needs to be done to provide the necessary data which will guide policy reform.

Other initiatives which support the Sustainable Development Goals with regard to legal identity include Aspiration 3²⁰ of Africa's Agenda for Children which aims to have every child's birth registered by 2040; and the recently formed coalition²¹ on every child's right to a nationality led by UNHCR and UNICEF. The coalition seeks to:

- “Ensure that no child is born stateless
- Eliminate laws and practices that deny children nationality because of religion
- Remove gender discrimination from nationality laws
- Improve birth registration to prevent statelessness
- Encourage States to accede to the UN Statelessness Conventions.”²²

The judiciary also plays an important role in developing the law and will be instrumental in ensuring that laws are interpreted and applied in line with international standards. A 2014 judgment of the High Court of South Africa declared a stateless child born in South Africa to be a South African citizen.²³ This judgment interprets and implements a 20 year old unknown provision which provides nationality to stateless children born in the territory. The South African system is one of few which has incorporated the international law principle that stateless children should acquire the nationality of the country where they are born.²⁴ This section was previously inaccessible to children and necessitated the intervention of the judiciary. The Court directed the State to provide regulations and forms to this provision in order to make it accessible to the public.²⁵ Without this

18 Target 16.9 of the Sustainable Development Goals.

19 Lawyers for Human Rights *Childhood Statelessness in South Africa* (2016) available at <http://www.lhr.org.za/publications/childhood-statelessness-south-africa> (last accessed: 13 December 2016).

20 African Committee of Experts on the Rights and Welfare of the Child, “Africa's Agenda for Children 2040” available at <http://www.acerwc.org/ourevents/africas-agenda-for-children-2040/> (last accessed: 13 December 2016).

21 UN Refugee Agency, “Coalition on Every Child's Right to a Nationality” available at <http://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/> (last accessed: 13 December 2016).

22 *Id.*

23 *DGLR and Another v Minister of Home Affairs and Others*, Case No. 38429/13, North Gauteng High Court. In that case, a Cuban mother approached the court after her 5-year old child was refused citizenship in South Africa. The child's parents had lost their Cuban citizenship prior to the child's birth as they had been out of Cuba for more than 11 months. With both the South African and Cuban governments refusing the child citizenship, the child was stateless. See also Lawyers for Human Rights Press Release, July 2014, available at <http://www.lhr.org.za/news/2014/press-release-high-court-recognises-child-stateless-and-declares-her-be-sa-citizen> (last accessed: 15 December 2016).

24 Article 7 of the UN Convention on the Rights of the Child and article 6 of the African Charter on the Rights and Welfare of the Child states that a child has the right to birth registration and a name and a nationality from birth and shall acquire the nationality of the country of birth where the child would otherwise be stateless.

25 The High Court declared the child a South African citizen and directed the Minister of Home Affairs to issue her with a South African ID number and birth certificate. The Court further directed the Minister to draft regulations to make the protection

judicial intervention the provision would remain obsolete.²⁶

The South African judgment is in line with the findings of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in the landmark case of *IHRDA and OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*.²⁷ Children of Nubian descent in Kenya were often left stateless, because they were unable to be registered at birth which prevented them from accessing nationality. Nubians in Kenya are regarded as foreigners even though they have been residing in the country for generations as a result of forced displacement. Even when birth certificates were issued, they did not confer nationality. Children of Nubian descent were often left to wait until they turned 18 to apply to acquire nationality. The African Committee found this to be a violation of article 6 of the African Children's Charter.²⁸ They held that "a purposive reading and interpretation of [article 6.1] strongly suggests that, as much as possible, children should have a nationality beginning from birth".²⁹

The African Committee added that "although States maintain the sovereign right to regulate nationality... States are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness".³⁰ There is an opportunity and a need to further develop the jurisprudence on nationality in Africa and in SADC specifically.

However encouraging the legal and policy developments in SADC may be there is a need to urgently act and finally end statelessness in SADC. The African Commission study found that "the right to a nationality is still not fully recognised as a fundamental human right on the African continent, as the current legal framework does not allow individuals to effectively protect themselves in the exercise of their right to a nationality".³¹ The African Commission has been tasked with drafting a protocol to the African Charter to address the right to nationality in Africa. The effect of such an instrument will depend largely on the support of African States. SADC States are in a position to truly make a difference to the lives of stateless people by pledging to sign this crucial protocol.

Statelessness remains a problem in Southern Africa and continues to increase because of the lack of an appropriate legal framework to address the issue. Ending statelessness in SADC will require both legal and practical solutions to the problems faced by millions of Africans in their fight to gain access to the right to nationality and thereby access to all other rights, particularly the right to human dignity.

of stateless children achievable. See Lawyers for Human Rights Press Release, July 2014, available at <http://www.lhr.org.za/news/2014/press-release-high-court-recognises-child-stateless-and-declares-her-be-sa-citizen> (last accessed: 15 December 2016).

- 26 Sadly the South African government did not implement the Court's ruling. The Department of Home Affairs instead appealed the High Court ruling. Two years later, the Department withdrew its appeal a day before the hearing, and agreed to comply with the High Court order. LegalBrief, 7 September 2016, *Minister of Home Affairs and Others v DGLR and Another*, SCA Case No. 1051/2015.
- 27 *IHRDA and OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision: No 02/Com/002/2009.
- 28 *Id.* para. 42.
- 29 *Id.*
- 30 *IHRDA and OSJI (On Behalf of Children of Nubian Descent in Kenya) v Kenya*, African Committee of Experts on the Rights and Welfare of the Child, Decision: No 02/Com/002/2009, para. 48.
- 31 African Commission on Human and Peoples' Rights *The Right to a Nationality in Africa*, (2015) 50.