

# The Impact of Gender Discrimination on Statelessness: Causes, Consequences and Legal Responses

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## Abstract

Gender discrimination, both direct and indirect, is a leading cause of statelessness worldwide. Most often, direct discrimination is reflected in patriarchal nationality laws that restrict women's ability to acquire, retain, and pass on their nationality to their children and their spouses. There are also many indirect forms of discrimination owing to women's often subordinate status that can impact women's (and their children's) vulnerability to statelessness. Overall, women are subject to a range of elevated and compounded risks of statelessness linked to patriarchal norms and deeply rooted gender inequalities. Despite the substantial impact of gender discrimination on statelessness, this issue is an understudied topic in the literature. This article discusses how gender discrimination impacts statelessness broadly and analyses how relevant international and selected Southern African and domestic law and policy frameworks have responded to this issue. First, the article briefly discusses some of the leading causes of statelessness arising from direct and indirect gender discrimination, and some of the key consequences of statelessness for women. Secondly, the article provides a critical gender analysis of the international legal framework on statelessness. It discusses how relevant international human rights legal and policy frameworks offer a robust protection of women's nationality rights and gender equality. Thirdly, the article analyses selected regional and national law and policy developments related to gender and statelessness in Southern Africa. Overall, while the analysis indicates progress in some areas, there remain ongoing challenges in bridging the statelessness gender discrimination gap and a need for further research in this area.

Keywords: statelessness, women, discrimination, international law, Southern Africa

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## I. INTRODUCTION

Statelessness is a significant issue impacting human rights globally and in Southern Africa. The latter region hosts some of the largest stateless populations on the African continent, including in South Africa and Zimbabwe.<sup>1</sup> While there is a lack of clear data on the exact numbers of stateless or potentially stateless people in the region,<sup>2</sup> the World Bank estimates indicate that more than 130 million people in Southern Africa lack identity and nationality identification.<sup>3</sup> For many, this can render them at high risk of statelessness, since many Southern African governments require identification documents to confirm nationality. Denied the right to a nationality, stateless people often face a range of barriers in accessing their fundamental human rights. As Arendt famously observed, nationality is ‘the right to have rights.’<sup>4</sup> When nationality rights are denied, the impacts often include a lack of legal status and protection, and the denial in practice of a wide range of human rights, including the right to work, to health and to education.<sup>5</sup> While statelessness has profound consequences for the human rights of both men and women, there is growing evidence that women are both more vulnerable to becoming stateless, and more vulnerable when stateless.<sup>6</sup> Worldwide, women in general face deep-rooted structural discrimination in public, in the home, and in the workplace, owing to gender inequality and patriarchal norms.<sup>7</sup> Pervasive gender inequalities are further compounded for women who face discrimination on multiple and intersecting grounds, including race or ethnicity, and those who are displaced, refugees, or stateless.<sup>8</sup> However, as various scholars who have brought attention to the links between gender and statelessness have noted, there is a gap in the literature regarding the many gender dimensions of statelessness.<sup>9</sup> In fact, as Brennan contends, gender perspectives, and particularly feminist analysis, have been

<sup>1</sup> Aimée-Noël Mbiyozo ‘Statelessness in Southern Africa: Time to end it, not promote it’ (2019) Institute for Security Studies, available at <https://issafrica.s3.amazonaws.com/site/uploads/sar32.pdf>, accessed on 12 May 2022.

<sup>2</sup> Emmanuelle Mitte ‘“Foreigners everywhere, nationals nowhere”: Southern Africa’s changing response to UN campaign on statelessness’ (2021), available at <https://africanlii.org/article/20211103/%E2%80%98foreigners-everywhere-nationals-nowhere%E2%80%99-southern-africa%E2%80%99s-changing-response-un>, accessed on 12 May 2022.

<sup>3</sup> World Bank ‘Identification for Development (ID4D) Global Dataset’ (2021), available at <https://datacatalog.worldbank.org/search/dataset/0040787>, accessed on 12 May 2022.

<sup>4</sup> Hannah Arendt *The Origins of Totalitarianism* (1951).

<sup>5</sup> David Weissbrodt & Clay Collins ‘The human rights of stateless persons’ (2006) 28 *Human Rights Quarterly* 245 at 265

<sup>6</sup> Committee on the Elimination of Discrimination against Women (CEDAW Committee) ‘General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (5 November 2014) CEDAW/C/GC/32 at para 51 (CEDAW GR 32).

<sup>7</sup> UN Women ‘Progress of the world’s women: In pursuit of justice’ (2011) at 8, available at [www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice](http://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice), accessed on 12 May 2022. References to ‘women’ in this Article are inclusive of both women and girls of all ages.

<sup>8</sup> UN Human Rights Council (HRC) ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo’ (6 June 2011) A/HRC/17/26.

<sup>9</sup> See, for example: Deirdre Brennan ‘Statelessness and the feminist toolbox: Another man-made problem with a feminist solution?’ (2019) 24(2) *Tilburg Law Review* 170; Elizabeth Hooker *Here, We Are Walking on a Clothesline: Statelessness and Human (In)Security Among Burmese Women Political Exiles Living in Thailand* (MSc thesis, University of Portland, 2013) at 118; Melissa George ‘Comment: The effects of statelessness on gender rights’ (2014) 4 *Righting Wrongs: A Journal of Human Rights* 1; TL Lee *Statelessness, Human Rights and Gender: Irregular Migrant Workers from Burma in Thailand* (2005).

<sup>10</sup> *Ibid* Brennan at 179.

'strikingly absent' in statelessness literature and research.<sup>10</sup>

This gender gap in the literature is concerning given that gender discrimination is a leading cause of statelessness worldwide and includes both direct and indirect manifestations. Most often, direct discrimination is reflected in nationality laws that discriminate against women, and includes limitations on their ability to acquire, retain, and pass on their nationality to their children and their spouses. This is a major contributor to statelessness experienced by women and children.<sup>11</sup> Such laws reflect an entrenched patriarchal view, reinforced through colonial practices, that women's nationality should be dependent on the male line. While less often discussed in existing literature, there are also many indirect forms of discrimination, occurring even where laws and practice are in theory gender neutral, owing to women's often subordinate status in society that can impact women's (and their children's) vulnerability to statelessness, or render them effectively stateless, unable to prove their identities and nationalities.<sup>12</sup>

Recognising this understudied area in the literature, this article discusses how gender discrimination impacts statelessness, globally and with specific focus on Southern Africa, and analyses how relevant international and selected regional and domestic law and policy frameworks have responded to this issue. The article seeks to contribute to the literature in this area in two ways: first, by analysing the current literature and highlighting the need for further research on issues of gender discrimination, both direct and indirect, related to statelessness; and, secondly, by adding to the existing literature through analysis of current law and policy developments in a specific context where statelessness is a growing issue of concern, viz. Southern Africa. The region of Southern Africa, understood broadly for the purposes of this article as comprising the sixteen Southern African Development Community (SADC) members,<sup>13</sup> is selected as the geographic focus of this article for the following reasons. As noted above, statelessness, and the risk of statelessness, is identified as a major human rights issue in this region. Further, while there is limited but growing literature on statelessness generally in this region, there are several relevant law and policy developments of interest in this area. Finally, there is limited attention to gender issues in existing statelessness literature in the region, a gap to which this article seeks to contribute.

The next section discusses some of the leading causes of statelessness, arising

<sup>11</sup> See, for example, Laura van Waas Zahra Al-Barazi & Deirdre Brennan 'Gender discrimination in nationality laws: Human rights pathways to gender neutrality' in Niamh Reilly (ed) *International Human Rights of Women* (2019); UNHCR 'Background Note on gender equality, nationality laws and statelessness' (2022), available at <https://www.refworld.org/docid/6221ec1a4.html>, accessed on 14 November 2022.

<sup>12</sup> See Allison J. Petrozziello '(Re)producing statelessness via indirect gender discrimination: Descendants of Haitian migrants in the Dominican Republic' (2019) 57(1) *International Migration* 213 at 214; Betsy L. Fisher 'Gender discrimination and statelessness in the Gulf Cooperation Council states' (2016) 23 *Michigan Journal of Gender and Law* 269.

<sup>13</sup> While there is some debate over how the region of Southern Africa is defined, the SADC member states comprise Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe. SADC 'Member States', available at <https://www.sadc.int/member-states#:~:text=The%20Southern%20African%20Development%20Community,Republic%20Tanzania%2C%20Zambia%20and%20Zimbabwe>, accessed on 11 November 2022.

both from direct and indirect gender discrimination, as well as some of the key consequences of statelessness for women. The third section provides a critical gender analysis of the relevant international legal frameworks on statelessness, highlighting concerns about inadequate gender responsiveness in the existing instruments. However, analysis of the relevant international human rights legal and policy frameworks — binding in the Southern African region — demonstrates a comprehensive foundation for women’s nationality rights and gender equality. The fourth section addresses relevant regional and sub-regional laws, policy developments, and jurisprudence. While not exhaustive, the analysis in this section indicates that there is growing attention to gender discrimination in statelessness law and policy in Southern Africa, and notable progress in some areas, such as the reform of gender discriminatory nationality laws. However, there remain ongoing challenges in bridging the statelessness gender gap that results in compounded vulnerabilities and consequences for women.

## II. GENDERED CAUSES AND CONSEQUENCES OF STATELESSNESS

### *(a) Conceptualising statelessness*

To clarify and frame the key concepts used in this article, the section begins with a brief discussion on conceptualising statelessness. Under international law, as per the 1954 Convention relating to the Status of Stateless Persons (1954 Convention), a stateless person is defined as someone ‘who is not considered as a national by any State under operation of its law’.<sup>14</sup> This definition has historically been understood as limited to cases of statelessness *de jure* (in law), which occurs due to various reasons, including by operation of the nationality laws of a country, or due to state succession and changes to national borders.<sup>15</sup> However, critiques in the literature have pointed to the shortcomings of this legally formalistic definition, proposing that the real test should be one of ‘effective nationality’, that is, whether there is effective national protection of an individual’s nationality rights.<sup>16</sup> Thus, the term ‘*de facto* (in practice) statelessness’ developed, pointing to the many ways in which people are not able to exercise their nationality rights in practice, for example, due to displacement from conflict or instability or migration, lack of birth registration, bureaucratic and administrative difficulties in obtaining identification documents, or as a consequence of human trafficking.<sup>17</sup> As discussed below, women are often more likely to face particular vulnerabilities to *de facto* statelessness owing to indirect gender discrimination.

However, as van Waas and de Chickera note, absent a binding definition under international law, the meaning of the concept of *de facto* statelessness has long

<sup>14</sup> Convention Relating to the Status of Stateless Persons 1954, 360 UNTS 117 art 1(1).

<sup>15</sup> Weissbrodt & Collins *op cit* note 5 at 251.

<sup>16</sup> Carol A. Batchelor ‘Stateless persons: Some gaps in international protection’ (1996) 7(2) *International Journal of Refugee Law* 232 at 233.

<sup>17</sup> *Ibid.*

been debated in the literature.<sup>18</sup> According to discussions facilitated by the United Nations High Commissioner for Refugees (UNHCR) in 2010 known as the Prato conclusions, 'de facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country'.<sup>19</sup> Ultimately, van Waas and de Chickera contend, this distinction around what de facto statelessness entails is less relevant now, given that the UNHCR has endorsed a broader understanding of what statelessness entails, and in light of modern human rights legal protections.<sup>20</sup> The 2014 UNHCR Handbook on the Protection of Stateless Persons provides very detailed guidance clarifying how the 1954 Convention definition of a stateless person should be interpreted, considering not only the relevant law of a state, but how it is implemented in practice, recognising that states may not follow, or even ignore, laws in practice.<sup>21</sup> This broader interpretation of the definition of a stateless person recognises that regardless of a state's nationality laws, persons can be rendered stateless in practice and in fact, even if not in law. This approach arguably reflects a more substantive interpretation of what nationality is and what it entails in practice, especially from a gendered perspective, given the many compounded risks of statelessness (direct and indirect) that women tend to face, as is discussed in the following sections.

### *(b) Direct gender discrimination in nationality laws*

Gender discriminatory nationality laws are a leading cause of statelessness globally.<sup>22</sup> Much of the advocacy work and literature around gender and statelessness has focused on gender-discriminatory nationality laws and the significant impacts they have on risks of *de jure* statelessness.<sup>23</sup> For example, the UNHCR Global Action Plan to End Statelessness includes a goal (Action 3) to remove gender discrimination from nationality laws by 2024, and there has been notable progress on this at the global level.<sup>24</sup> Such laws are based on the concept of 'dependent nationality', which is strongly rooted in patriarchal ideas about the dominance of the male as 'head of the family' through which familial nationality should flow.<sup>25</sup> During the colonial era, nationality laws of colonial powers, including the United Kingdom and France, enshrined dependent nationality along the male line, causing it to be replicated in domestic laws

<sup>18</sup> Laura van Waas & Amal de Chickera, 'Unpacking statelessness' in Tendayi Bloom Katherine Tonkiss & Phillip Cole (eds) *Understanding Statelessness* (2017).

<sup>19</sup> UNHCR 'Expert meeting – The concept of stateless persons under international law (Prato Conclusions)' Section II (2010), available at <http://www.refworld.org/docid/4ca1ae002.html>, accessed on 12 November 2022.

<sup>20</sup> Van Waas & de Chickera op cit note 18.

<sup>21</sup> UNHCR 'Expert meeting – The concept of stateless persons under international law (Prato Conclusions)' Section II (2010), available at <http://www.refworld.org/docid/4ca1ae002.html>, accessed on 12 November 2022.

<sup>22</sup> UNHCR 'Global Action Plan to end Statelessness: 2014-2024' at 12, available at [www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html](http://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html), accessed on 12 May 2022.

<sup>23</sup> See for example, the Global Campaign for Equal Nationality Rights, available at <https://equalnationalityrights.org/>, accessed on 12 May 2022; Zahra Albarazi & Laura van Waas, 'Towards the abolition of gender discrimination in nationality laws' (2014) 46 *Forced Migration Review* 49.

<sup>24</sup> UNHCR Global Action Plan op cit note 22 at 12.

<sup>25</sup> International Law Association 'Committee on feminism and international law: Final report on women's equality and nationality in international law' (London Conference, 2000) at 17, 25.

of colonised countries around the world, as occurred in many countries throughout Africa.<sup>26</sup> Consequently, this discriminatory approach was prevalent in nationality laws around the world until recent decades, although it is less common now.

There are two main legal consequences arising from the dependent nationality approach that result in gender discrimination. First, women can be required to automatically give up their own nationality upon marriage to a foreign national and acquire their husband's.<sup>27</sup> Conversely, some laws also restrict women from passing their nationality to their foreign husbands upon marriage on an equal basis with men's right to pass nationality to their wives. This restriction is a concern where the male spouse is stateless or at risk of statelessness. As recognised by the UN Human Rights Committee (HRC) in a case concerning Mauritius in 1981, this restriction impedes the right to family and is discriminatory on the basis of sex.<sup>28</sup> Secondly, due to the preference for following the male lineage, nationality of children passes through the man, barring women from passing their nationality to their children.<sup>29</sup> As such, many countries enacted laws that require women to lose their nationality upon marriage and restrict women from passing nationality to their children. No such restrictions apply to men who married foreign nationals or became a parent. The consequences can be severe. For example, children who cannot acquire nationality from their father can become stateless if their father dies, abandons the family, becomes stateless, or cannot prove his nationality.<sup>30</sup> Women married to foreign nationals risk losing their acquired nationality and becoming stateless if their status changes, such as through divorce or death or abandonment by the husband.<sup>31</sup>

As of 2022, more than 50 countries worldwide have laws restricting women's equal rights to acquire, retain, or change their own nationality.<sup>32</sup> A total of 25 countries still have laws that restrict women from passing their nationality to their children.<sup>33</sup> For example, in Eswatini, the Constitution states that children can only acquire nationality from their fathers.<sup>34</sup> There is an exception if the child is born out of wedlock and not legally or customarily recognised by the father, which is the only circumstance where a Swazi mother can pass her nationality to her child. There are still many countries worldwide, including Malawi and Lesotho, that restrict a woman from passing her nationality to her non-citizen spouse, although no such restriction applies to men.<sup>35</sup> Overall, there has been significant progress in the Southern African region to reform gender discriminatory nationality laws. As one of the last remaining countries in the region to include gender discrimination in

<sup>26</sup> Ibid.

<sup>27</sup> Ibid at 16.

<sup>28</sup> *Aumeeruddy-Cziffra v Mauritius* (35/1978), Views, CCPR/C/12/D/35/1978.

<sup>29</sup> International Law Association op cit note 25 at 18.

<sup>30</sup> CEDAW GR 32 op cit note 6 para 61.

<sup>31</sup> Ibid para 60.

<sup>32</sup> UNHCR 'Background Note' op cit note 11 at 2.

<sup>33</sup> Ibid at 2.

<sup>34</sup> Constitution of the Kingdom of Eswatini, 2005, Article 43. This provision applies to children born after 2005. According to the 1992 Citizenship Act the same provisions apply to children born after 1992.

<sup>35</sup> Bronwen Manby 'Statelessness in Southern Africa' (2012) Briefing paper for the UNHCR at 9.

its nationality laws, Eswatini has pledged to reform its nationality laws to eliminate gender discrimination by 2024.<sup>36</sup>

In addition, nationality laws that discriminate against a group of people, on the basis of race, ethnicity, or religion, can directly cause statelessness through the mass denial of nationality rights. Women from these groups are likely to face compounded discrimination on intersecting grounds owing to their gender, and thus, greater vulnerabilities. For example, in Madagascar, the Karana community, a predominantly Muslim minority group of Indo-Pakistani descent, faces entrenched discrimination and deprivation of nationality rights, despite living in the country for generations, perpetuating a multi-generational cycle of statelessness.<sup>37</sup>

*(c) Indirect gender discrimination*

Indirect gender discrimination also plays a significant role as a cause of statelessness. Indirect discrimination refers to the gender discriminatory impact of laws, policies, and practices that may appear gender neutral, but in practice have a disproportionate and negative impact on women.<sup>38</sup> As Petrozziello discusses, the impact of indirect discrimination against women in statelessness is an understudied area in the literature.<sup>39</sup> There are a number of ways in which indirect gender discrimination contributes to statelessness of women, and children. The UN Committee for the Elimination of Discrimination against Women (CEDAW Committee) discusses the impacts of indirect discrimination as a cause of statelessness in detail in its General Recommendation No. 32.<sup>40</sup> The consequences of indirect discrimination resulting in increased risks of statelessness include indirect discrimination arising from gender-neutral laws and practices, challenges in attaining birth registration, and difficulties in accessing and retaining identity documents, often due to displacement, conflict, or human trafficking.

As the CEDAW Committee outlines, even nationality laws that appear gender neutral can be discriminatory in practice and lead to greater risks of statelessness. Generally, women are more likely than men to change their nationality to that of their foreign spouse and are therefore more vulnerable to statelessness if there is a gap between renouncing one nationality and acquiring another.<sup>41</sup> For women who marry a foreign husband and relocate to his country, indirect discrimination may also result because women face more barriers and challenges in acquiring new nationality. For example, women are generally less likely to acquire adequate language skills in a new country, due to reduced access to education and the public sphere.<sup>42</sup> They may also

<sup>36</sup> UNHCR 'Background Note' op cit note 11 at 6.

<sup>37</sup> Mbiyozo op cit note 1 at 15-16.

<sup>38</sup> CEDAW GR 32 op cit note 6 para 54.

<sup>39</sup> Petrozziello op cit note 12 at 214.

<sup>40</sup> CEDAW GR 32 op cit note 6 para 51.

<sup>41</sup> Ibid para 54.

<sup>42</sup> Ibid para 55.

<sup>43</sup> Ibid.

have difficulty in proving property ownership or economic self-sufficiency.<sup>43</sup> Some countries require the spouse to sponsor nationality acquisition. This practice can leave women vulnerable to control by their spouse, which could have serious consequences in situations involving domestic violence.<sup>44</sup> If there is a gap in nationality status, women, and potentially their children, may be left in a situation where no state considers them to be nationals and therefore become temporarily stateless, resulting in restrictions on movement, as well as barriers in accessing services and legal protection.<sup>45</sup> Moreover, 'situations of statelessness following marriage to a foreigner and naturalization requirements ... can lead to women being dependent on men economically, socially, culturally and linguistically and, in turn, expose women to an increased risk of exploitation.'<sup>46</sup> Thus, it appears likely that women who are caught in-between nationalities due to marriage and relocation are increasingly vulnerable to abuse and intimate partner violence.<sup>47</sup>

A major barrier to proving nationality, for both women and their children, is the global challenge in ensuring birth certificate registration. Both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) recognise a child's right to have their birth registered as a basic human right.<sup>48</sup> The UN's Sustainable Development Goals (SDGs), under Target 16.9, recognise the importance of ensuring legal identity for everyone, including birth registration.<sup>49</sup> Without birth certificates, individuals cannot prove their identity and their nationality, leaving them vulnerable to statelessness.<sup>50</sup> This is a major cause of vulnerability to statelessness in Southern Africa, where less than 50% of births are registered.<sup>51</sup> In some countries, it is much lower; such as in Zambia, where only 10% of births are registered.<sup>52</sup> To varying degrees in different countries, there are many barriers to accessing birth registration and obtaining a birth certificate. Barriers include bureaucratic and procedural obstacles, lack of knowledge about or access to services, high costs, and discrimination against certain groups, including women. Some countries do not permit women to register the births of their children. For example, in Eswatini, the relevant law requires the father to register the birth of a child.<sup>53</sup> Only if he is dead, absent, or unable to register the birth is another person, such as the mother, permitted to register the birth. In other countries, such as Zambia, gender discrimination in administrative and customary procedures can

<sup>44</sup> Alice Edwards 'Displacement, statelessness, and questions of gender equality and the Convention on the Elimination of All Forms of Discrimination against Women' Legal and Protection Policy Research Series No. 14 UNHCR (2009) at 61.

<sup>45</sup> CEDAW GR 32 op cit note 6 para 57.

<sup>46</sup> Ibid.

<sup>47</sup> Edwards op cit note 44 at 61.

<sup>48</sup> Convention on the Rights of the Child (CRC), 1989 1577 UNTS 3, Article 7; African Charter on the Rights and Welfare of the Child (ACRWC), OAU Doc. CAB/LEG/24.9/49 (1990), Article 6(2).

<sup>49</sup> UN 'Transforming Our World: the 2030 Agenda for Sustainable Development' (2015), available at [www.sustainabledevelopment.un.org/post2015/transformingourworld](http://www.sustainabledevelopment.un.org/post2015/transformingourworld), accessed on 12 May 2022.

<sup>50</sup> Laura van Waas *Nationality Matters: Statelessness in International Law* 2 ed (2008) at 155.

<sup>51</sup> UNHCR 'Statelessness Update: Southern Africa' (September, 2020) at 5.

<sup>52</sup> Ibid.

<sup>53</sup> Eswatini Births, Deaths and Marriages Act 18 of 1983.

<sup>54</sup> Mitte op cit note 2.

mean that women are limited from registering children's births in practice.<sup>54</sup> Some women face compounded challenges in accessing birth registration on the basis of both gender and racial discrimination, as Petrozziello's research in the Dominican Republic demonstrates, contributing to risks of statelessness for women and their children.<sup>55</sup>

Practical challenges in obtaining identity documentation are also a major barrier to proving nationality in the Southern African region.<sup>56</sup> Gender-discriminatory norms and practices contribute to barriers to women obtaining documentation, as women tend to face greater challenges than men in securing and retaining their own identity documents.<sup>57</sup> Additionally, some women experience compounded discrimination in obtaining identity and citizenship documentation, such as due to their socio-economic status, and additional barriers due to lack of access to information, resources, and legal assistance.<sup>58</sup> Thus, while women in these circumstances may have nationality rights in law, they can be denied their effective protection in practice.

Violence against women (VAW) can also have consequences for women's ability to access documentation and prove their identity and nationality. In cases of violence, abuse, or trafficking, women's identity documentation may be seized or destroyed as a means of control.<sup>59</sup> For example, women and girls comprise more than 70 per cent of all victims of trafficking,<sup>60</sup> many of whom have their identity documents, such as passports, seized by traffickers or pimps.<sup>61</sup> They are thus left without any way to prove their identity and nationality.<sup>62</sup> As such, the UNHCR notes '... victims of trafficking, many of whom, especially women and children, are rendered effectively stateless due to an inability to establish such status.'<sup>62</sup> Owing to the widespread epidemic of VAW around the world, women are also more likely than men to face situations of gender-based violence, abuse, and exploitation. In South Africa, there is evidence to suggest that women who lack identification documents to prove their nationality, and are consequently at risk of statelessness in practice, are at greater risk of VAW. In such cases, women who do not have identity documents are often reluctant to seek help from authorities, or face barriers in seeking assistance and services.<sup>64</sup>

The above discussion seeks to highlight some of the leading direct and indirect

<sup>55</sup> Petrozziello op cit note 12.

<sup>56</sup> Bronwen Manby *Citizenship in Africa: The Law of Belonging* (2018).

<sup>57</sup> CEDAW GR 32 op cit note 6 para 57.

<sup>58</sup> Trisha Sabhapandit & Padmini Baruah 'Untrustworthy and unbelievable: Women and the quest for citizenship in Assam' 2021 3(1) *Statelessness & Citizenship Review* at 236.

<sup>59</sup> UN Human Rights Council (HRC) 'Report on discrimination against women on nationality related matters, including the impact on children' (2013) UN Doc. A/HRC/23/23 at para 24.

<sup>60</sup> UN Office on Drugs and Crime (UNODC) 'Global report on trafficking in persons 2018' (December 2018) at 25, 28, available at [www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP\\_2018\\_BOOK\\_web\\_small.pdf](http://www.unodc.org/documents/data-and-analysis/glotip/2018/GLOTIP_2018_BOOK_web_small.pdf), accessed on 12 May 2022.

<sup>61</sup> UNHCR 'Activities in the field of statelessness: Progress report' (2002) EC/51/SC/CRP.13 at para 18.

<sup>62</sup> Edwards op cit note 44 at 61

causes of statelessness for women and their children, that are rooted in or exacerbated by gender discrimination. While not an exhaustive analysis, and certainly there is further research required on this issue, it demonstrates that women are vulnerable to a range of elevated and compounded risks of statelessness linked to patriarchal norms and deeply rooted gender inequalities. These risks are not only limited to the discrimination *de jure* of gender discriminatory nationality laws, but also arise from indirect gender discrimination, especially as reflected in bureaucratic and administrative practices. For women who may also suffer discrimination on other grounds, such as race, ethnicity, religion, or socio-economic status, these effects are further compounded.

*(d) Key consequences of statelessness for women*

Despite the many serious consequences of being stateless, there is limited existing research into the gender-specific impacts of statelessness on women and their lived experiences. This is a significant gap, as Manjoo's discussion of a feminist approach to citizenship highlights. She argues that there is a need for 'a situated understanding of citizenship for women' informed by women's lived experiences.<sup>65</sup> Also, as George notes, 'limited existing research largely ignores the impacts that statelessness specifically has on women, including the extent to which statelessness creates vulnerabilities for abuse.'<sup>66</sup> As a starting point, it is very difficult to quantify how many women actually experience statelessness, given that the limited global data that does exist is not gender-disaggregated.<sup>67</sup> While there is a dearth of research in this area, some key overarching concerns often affecting stateless women are identifiable. As Rijken et al observe, 'in a number of areas, stateless women are more affected by the consequences of statelessness and find themselves in a more vulnerable position than men.'<sup>68</sup> The COVID-19 pandemic, and accompanying lockdowns and reduced access to services, as well as its severe socio-economic impacts, have heightened this vulnerability for stateless women even further.<sup>69</sup> Emerging research suggests that women who are stateless are especially vulnerable to VAW, including trafficking and sexual exploitation, as well as domestic violence and intimate partner violence.<sup>70</sup>

<sup>63</sup> UNHCR 'Statelessness: Prevention and reduction of statelessness and protection of stateless persons' (14 February 2006) EC/57/SC/CRP.6 at para 7(d).

<sup>64</sup> Pumla Rulashe 'Without documents, women at high risk of gender-based violence' UNHCR (15 December 2021), available at <https://www.unhcr.org/news/stories/2021/12/61b9c3104/documents-women-high-risk-gender-based-violence.html>, accessed on 12 May 2022.

<sup>65</sup> Rashida Manjoo 'Special guest contribution: Violence against women as a barrier to the realisation of human rights and the effective exercise of citizenship' (2016) 112 *Feminist Review* 11 at 14.

<sup>66</sup> George op cit note 9 at 1.

<sup>67</sup> UNHCR 'Global trends: Forced displacement in 2018' (2019) at 51. The report notes that fewer than half of countries have official statistics on stateless people, and it does not include any gender-disaggregated data on statelessness.

<sup>68</sup> Conny Rijken Laura van Waas Martin Gramatikov & Deirdre Brennan *The Nexus Between Statelessness and Human Trafficking in Thailand* (2015) 106.

<sup>69</sup> UNHCR 'Displaced and stateless women and girls at heightened risk of gender-based violence in the coronavirus pandemic' (20 April 2020), available at <https://www.unhcr.org/news/press/2020/4/5e998aca4/displaced-stateless-women-girls-heightened-risk-gender-based-violence-coronavirus.html>, accessed on 12 May 2022.

<sup>70</sup> UNHCR op cit note 59 para 53.

The CEDAW Committee further observes that ‘stateless women and girls are often marginalised’ and deprived of a host of rights, including the right to political participation, access to social benefits, and access to justice, as well as their human rights to education, health care, property, and employment.<sup>71</sup> In addition, many stateless people face barriers in mobility, right to travel, and right to legally form a family through marriage. While all stateless people are likely to face challenges in accessing key services and rights, there is evidence to suggest that women face compounded challenges in accessing such services owing to gender inequalities, discrimination, and patriarchal norms.<sup>72</sup> The consequences are significant, as empirical research shows that stateless people tend to have lower income levels, lower education levels, and poorer health outcomes.<sup>73</sup> As women are usually paid less than men, and have less access to education than men, while shouldering greater home and childcare responsibilities, the gendered impacts are compounded.<sup>74</sup>

In general, restrictions on access to health services can arise because stateless people are formally excluded, or because of differential fees for non-nationals, or the lack of identity documentation, or immigration status.<sup>75</sup> Restrictions on access to health care ‘... disproportionately affect women who may be unable to receive proper sexual and reproductive health care, including maternal and neonatal care.’<sup>76</sup> Lack of access to services can be life threatening, when women cannot obtain health care or seek legal assistance, such as in cases of VAW. Statelessness also severely impacts mobility and the ability to travel, a situation often heightened for women, who tend to face greater barriers to moving around and travelling.<sup>77</sup> There is also some evidence that statelessness negatively impacts the right to form a family, to marry and to have children, as the legal process of marriage typically requires identity documents.<sup>78</sup> While there is a clear need for further research into the gendered impacts of statelessness as experienced by women themselves, the foregoing outlines key areas of concern and demonstrates that gender discrimination certainly impacts the harms, restrictions, and vulnerabilities commonly experienced by women who are stateless.

### III. RELEVANT INTERNATIONAL LEGAL FRAMEWORKS

#### *(a) International human rights law: Protecting the right to a nationality, gender equality, and non-discrimination*

<sup>71</sup> CEDAW GR 32 op cit note 6 para 53.

<sup>72</sup> Women’s Refugee Commission ‘Our motherland, our country: Gender discrimination and statelessness in the Middle East and North Africa’ (2013) at 3, available at [www.womensrefugeecommission.org/research-resources/our-motherland-our-country-gender-discrimination-and-statelessness-in-the-middle-east-and-north-africa/](http://www.womensrefugeecommission.org/research-resources/our-motherland-our-country-gender-discrimination-and-statelessness-in-the-middle-east-and-north-africa/), accessed on 12 May 2022.

<sup>73</sup> D Blitz S Balaton-Chrimes R Lakshman & M Lynch ‘The cost of statelessness: A livelihoods analysis’ Bureau of Population, Refugees and Migration, United States Department of State (2011).

<sup>74</sup> Rijken et al op cit note 68 at 19, 60.

<sup>75</sup> UN HRC op cit note 59 para 50.

<sup>76</sup> Ibid at 70.

<sup>77</sup> Rijken et al op cit note 68 at 58.

<sup>78</sup> Ibid at 70.

International human rights law provides a robust, and widely subscribed, framework for the protection of a right to nationality, gender equality, and non-discrimination. The right to a nationality is recognised and protected in a number of international human rights law instruments that are widely ratified in the Southern African region. The Universal Declaration of Human Rights (UDHR) provides under article 15 that ‘everyone has the right to a nationality’, and that ‘no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’.<sup>79</sup> The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) also recognises the general right to a nationality.<sup>80</sup> The International Covenant on Civil and Political Rights (ICCPR)<sup>81</sup> and the UN Convention on the Rights of the Child (CRC),<sup>82</sup> specifically protect the rights of children to nationality. As all SADC member states have acceded to the core international human rights treaties, including the ICCPR, ICERD, the CRC, and the International Covenant on Economic, Social and Cultural Rights (the ICESCR),<sup>83</sup> these international legal protections are binding in each country in the region.<sup>84</sup>

As noted above, stateless persons who cannot prove their nationality are typically barred from exercising a range of internationally protected civil, political, social, and economic rights. For example, a stateless person is not allowed to vote or stand for public office — rights protected under the ICCPR.<sup>85</sup> They are denied freedom of movement, including travel outside national borders.<sup>86</sup> The ICESCR protects a range of rights, including the right to work, to education, to health, and to housing. In practice, a stateless person would typically be barred from all of these ‘official’ areas of life.<sup>87</sup> Yet, as Weissbrodt & Collins discuss, human rights apply simply because we are human, thus nationality should be irrelevant.<sup>88</sup> For example, under article 2, the ICCPR applies ‘to all individuals within [a state’s] territory and subject to its jurisdiction’.<sup>89</sup> The UN Human Rights Committee has confirmed that the rights in the ICCPR apply to everyone, ‘irrespective of his or her nationality or statelessness’.<sup>90</sup>

International human rights law also recognises some gendered dimensions of statelessness. This tends to focus on recognition that statelessness is often caused

<sup>79</sup> Universal Declaration of Human Rights (UDHR) 1948, Article 15(1), (2).

<sup>80</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965, 660 UNTS 195, Article 5(c)(iii).

<sup>81</sup> International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171 (ICCPR), Article 24(3).

<sup>82</sup> CRC op cit note 48, Article 7.

<sup>83</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, 993 UNTS 3.

<sup>84</sup> All sixteen SADC member states have ratified each of the noted treaties: United Nations Treaty Database, available at [https://tbineternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en](https://tbineternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en), accessed on 11 November 2022.

<sup>85</sup> ICCPR op cit note 81, Article 25.

<sup>86</sup> Freedom of movement is protected under Ibid ICCPR, Article 12.

<sup>87</sup> CEDAW GR 32 op cit note 6 para 52.

<sup>88</sup> Weissbrodt & Collins op cit note 5 at 249.

<sup>89</sup> ICCPR op cit note 81, Article 2.

<sup>90</sup> Human Rights Committee ‘General Comment No. 15: The position of aliens under the Covenant’ (11 April 1986) HRI/GEN/1/Rev.9 (Vol. I) at para 1.

by gender discriminatory nationality laws. First, equality and non-discrimination are fundamental overarching principles enshrined in all international human rights treaties. For example, the UDHR and the ICCPR prohibit discrimination on numerous grounds, including sex.<sup>91</sup> The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) specifically prohibits all forms of discrimination against women and seeks to ensure gender equality.<sup>92</sup> CEDAW further requires states to reform laws and processes and abolish practices that discriminate against women (whether directly or indirectly).<sup>93</sup> The CEDAW Committee, the expert treaty body charged with overseeing implementation of the treaty, confirms that formal equality between men and women in law is not sufficient, rather states must ensure ‘substantive equality’.<sup>94</sup> Substantive equality recognises the impacts of gendered power imbalances and underrepresentation of women, and seeks to ensure ‘equality of results.’<sup>95</sup> With regard to nationality issues, CEDAW expressly protects women’s ‘equal rights with men to acquire, change or retain their nationality’.<sup>96</sup> CEDAW recognises the prevalent state practices of restricting women’s rights to retain their nationality upon marriage and to pass their nationality to their children. As such, CEDAW article 9(1) states that ‘... neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.’ Article 9(2) affirms that women have equal rights with men regarding the nationality of their children.

CEDAW’s express recognition of women’s equal nationality rights, both in respect to marriage and children, is significant given that the treaty is widely ratified globally, including by all states in the SADC region.<sup>97</sup> The CEDAW Committee has also drawn attention to gender and nationality issues in the region, notably pointing both to direct and indirect forms of discrimination impacting nationality rights and risks of statelessness. For example, in its 2022 concluding observations on Namibia, the Committee noted various nationality concerns, calling on the state to ratify the Statelessness Conventions, and warning that birth registration remains low, especially impacting undocumented women.<sup>98</sup> In its concluding observations on Eswatini, referring to discriminatory nationality laws, the Committee stated that ‘the Committee is concerned that both the Constitution and the Citizenship Act

<sup>91</sup> ICCPR op cit note 81, Article 26.

<sup>92</sup> Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979, 1249 UNTS 13, Article 2.

<sup>93</sup> Ibid.

<sup>94</sup> CEDAW ‘General Recommendation No. 25. Article 4, paragraph 1, of the Convention (temporary special measures)’ (2004) at para 8.

<sup>95</sup> Ibid para 9.

<sup>96</sup> CEDAW op cit note 93, Article 9(1).

contain provisions depriving children born to Swazi women and foreign husbands of nationality, hence increasing their risk of statelessness.<sup>99</sup> These examples indicate that there are ongoing concerns with gendered dimensions of statelessness in the region.

Several 'soft law' normative developments in international human rights law also reflect greater attention to the unique gender implications of statelessness, again with focus on discriminatory nationality laws. This shift is reflected in international jurisprudence that has ruled against gender-discriminatory nationality laws.<sup>100</sup> Likewise, highlighting the impact of gender-discriminatory nationality laws, the UN Human Rights Council issued a Resolution on the right to a nationality for women and children in 2012.<sup>101</sup> The Resolution calls for states to refrain from enacting gender discriminatory nationality legislation. It also calls on states to reform any discriminatory legislation to ensure women's equal rights to confer nationality on their children and to retain their own nationality status in marriage.<sup>102</sup> With a similar focus, the UNHCR's Global Action Plan to End Statelessness, launched in 2014, includes a specific goal to remove gender-discriminatory nationality laws (Action 3).<sup>103</sup> However, the Action Plan does not refer to any other aspects of gender related to statelessness. In contrast, the CEDAW Committee has focused more broadly on this issue in its jurisprudence. Significantly, the CEDAW Committee's approach includes a more comprehensive focus on indirect discrimination and gendered impacts on stateless women, specifically in its General Recommendation 32.<sup>104</sup>

In conclusion, there is a robust body of international human rights law, binding in the Southern African region, with direct application to statelessness issues, enshrining the right to nationality, gender equality and non-discrimination. Further, the gendered implications of gender-discriminatory nationality laws are recognised by CEDAW and various normative developments. Attention to other aspects of gender-based discrimination, especially the impacts of indirect discrimination, have received limited attention, although the CEDAW Committee points to the impacts of this issue. However, as discussed in the preceding section, there continues to be a significant gap between these legal protections and practice.

### *(b) Locating the gender gaps in international laws on statelessness*

<sup>97</sup> All sixteen SADC member states have ratified CEDAW: United Nations Treaty Collection 'Ratification Status for CEDAW' available at [https://tbinetnet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en](https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en), accessed on 11 November 2022.

<sup>98</sup> CEDAW Committee 'Concluding observations on the sixth periodic report of Namibia' (2022) UN Doc CEDAW/C/NAM/CO/6 at para 36.

<sup>99</sup> CEDAW Committee 'Concluding observations on the combined initial and second periodic reports of Swaziland' (2014) UN Doc CEDAW/C/SWZ/CO/1-2 at para 28.

<sup>100</sup> See, for example, OC-4/84 Advisory opinion on proposed amendments to the naturalization provision of the Constitution of Costa Rica IACtHR Series A 4 (1984); *Genovese v Malta* Application No 53124/09 Judgment 11 October 2011.

<sup>101</sup> Human Rights Council 'Resolution 20/4, The right to a nationality: Women and children' (16 July 2012) A/HRC/20/L.8.

<sup>102</sup> *Ibid* paras 3–6.

<sup>103</sup> UNHCR Global Action Plan *op cit* note 22 at 12.

<sup>104</sup> CEDAW GR 32 *op cit* note 6.

<sup>105</sup> 1954 Convention *op cit* note 14.

There are two international UN treaties specifically focused on statelessness, namely the 1954 Convention<sup>105</sup> and the 1961 Convention on the Reduction of Statelessness<sup>106</sup> (1961 Convention) (collectively, the Statelessness Conventions). While the 1954 Convention obligates states parties to take steps to facilitate stateless persons to acquire nationality, the 1961 Convention focuses primarily on prevention and reduction of statelessness occurring in various scenarios, through reform of national legislation. The 1954 Convention focuses on protection and obligates states parties to ensure stateless people have basic rights. These treaties recognise the general principle that while states have the right to determine their own nationality laws,<sup>107</sup> they must do so in line with international norms.<sup>108</sup> Under international law, nationality (used interchangeably here with citizenship) refers to the legal bond between an individual and the state.<sup>109</sup> Nationality is typically obtained at birth either through the nationality of one's parents (*jus sanguinis*) or based on the country in which one is born (*jus soli*), and can also be obtained, or lost, subsequently through various changes to personal status, including residency changes or marriage. Overall, the Conventions are relatively undersubscribed, with limited international reach. Although most Southern African states are party to the 1954 Convention, including Angola, Botswana, Eswatini, Lesotho, Madagascar, Malawi, Mozambique, Zambia, and Zimbabwe, several are not, specifically South Africa and Namibia.<sup>110</sup> South Africa, for example, has so far resisted calls to accede to the Conventions, despite stating it would do so in 2011, claiming that its existing laws are adequate to protect against statelessness.<sup>111</sup> Only four countries in the region, Angola, Eswatini, Lesotho, and Mozambique, have acceded to the 1961 Convention.<sup>112</sup> While states' reasons for declining to accede to the Conventions may vary, Bloom notes that statelessness is contentious and often viewed as politically problematic, especially given states' interests with preserving their sovereignty over citizenship issues as compared to the 'strong positive requirements' of the Conventions.<sup>113</sup>

While the Statelessness Conventions offer a targeted and technical focus on addressing the legal causes and consequences of statelessness, they have obvious normative gender gaps. The language of the 1961 Convention uses only the male pronoun ('he', 'his', 'himself'), signalling the invisibility of women during the Convention's drafting, perhaps unsurprising given the era. The 1954 Convention does not recognise gender or sex as a ground of discrimination.<sup>114</sup> In fact, most

<sup>106</sup> Convention on the Reduction of Statelessness 1961, 989 UNTS 175.

<sup>107</sup> *Nottebohm Case (Liechtenstein v Guatemala)* Second Phase, ICJ Reports 1955, 4.

<sup>108</sup> Hague Convention on Certain Questions Relating to the Conflict of Nationality Law 1930, 179 LNTS 89.

<sup>109</sup> *Nottebohm* op cit note 107.

<sup>110</sup> United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdspg=no-V-3&chapter=5&Temp=mtdspg2&clang=en>, accessed on 12 May 2022.

<sup>111</sup> Fatima Khan 'Exploring childhood statelessness in South Africa' PER / PELJ 2020 (23) at 19.

<sup>112</sup> United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdspg=no-V-4&chapter=5&clang=en>, accessed on 12 May 2022

<sup>113</sup> Tendayi Bloom 'United Nations University-GCM Policy Report 02/01: Problematising the Conventions on Statelessness' (2013) at 14.

<sup>114</sup> For example, Article 3 of the 1954 Convention provides: 'the Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.'

countries had discriminatory nationality laws in effect during this time that denied women equal rights to retain their nationality upon marriage (to a foreign national), or to pass their nationality to their children.<sup>115</sup> While the 1961 Convention recognises these situations, it gives states wide latitude to retain gender discriminatory laws. For example, in cases where nationality is lost due to marriage (or related change to personal status) the 1961 Convention does not prohibit such outcomes. Instead, article 5 of the 1961 Convention states that ‘such loss shall be conditional upon possession or acquisition of another nationality’. In cases where the mother is barred from passing her nationality to her children, the 1961 Convention provides nationality must be granted to the child. However, under article 3 this protection only applies if the child would otherwise be stateless, and it further stipulates this applies in cases of wedlock only. Thus, the Statelessness Conventions do not challenge the direct gender discrimination rooted in nationality laws that subsume women’s nationality rights under their husbands’. Notably, the 1957 Convention on the Nationality of Married Women (1957 Convention) did directly address the issue of nationality loss due to marriage. The 1957 Convention, articles 1 and 2, states that a woman’s nationality should not be automatically affected by marriage to a foreign national, and acquisition or renunciation of a nationality by a husband must not prevent the wife’s retention of her nationality.<sup>116</sup> As noted above, these protections were further expanded and strengthened in article 9 of the widely ratified CEDAW treaty, expressly protecting women’s equal nationality rights both in marriage and in relation to any children.<sup>117</sup>

The consequences of a gender-blind international legal framework on refugees and statelessness are significant. As Edwards contends with reference to the 1951 Refugee Convention, failing to include sex and gender in the treaty ‘... established the masculine experience as the norm ... and relegated women and women’s experiences to second-class status.’<sup>118</sup> It is suggested here that the same assessment can be applied to the Statelessness Conventions. Undoubtedly, international human rights law, and the principle of gender equality, have advanced significantly since the Statelessness Conventions were enacted. The UNHCR confirms that the treaties ‘must be read and interpreted in light of developments in international law, in particular international human rights law.’<sup>119</sup> Further, the principle of gender equality, as reflected in widely ratified international human rights treaties, must be taken into account.<sup>120</sup> However, the fact remains that the Statelessness Conventions are, on their face, inadequate from a gender perspective. As Brennan cautions while noting the exclusion of gender in the Statelessness Conventions, ‘to uncritically celebrate the existence of these treaties

<sup>115</sup> International Law Association op cit note 25 at 17, 25.

<sup>116</sup> Convention of the Nationality of Married Women 1957, 309 UNTS 65, Articles 1–2.

<sup>117</sup> See CEDAW, section III(a) at 15.

<sup>118</sup> Alice Edwards ‘Transitioning gender: Feminist engagement with international refugee law and policy 1950–2010’ (2010) 29(2) *Refugee Survey Quarterly* 21 at 23.

<sup>119</sup> UNHCR ‘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’ (21 December 2012) HCR/GS/12/04 at para 8.

<sup>120</sup> Ibid para 13.

is to celebrate a continued compartmentalization [of] gender issues that instead ought to be treated as structural and all-pervasive.<sup>121</sup> From a feminist perspective, it is important that these gender-based normative shortcomings are recognised and their impact on ongoing statelessness advocacy, policy, and research considered.

#### IV. CURRENT DEVELOPMENTS ON GENDER AND STATELESSNESS IN SOUTHERN AFRICA

##### *(a) Selected African regional human rights law and policy developments*

There are no laws that are binding on all member states of the African Union (AU) that expressly address statelessness or statelessness through the lens of gender. Core instruments in the regional human rights system in Africa do include protections for nationality rights, gender equality, and non-discrimination on the basis of sex. While it guarantees non-discrimination on the basis of sex, the African Charter on Human and Peoples' Rights (ACHPR)<sup>122</sup> does not specifically refer to the right to a nationality. However, in practice, in its jurisprudence the African Commission has linked the right to a nationality to other rights protected under the Charter, including the prohibition of discrimination (article 2) and equality before the law (article 3).<sup>123</sup> The African Charter on the Rights and Welfare of the Child (ACRWC), article 6(3), affirms the right of all children to acquire a nationality, as well as non-discrimination on the basis of sex.<sup>124</sup>

Also importantly, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), aims to ensure the protection and realisation of the rights of women 'in order to enable them to enjoy fully all their human rights.'<sup>125</sup> Article 2(1), states that 'States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures'. Article 6 of the Maputo Protocol highlights the issue of equality between men and women in the context of marriage, and addresses the issue of nationality, and this consequently raises the issue of statelessness. Article 6(g) expressly states that women have the right to retain their nationality or acquire that of their husband. The Maputo Protocol also affirms that women and men have equal rights with respect to nationality of their children, although this protection is limited in cases 'where this is contrary to a provision in national legislation or is contrary to national security interests' (article 6(h)). Unfortunately, this caveat essentially allows

<sup>121</sup> Brennan op cit note 9 at 175.

<sup>122</sup> African Charter on Human and Peoples' Rights (ACHPR) 'OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58' (1982).

<sup>123</sup> LH Muller 'Legal identity for all – ending statelessness' in Goal 16 of the sustainable development goals, Perspectives from judges and lawyers in Southern Africa on promoting rule of law and equal access to justice, (1 December 2016) at 141, available at [www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf](http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf), accessed on 12 May 2022.

<sup>124</sup> ACRWC op cit note 48.

<sup>125</sup> ACHPR 'Protocol to the Charter on the Rights of Women in Africa 2003, Assembly/AU/Dec 14(II) (Maputo Protocol); Article 6(g).

states parties to maintain laws that limit women's rights to pass their nationality to their children.

In terms of future legal developments, discussion continues on a Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (AU Draft Protocol on Nationality).<sup>126</sup> It was prepared by the African Commission on Human and Peoples' Rights (ACHPR) following the adoption of two resolutions — Resolution 234 on the Right to Nationality<sup>127</sup> and Resolution 277 on the Drafting of a Protocol on the Right to Nationality in Africa.<sup>128</sup> The Preamble to Resolution 234 provides that the African Commission notes, among other things, the provisions of articles 2 and 6(h) and 6(g) of the Maputo Protocol that establish the equal right of men and women to acquire their partner's nationality, and article 15 of the Universal Declaration of Human Rights (UDHR) which provides that everyone has the right to a nationality. Concern is expressed at 'the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states', especially as a result of discrimination on various grounds, including sex.<sup>129</sup> States are encouraged to adopt constitutional and other legislative provisions to prevent and reduce statelessness, in line with fundamental principles of international law. The Preamble to Resolution 277 stresses 'the need to take new decisive steps towards identifying, preventing and reducing statelessness and protecting the right to nationality', including through the preparation of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa.<sup>130</sup> This latter task was assigned to the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa,<sup>131</sup> and the mandate holder has continued to raise the issue of statelessness in different meetings and conferences.

*(b) The AU Draft Protocol on Nationality*

This growing focus on statelessness issues in Africa culminated in the AU Draft Protocol on Nationality, formally submitted to the Commission for the African Union in May 2017. It aims to 'facilitate the inclusion of individuals within African states, by providing legal solutions for the resolution of the practical problems linked to the recognition and exercise of the right to a nationality, to eradicate statelessness ...'<sup>132</sup> Among other provisions, in its Preamble, the AU Draft Protocol on Nationality

<sup>126</sup> ACHPR 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa' (2015), available at [https://www.achpr.org/public/Document/file/English/draft\\_citizenship\\_protocol\\_en\\_sept2015\\_achpr.pdf](https://www.achpr.org/public/Document/file/English/draft_citizenship_protocol_en_sept2015_achpr.pdf), accessed on 12 May 2022.

<sup>127</sup> ACHPR 'Resolution 234 on the Right to Nationality' ACHPR/Res.234 (LIII) 2013.

<sup>128</sup> ACHPR 'Resolution 277 on the Drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa' ACHPR/Res.277 (LV) 2014.

<sup>129</sup> ACHPR 'Resolution 234' op cit note 127 at 130.

<sup>130</sup> ACHPR 'Resolution 277' op cit note 128 at 131.

<sup>131</sup> Ibid.

<sup>132</sup> African Union (AU) 'Draft Protocol, Explanatory Memorandum' (2018) at para 1, available at [https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527\\_e\\_originalexplanatory\\_memorandum.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-pa22527_e_originalexplanatory_memorandum.pdf), accessed on 12 May 2022.

<sup>133</sup> ACHPR 'Draft Protocol' op cit note 126 at preamble.

recognises that 'the right to a nationality is a fundamental condition for the protection and effective exercise of the full range of other human rights'; affirms that statelessness violates 'the right to human dignity and to legal status enshrined in article 5 of the African Charter on Human and Peoples' Rights'; and articulates the political will to eradicate statelessness in Africa through ensuring that all residents of African states have a nationality, through the harmonisation of nationality laws and the prohibition of arbitrary deprivation or denial of nationality.<sup>133</sup>

Article 3 of the AU Draft Protocol on Nationality affirms general principles including that 'every person has the right to a nationality'; that 'no one shall be arbitrarily deprived or denied recognition of his or her nationality nor denied the right to change his or her nationality'; and that 'States have the obligation to act, both alone and in cooperation with each other, to eradicate statelessness'. Article 4(1) of the AU Draft Protocol on Nationality regarding non-discrimination provides for a prohibition on the inclusion of distinctions, exclusions, restrictions, or provisions promoting differential treatment, which are based on a number of grounds including race, ethnic group, colour, and sex. Article 4(2) provides that states parties 'shall grant women and men equal rights to acquire, change or retain their nationality and with respect to the nationality of their children'. However, there is an exception to the non-discrimination prohibition in article 4(3) that allows for a state party to reserve the right to make distinctions among its nationals, if at the time of signature, ratification or accession it reserves its retention of such right.

Article 6 provides for the possibility of the acquisition of a nationality, including the acquisition of nationality by the spouse of a national, consequently making it possible for women to acquire the nationality of their husbands, or vice versa. Article 9 on marriage provides further protection to spouses regarding their right to nationality in the context of marriage or upon the dissolution of such marriage. It states that a state party shall provide in law that 'a marriage or the dissolution of a marriage between a national and a non-national shall not automatically change the nationality of either spouse nor affect the capacity of the national to transmit his or her nationality to his or her children', and also, that 'the change of nationality of one spouse during marriage shall not automatically affect the nationality of the other spouse or of the children'. Importantly, from an equality and non-discrimination perspective, article 13 of the AU Draft Protocol on Nationality provides for every person's right to documentation that proves their nationality, with women and men having equal rights to obtain such documents and having the right to have them issued in their own names. Overall, the AU Draft Protocol on Nationality addresses some of the key gender discrimination issues impacting women's nationality rights. As recognised in international human rights instruments discussed above, it prohibits direct discrimination by affirming women's and men's equal rights to nationality and to that of their children, and equal rights to retain or pass nationality to a spouse upon marriage. Importantly, given the impact of statelessness concerns arising from

<sup>134</sup> See also discussion by Muller *op cit* note 123 at 143–144.

documentation challenges, it affirms women's equal rights to identity documents.

*(c) Developments in the Southern African Development Community (SADC)*

There are no laws that are binding on all member states of the SADC that expressly address statelessness, or statelessness through the lens of gender. However, various legal and policy developments in the region have considered this issue.<sup>134</sup> For example, the SADC legal framework does, however, include a legal instrument that addresses a cause of statelessness. The Southern African Development Community Protocol on Gender and Development (SADC Protocol) was adopted in 2008, and aims to provide for the empowerment of women, and to eliminate discrimination and achieve gender equality.<sup>135</sup> While the SADC Protocol does not directly address the issue of statelessness, article 8(5) addresses a common cause of statelessness, namely, the absence of gender equality in the laws that govern the acquisition and transfer of nationality within the context of marriage. It obligates states parties to ensure that men and women have equal rights to either retain or change nationality upon marriage.

From a policy perspective, the SADC Parliamentary Forum Plenary Assembly held its 40th Plenary Assembly Session in 2016 in Zimbabwe, on the theme of 'Statelessness in the SADC Region'. This Forum adopted a Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC Region (SADCPF Resolution on Statelessness).<sup>136</sup> Paragraphs (iii) and (iv) of the SADCPF Resolution on Statelessness address the link between gender discrimination and the occurrence of statelessness. It calls upon states to 'initiate legislative reforms that address any identified gaps or challenges, including any discrimination on the basis of race, ethnicity, religion, or gender, thereby helping to prevent statelessness'; and 'to 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'.<sup>137</sup> In another policy level statement issued in 2016, the Migration Dialogue for Southern Africa, comprising representatives from governments in the region, adopted Recommendation 2.3 in respect of the issue of statelessness.<sup>138</sup> This statement addresses, albeit briefly, the issue of gender inequality in the laws that govern nationality within the SADC member states, affirming the need to ensure equality between men and women to pass on their nationality to their spouse and children. Thus, at both the legal and policy level in the SADC region there is recognition of the need to affirm and protect the equal nationality rights of

<sup>134</sup> Southern African Development Community (SADC) 'Protocol on Gender and Development' (2008), available at [https://www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf), accessed on 12 May 2022.

<sup>136</sup> SADC 'Resolution on the Prevention of Statelessness and the Protection of Stateless Persons in the SADC Region' (2016).

<sup>137</sup> *Ibid* paras iii and iv.

<sup>138</sup> Migration Dialogue for Southern Africa 'Addressing mixed migration in Southern Africa: Linking protection, immigration, border management and labour migration' (2016).

men and women.

(d) *National level developments*

Over recent decades, many countries, including in the Southern Africa region, have moved away from the dependent nationality approach and recognised that denying women their nationality simply due to marriage, or from sharing their nationality with their children, was clear gender discrimination in nationality laws. Ground-breaking litigation and advocacy initiatives have sometimes driven law reform at the domestic level, although progress has been slow. For example, the landmark Botswana case *Dow v. Attorney-General*<sup>139</sup> demonstrates both the consequences of gender discriminatory laws and the impact of advocacy in forcing law reform. Unity Dow, a female human rights lawyer and judge, married an American foreign national and they had three children.<sup>140</sup> Botswana's Citizenship Act 1984 provided that children born in Botswana are citizens of Botswana only if (1) the father is a citizen, or (2) if the child is born out of wedlock, the mother is a citizen.<sup>141</sup> Thus the law prohibited women, like Dow, who are married to foreign nationals, from passing their Botswana nationality to their children. Consequently, her children could not share her nationality and would require residence permits to remain in the country, and they would also be denied access to social, health, and educational benefits.<sup>142</sup> Dow claimed that this provision of the Citizenship Act was a violation of the Constitution's equality protections because it discriminated against women on the basis of sex.<sup>143</sup> Botswana's High Court and Court of Appeal agreed, and ruled that this provision of the nationality law was unconstitutional due to discrimination on the basis of sex.<sup>144</sup> The Botswana Citizenship Act was subsequently amended to confirm that any person born in Botswana is a national of Botswana, if either the mother or father is a national.<sup>145</sup>

Other countries in the region, such as Zambia and Zimbabwe, have taken steps to reform their nationality laws through their Constitutions to ensure compliance with gender equality rights.<sup>146</sup> More recently, in 2017, Madagascar amended its nationality laws to give women equal rights to transmit nationality to their children.<sup>147</sup> In addition, there has been progress towards reforming administrative laws and procedures that discriminate against women. For example, in 2004 Mozambique reformed its Civil Registration Code to allow either parent to register the birth of a

<sup>139</sup> *Dow v Attorney-General* 991 BLR 233 (High Court of Botswana), affirmed on appeal *Attorney-General v Dow* 1992 BLR 119 (Botswana Court of Appeal).

<sup>140</sup> *Ibid* at 235–236.

<sup>141</sup> *Ibid* at 236–237.

<sup>142</sup> *Ibid* at 242–243.

<sup>143</sup> *Ibid* at 243.

<sup>144</sup> *Ibid* at 247.

<sup>145</sup> Botswana Citizenship Act (Cap 01-01) (Act No 8 of 1998), Article 4(1).

<sup>146</sup> Constitution of Zambia Act No1 of 1991; Constitution of Zimbabwe Amendment Act No 14 of 1996.

<sup>147</sup> Madagascar Law No 2016-038 of 25 January 2017, Article 9.

<sup>148</sup> Mozambique Law No 12 on the Civil Registration Code 2004 (as amended by law 12/2018), Article 149; and Mozambique Family Law, 2004 (amended by law 22/2019), Article 238(1).

child and request a birth certificate, while single mothers can register their children directly.<sup>148</sup>

*(e) The gap between law and practice*

The developments discussed in this section focus primarily on legal reforms and developments at the regional level and national levels to address gender discriminatory nationality laws. However, as the African Commission on Human and Peoples' Rights concludes, in reference to nationality-related protections in relevant regional human rights treaties,

... these new provisions have only had a very limited impact on the continent, notably due to the fact that the treaties are not systematically transposed into the national legal systems of the States parties and are not often invoked in national or regional courts by individuals whose rights to nationality are contested or denied.<sup>149</sup>

In short, the gap between law and practice remains significant. Further, while the law reform examples cited here reflect important progress, there appears to be far less attention to the indirect forms of gender discrimination that can function as drivers increasing the risks of statelessness for women. For example, as a leading cause of statelessness in the region, the lack of birth registration and access to identity documentation — essential to proving nationality — poses significant problems. As Manby notes, 'civil registration and identification systems are key to recognition of nationality', although these systems remain weak in the region owing largely to colonial legacies.<sup>150</sup> This issue has strong gender dimensions, as women often face greater challenges in accessing identity documentation, birth registration, and accessing and navigating bureaucratic processes.<sup>151</sup> For example, in its recent concluding observations on South Africa, the CEDAW Committee noted its concern that many women, especially in rural areas and informal settlements, 'face challenges in accessing birth registration and identity documents, depriving them of access to basic services.'<sup>152</sup> The Committee also pointed to the lack of safeguards in the birth registration laws to prevent children of undocumented women from becoming stateless.<sup>153</sup> In both Mozambique and Madagascar, there is a noticeable gap between the higher proportion of men who have identity documentation, as compared to the lower rates involving women.<sup>154</sup> In the context of Zambia, where only 10% of births are registered, the UNHCR points to the impact of gender discrimination even

<sup>149</sup> ACHPR 'The Right to a Nationality in Africa' (2015) at 7.

<sup>150</sup> Bronwen Manby 'Citizenship and statelessness in the member states of the Southern African Development Community' UNHCR (2020) at 1.

<sup>151</sup> See Mbiyozo *op cit* note 1 at 7.

<sup>152</sup> CEDAW Committee 'Concluding observations on the fifth periodic report of South Africa' (2021) UN Doc CE-DAW/C/ZAF/CO/5 at para 41.

<sup>153</sup> *Ibid.*

<sup>154</sup> Manby *op cit* note 150 at 72.

<sup>155</sup> Mitte *op cit* note 2.

where laws are gender neutral, noting that traditional practices of birth registration managed by traditional chiefs often give precedence to men.<sup>155</sup> Thus, it appears that even where there has been progress on reforming overtly gender discriminatory laws, the reality for women tends to be impacted by gender discriminatory norms in practice.

## V. CONCLUSION

According to Coomaraswamy, 'statelessness is a status of profound marginalization'.<sup>156</sup> As the foregoing discussion shows, this profound marginalisation is particularly acute for stateless women, or those who are at risk of being stateless, who often must navigate multiple and compounded levels of discrimination and risks on the basis of their gender. This article has sought to highlight some of the key direct and indirect forms of gender discrimination that contribute to statelessness, as well as some of the key consequences of statelessness particularly impacting women. The denial of nationality rights comes with a much greater risk of the denial of a wide range of human rights and elevates risks of gender-based violence and exploitation for women. With the exception of the focus on gender-discriminatory nationality laws, this gender gap has received relatively limited attention in statelessness scholarship and practice. This deficit is perhaps not surprising in light of the normative gender gaps persisting in the international legal framework on refugees and statelessness, where the foundational treaties omit reference to sex or gender discrimination. It seems that attention to gender issues in statelessness has long been side-lined. Yet, as the foregoing discussion has sought to demonstrate, gender discrimination significantly impacts statelessness and the risk of statelessness, including in the Southern African region.

Despite the gender gaps in the Statelessness Conventions, analysis of relevant international human rights laws and policies, binding in Southern African countries, demonstrates that there are strong legal protections of the rights to nationality, equality and non-discrimination on the basis of gender. Selected regional and domestic developments in the African human rights system indicate that there is also growing awareness of and responses to this issue in the regional context. For example, the affirmation of key protections related to gender discrimination in the AU Draft Protocol on Nationality is significant. However, even the Maputo Protocol provides an exception allowing states to retain gender discriminatory laws with respect to passing nationality to children, indicating that robust protection of equality rights in nationality and statelessness issues still face challenges. Nonetheless, there are encouraging developments in domestic law reform efforts to address these issues in countries throughout Southern Africa. The Unity Dow case from Botswana remains an important example of how gender-discriminatory

<sup>156</sup> Radhika Coomaraswamy 'Beyond borders: Statelessness and the people in between' International Conference on Statelessness Keynote Speech (26 June 2019), available at [https://files.institutesi.org/Keynote\\_Radhika\\_Coomaraswamy.pdf](https://files.institutesi.org/Keynote_Radhika_Coomaraswamy.pdf), accessed on 12 May 2022.

nationality laws have been successfully challenged and reformed on the basis of their violation of equality and non-discrimination rights, setting a precedent for law reform in many other jurisdictions. However, as we have seen in the above discussion, law reform is only part of the response. As the African Commission on Human and Peoples' Rights notes, significant gaps remain between these guarantees on paper and implementation in practice at the national level. Moreover, there is evidence of indirect forms of gender discrimination impacting the application of gender-neutral laws, undermining women's nationality rights, including with access to identity documentation and birth registration. This preliminary analysis suggests that gender discrimination is so widespread in nature that it requires closer attention to how indirect, systemic gender discrimination plays out in the implementation of even gender-neutral laws and administrative and bureaucratic processes related to nationality, with consequences for elevated risks of statelessness.

The promising progress in recognising how gender discrimination against women impacts statelessness is welcome. There is a clear trend towards reform of gender-discriminatory nationality laws and affirmation of equal nationality rights at international, regional, and national levels. But, as many people, especially women, around Southern Africa struggle to obtain or retain identity documents, register the births of their children, and face gender-discriminatory laws and policies, it is apparent that more work and further research is needed. International human rights law, and especially the substantive view of equality enshrined in CEDAW, calls for much more attention to the many ways in which varied forms of discrimination against women contribute to statelessness and compound the effects of being stateless. Intersectional feminist analysis highlights the need to explore underlying structural inequalities and discriminatory norms that play out in women's vulnerability to statelessness, and the compounded and intersecting grounds of discrimination that are often involved. While this article has sought to draw attention to some of these issues, and provide insights into current developments on gender and statelessness in the Southern African region, further attention in research and literature is needed. Deepening understanding of the unique gendered dimensions that are both a cause and consequence of statelessness is important to ensure a rights-based and comprehensive response in prevention and protection efforts.