

The Role of Colonialism in Creating and Perpetuating Statelessness in Southern Africa

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Abstract

Some of the largest stateless populations in the world are in Southern Africa. Statelessness in the region is primarily linked to colonial histories, border changes, migration, gender, ethnic and religious discrimination, and poor civil registry systems. Colonial and white minority rulers created and implemented multi-tiered citizenship systems — extending full rights only to settlers. Like all other aspects of society, colonisers based citizenship on ethnic exclusion, exploitation, and discrimination. Native Africans were forced into legal subordination with minimal rights that were superseded by those of white settlers. At independence, most Southern African countries adopted nationality laws based on the models of their former colonial rulers while making efforts to reverse the systems of discrimination. Efforts to redress the inequalities via nationality laws have had unintended and intended consequences on vulnerable populations and exacerbated statelessness. Xenophobia is another consequence of colonial heritage that has perpetuated statelessness. Colonial powers relied on political exclusion. They used violence to ‘divide and conquer’, creating and reinforcing racial, ethnic, and tribal clashes. In many parts of Southern Africa, we see an increase in xenophobia and nationalism as the emerging form of political exclusion, resulting in restrictive and repressive migration responses to prevent migrants from arriving or integrating into societies. There are concerning signs that states are instrumentalising statelessness as a migration management tool. Rising nationalism and anti-migrant sentiments threaten to undo gains in the fight against statelessness.

Keywords: xenophobia, migration, native, settler, Madagascar, Zimbabwe, South Africa, nationalism, exclusion

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I. INTRODUCTION

Since the beginning of known history, people moved throughout Southern Africa relatively freely in search of new territories and resources. Today, many Africans of African descent are not considered citizens by any country. They are stateless. According to the United Nations High Commissioner for Refugees (UNHCR), the international legal definition of a stateless person is 'a person who is not considered as a national by any State under the operation of its law'.¹

Nationality is the legal bond between an individual and a state. This paper uses the terms nationality and citizenship interchangeably. It is the central right that determines how a country treats a person — the right to have rights. Stateless people do not have a nationality and are not entitled to other human rights. They struggle to access social services, healthcare, education, free movement, or political participation. They are among the world's most vulnerable and are at high risk of exploitation, arbitrary detention, and expulsion.² Statelessness has been described as a 'forgotten' issue — one of the most neglected areas of the global human rights agenda.³ Some people become stateless due to movement, while others are born stateless. Most stateless people remain in the country of their birth.⁴

Statelessness across Southern Africa is primarily linked to colonial histories, border changes, migration, gender, ethnic and religious discrimination, and poor civil registry systems.⁵ The nature of movement changed significantly under colonialism. European nations sent settlers and established government structures in the race to colonise the continent, farm the best land and extract the best resources. They drew and re-drew arbitrary borders, often through territories that had previously formed one political unit, established laws about who could move, and created tiered citizenship regimes that favoured the rights of settlers over native inhabitants.⁶ Native African inhabitants were told where they could and could not move and live and were used — often forcibly — to provide labour.

Manby explains that colonialism in Southern Africa relied on native labour and established complex labour recruitment systems to build and manage colonial infrastructures. Under colonial conquest, authorities encouraged — even coerced and forced — labour migration, primarily to work on farms and mines. Throughout

¹United Nations High Commissioner for Refugees (UNHCR) 'About statelessness', available at <https://www.unhcr.org/ibelong/about-statelessness/>

²Bronwen Manby 'Citizenship and statelessness in the member states of the Southern African Development Community' UNHCR (2020).

³See the address by then UNHCR High Commissioner Antonio Guterres to Intergovernmental Meeting at Ministerial Level to mark the 60th anniversary of the 1951 Convention Relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness held in Geneva, Switzerland, 7 December 2011, available at www.unhcr.org/admin/hcspeeches/4ecd0cde9/statement-mr-antonio-guterres-united-nations-high-commissioner-refugees.html

⁴United Nations High Commissioner for Refugees (UNHCR) *Emergency Handbook* Stateless person definition, available at <https://emergency.unhcr.org/entry/52865/stateless-person-definition>

⁵Liesel H Muller 'Legal identity for all – ending statelessness in SADC' in Southern Africa Litigation Centre *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* (2016).

⁶Bronwen Manby 'Statelessness in Southern Africa' UNHCR (2011), available at <https://www.refworld.org/pdf/id/50c1f9562.pdf>

most of the colonial period, people could move relatively freely throughout the British colonies of Southern Rhodesia (Zimbabwe), Northern Rhodesia (Zambia), and Nyasaland (Malawi). Labour migrants from non-British or non-colonised countries, including Mozambique, Eswatini, and Lesotho, were also recruited. At its peak in 1956, 300,000 migrant labourers were working away from their homes within the 'Central African Federation' (Southern Rhodesia, Northern Rhodesia, and Nyasaland). Under independent white minority rule, South Africa and Zimbabwe continued similar recruitment practices. Colonists also brought Asian indentured servants to provide labour. Countries with the most extensive histories of labour migration and land dispossession where large numbers of 'foreigners' have remained after independence have encountered the most nationality disputes since the end of colonialism.

Manby further explains that European colonisers established multi-tiered citizenship structures that provided full citizenship rights only to settlers. Like all other aspects of society, the citizenship system was founded on racial and ethnic exclusion, exploitation, and discrimination. Some indigenous people were granted full citizenship rights in Portuguese and French colonies under exceptional circumstances. Settlers were simultaneously offered full citizenship benefits in their European 'home' countries. Native Africans were forced into legal subordination with minimal rights that were superseded by those of white settlers.

In the post-colonial period, strong resentment lingered toward colonial powers for their legacies of extreme inequality and dispossession.⁷ Most Southern African countries adopted nationality laws based on the models of their former colonial rulers. Some, however, made efforts to reverse the system of discrimination and even sought laws to disenfranchise their colonial oppressors.

Some countries, such as Mozambique, established citizenship rules offering preference to people who had participated in the liberation and punishing those who fought against it. In some other parts of the region, nationality laws discriminate according to ethnicity, favouring people belonging to groups whose ancestral origins are within the territories. Malawi restricts citizenship to children born to at least one parent who is not only a Malawian citizen but also of the 'African race'; Eswatini has similarly included nationality provisions that make it difficult for non-ethnic Swazis to obtain citizenship. Many of these measures have ended up dispossessing native Africans who were also unjustly marginalised by colonialism, even more than they have affected settlers. Now, many native Africans are denied citizenship in their current territory because their ancestors once lived in a different territory.

Democratisation has dismantled minority white rule, and new constitutions have enshrined the rights of native people across the region. However, in the wake of colonialism, the practice of political exclusion has remained.⁸ Classifying people

⁷Bronwen Manby 'Struggles for citizenship in Africa' Open Society Justice Initiative (2009), available at www.justiceinitiative.org/publications/struggles-citizenship-africa

⁸Brian Klaas 'Political exclusion in Africa' in Oxford Research Encyclopedia of Politics (2019), available at <https://doi.org/10.1093/acrefore/9780190228637.013.1326>

and creating distinctions between ‘insiders’ and ‘outsiders’ has remained using new classifications of protectionism against ‘others’. Nationality has become an increasingly important tool for classifying people. People who come from or have links outside of a country are increasingly viewed as ‘others’ or ‘outsiders’. Migration has become criminalised, and blurred distinctions between ‘legal’ and illegal migration have become entrenched in political and media narratives. Politicians have homed in on these exclusionary practices as an expedient political tool. Political exclusion is the ‘easiest’ way to stay in power in the short term, even if it creates long-term instability.⁹

This paper explores colonialism’s role in modern-day statelessness in Southern Africa. It examines the cases of South Africa, Zimbabwe, and Madagascar to show how the colonial legacies founded on exclusionary practices and defining ‘outsiders’ and ‘insiders’ are creating and perpetuating statelessness. It explores how, in post-colonialism, each of these countries leverages nationality as a form of ‘othering’ to achieve slightly different ends. In Zimbabwe, statelessness is used as a form of political repression; in South Africa, to deter irregular migration and even asylum-seeking; and in Madagascar, as an enduring form of ethnic and religious discrimination. It warns that these exclusionary practices risk increasing and intensifying statelessness and that the costs, while often invisible to the general public, greatly outweigh any perceived benefits.

II. METHODOLOGY

This paper is based on a literature review of existing publications on statelessness in the Southern African region. It extracts and summarises relevant text about the colonial period to describe the role of colonialism in creating and perpetuating statelessness. It examines current national immigration policy frameworks to assess the direction of current and proposed immigration platforms, namely in the Republic of South Africa. Finally, it references papers and media articles from scholars who research xenophobia in Southern Africa to establish current xenophobia trends and trajectories and link them to colonial practices.

III. STATELESSNESS IN SOUTHERN AFRICA

The very nature of statelessness — that people are undocumented and unaccounted for — makes it impossible to know how many people in the world, or in any region or country, are affected.¹⁰ The African Commission on Human and Peoples’ Rights estimates that hundreds of thousands, possibly millions, of Africans do not have access to a nationality.¹¹ The status of many others is in doubt or in dispute. According to the UNHCR, it is not possible to determine the number of stateless

⁹Ibid.

¹⁰United Nations (UN) “‘2 million’ stateless people globally, warns UNHCR chief in call to States for decisive action’ UN News (12 November 2018), available at <https://news.un.org/en/story/2018/11/1025561>

¹¹Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons “The right to nationality in Africa’ African Commission on Human and Peoples’ Rights (2014).

people in the Southern African Development Community (SADC) states, but they host 'significant' populations of people who are stateless or at risk of statelessness.¹²

As of 2021, 95 countries reported 4.3 million stateless individuals to the UNHCR.¹³ Due to the counting difficulties and under-reporting, actual estimates are between 12–15 million.¹⁴ Not only is it extremely difficult to estimate the actual number of undocumented people, but only a fraction of countries report statelessness statistics. As of 2004, only 30 countries reported statistics on stateless people. By 2021, this had grown to 95 — less than half of all countries. Many of the countries (approximately 20) with known stateless populations do not report statistics.

The number of stateless people in Southern Africa is unknown in part because none of the 16 states have procedures to capture data and report statelessness statistics.¹⁵ Among the nine African countries where the UNHCR recognises that there are major populations at risk of statelessness, four are in the SADC region: Zimbabwe, South Africa, Madagascar, and the Democratic Republic of the Congo (DRC).¹⁶

The 1954 Convention Relating to the Status of Stateless Persons affirms that the fundamental rights of stateless persons must be protected.¹⁷ It establishes a set of minimum standards of treatment for stateless people in respect to a number of rights, including education, employment, and housing. It also guarantees stateless people a right to an identity, travel documents and administrative assistance. Only eight of the 16 SADC member states have acceded to the 1954 Convention: Angola, Botswana, Eswatini, Lesotho, Malawi, Mozambique, Zambia, and Zimbabwe.

The 1961 Convention on the Reduction of Statelessness aims to prevent statelessness and reduce it over time.¹⁸ The 1961 Convention establishes that children should acquire the nationality of the country where they are born if they do not acquire any other nationality and provides safeguards to prevent statelessness in the case of state succession or renunciation of nationality. Only four SADC States have acceded to the 1961 Convention — Angola, Eswatini, Lesotho, and Mozambique.

¹²Manby op cit note 2.

¹³United Nations High Commissioner for Refugees (UNHCR) 'Refugee data finder global trends' Annex Table Statelessness (2021).

¹⁴Laura van Waas & Maria José Recalde 'Nationality and statelessness' *Oxford Bibliographies* (2017).

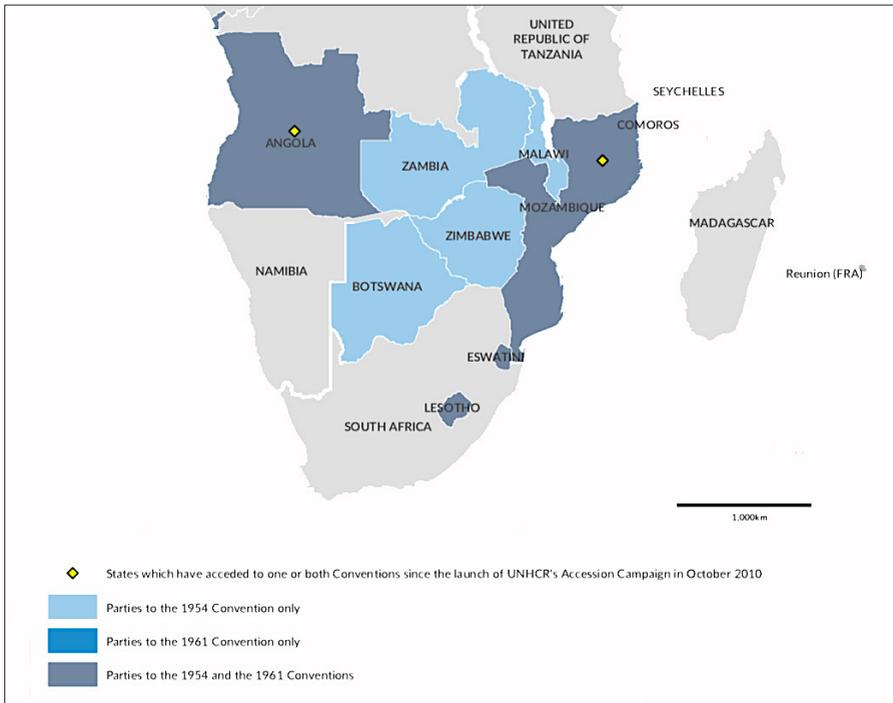
¹⁵Manby op cit note 2.

¹⁶Citizenship Rights Africa 'Statelessness', available at <https://citizenshiprightsafrica.org/theme/statelessness/>, accessed on 28 November 2022.

¹⁷Convention Relating to the Status of Stateless Persons 1954, available at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=en

¹⁸Convention on the Reduction of Statelessness 1960, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en

Figure 1: SADC States party to the 1954 Convention relating to the Status of Stateless Persons and to the 1961 Convention on the Reduction of Statelessness:¹⁹



In Southern Africa, the stateless population overlaps with an even larger undocumented population. The World Bank estimates that over 137 million people in the region are undocumented.²⁰ Many people face severe restrictions in accessing documentation regardless of whether their nationality is contested.

Historically, it was far less necessary to prove where one lived or belonged. People who were habitually resident in a country were typically considered citizens.²¹ Today, identification and documentation are essential to all forms of social and civic participation, including proving nationality. Even residents of the most remote and isolated communities now must establish their identity and nationality.

Efforts to document people — such as the World Bank’s ID4D campaign that seeks to ensure every person on the planet has identification by 2030 — are helping. A growing number of people can access identification, particularly digital

¹⁹Manby op cit note 2.

²⁰World Bank ‘Identification for Development (ID4D) Global Dataset’, available at <https://datacatalog.worldbank.org/dataset/identification-development-global-dataset>

²¹The Hague & the Wits Institute for Social and Economic Research (WISER) ‘The Hague Colloquium on the Future of Legal Identity’ (2015).

and biometric.²² Paradoxically, these efforts are exposing more people to risk as most people learn their nationality is questioned while trying to access documents. Similarly, the push to document more people runs the risk of leaving undocumented people even further left behind. In some cases, people who were previously treated as citizens are being refused nationality documents.²³

One of the most prominent causes of statelessness in Southern Africa is the lack of birth registration. While birth registration does not confer citizenship, all identity documents rely on proof of birth and nationality. It is impossible to claim nationality without a birth certificate. Identity documents are a fundamental feature of life and social and civic participation.

In its General Comment on Article 6 on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child focuses specifically on the issues related to birth registration across Africa. It claims: “The right to birth registration is one of the rights that consistently appears not to be fully implemented by States parties.”²⁴

It lists poverty, lack of education, gender discrimination, ethnic discrimination, or membership of a vulnerable group — such as refugees or irregular migrants — as common barriers to registration. A lack of decentralised, properly managed civil registrations also contributes.

More than half of the children born in Africa are not registered at birth.²⁵ The United Nations Development Programme (UNDP) has noted that more than half of all children in the SADC region are still unregistered at age five. Birth certificates are not issued immediately in some regions and take weeks or months to be issued. In other cases, issuing birth certificates requires administrative processes or costs that are not accessible to all parents.

Nationality deprivation and denationalising has seen a resurgence in recent years, primarily, ostensibly as a counter-terrorism or security tool.²⁶ The focus on nationality has increased in the globalisation era, including in Southern Africa. As absolute migration continues to grow, it has become an increasingly important tool for classifying people, and citizenship is increasingly being used as a migration management tool. United Nations (UN) Secretary-General Antonio Guterres has warned that damaging forms of nationalism and anti-migrant and anti-refugee sentiments are at risk of driving statelessness upwards.²⁷ Citizenship deprivation

²²World Bank ‘Identification for Development (ID4D) 2018 Annual Report’ World Bank Group (2018), available at https://id4d.worldbank.org/sites/id4d.worldbank.org/files/2018_ID4D_Annual_Report.pdf

²³Manby op cit note 6.

²⁴African Committee of Experts on the Rights and Welfare of the Child (ACERWC) ‘General comment on Article 6 on the rights and welfare of the child’ (2014), available at <https://data2.unhcr.org/en/documents/download/62899>

²⁵United Nations Children’s Fund (UNICEF) ‘Crisis of invisibility in Sub-Saharan Africa: Less than 1 in 2 births registered’ Press release (07 December 2017), available at <https://www.unicef.org/wca/press-releases/crisis-invisibility-sub-saharan-africa-less-1-2-births-registered>

²⁶Global Citizenship Observatory (EUI) & the Institute on Statelessness and Inclusion (ISI) ‘Instrumentalising citizenship in the fight against terrorism’ (March 2022), available at https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf

²⁷United Nations (UN) “‘Dangerous nationalism’ seriously threatens efforts to tackle statelessness: UNHCR chief” UN News (7 October 2019), available at <https://news.un.org/en/story/2019/10/1048722>

and denationalising are back in fashion to sanction people deemed ‘undesirable’.²⁸ There has been increased nationalism and restrictive migration responses to prevent perceived ‘others’ from integrating into societies. Some governments are intentionally framing foreigners as threats to society. This is putting people at risk of, or creating, or perpetuating statelessness.

IV. CASE STUDIES

(a) *Zimbabwe*

Citizenship Rights in Africa Initiative labels Zimbabwe as the ‘main’ citizenship crisis in Southern Africa.²⁹ When the country gained political freedom in 1980, the citizenship issue was immediately politicised. The colonial government expropriated land from native farmers and gave it to white settlers to profit for decades from commercial farms. It established labour recruitment systems from Nyasaland (Malawi), Northern Rhodesia (Zambia), and Mozambique.

Labour migration largely ceased when Rhodesia declared independence from Britain in 1965, but most foreign workers stayed. When the country gained majority rule in 1980, between one-quarter and one-half of farmworkers had foreign origins, although most had been born in Zimbabwe.³⁰ More worked in commercial and mining sectors.

In the new democracy, citizenship was immediately highly politicised.³¹ The 1979 Constitution allowed for dual nationality. This was negotiated on behalf of the defeated white settlers, almost all of whom retained British nationality, to protect their interests in the country. The ruling Zimbabwe African National Union (ZANU) — now ZANU-PF (Patriotic Front) — opposed this provision, and by 1983, the new majority government had already amended the Constitution to prohibit dual citizenship. The spirit of this amendment was directed at white settlers who were able to hold both Zimbabwean and British citizenship.

In 1984 the government passed a new citizenship law prohibiting dual citizenship and requiring Zimbabweans to renounce any other citizenship they were entitled to.³² Approximately two-thirds of the one million white residents left Zimbabwe, while 20,000 renounced entitlements to foreign citizenship to keep their Zimbabwean ones. Thousands more held foreign passports but remained residents without full citizenship.

A large percentage of the farmworkers, mineworkers, and commercial workers of foreign African origin were impacted by the dual nationality ban even though

²⁸Guy Goodwin-Gill ‘Statelessness is back (not that it ever went away...)’ (12 October 2019) EJIL: Talk! Blog of the European Journal of International Law, available at www.ejiltalk.org/statelessness-is-back-not-that-it-ever-went-away/

²⁹Citizenship Rights in Africa Initiative ‘Southern Africa’, available at <http://citizenshiprightsafrika.org/region/southern-africa/>, accessed on 28 November 2022.

³⁰Manby op cit note 7.

³¹Bronwen Manby ‘Report on Citizenship Law: Zimbabwe’ Robert Schuman Centre for Advanced Studies European University Institute (2019).

³²Bronwen Manby ‘Dual citizenship, denationalisation and disenfranchisement in Zimbabwe’ in Bronwen Manby *Citizenship in Africa: The Law of Belonging* (2018) 149–163.

most had never accessed, or had any desire to access, another citizenship that they hypothetically had rights to. The government was suspicious of farmworkers with foreign origins, based chiefly on their association with white farm owners.¹ Many of these people were unaware that they had entitlement to other citizenships or were required to renounce them and failed to submit a declaration to the authorities as required.

The 1979 Constitution also discriminated by gender, limiting the transfer of citizenship by birth to children born to Zimbabwean fathers or mothers if out of wedlock. Only foreign wives of Zimbabwean husbands were able to access citizenship. Women could not pass on citizenship to their children by non-Zimbabwean fathers or to their non-Zimbabwean husbands. Like the dual nationality debate, where the target was supposed to be 'elite' women with foreign husbands, poor rural women living in border regions were the most affected populations.

The rise of the Movement for Democratic Change (MDC) as political opposition to ZANU-PF in 1999 led to more restrictions on both citizenship and voting rights. The subsequent decades were marked by state-sponsored violence and repression against political opponents to hold on to power.² Hundreds of thousands of farmworkers of foreign descent were considered anti-government political opponents. Denationalisation formed part of a broader effort to disenfranchise people who might support opposition parties and prevent them from political participation. In January 2000, an estimated 30% of the two million farmworkers and their families who lived on commercial farms were of foreign descent.³

The government increased requirements on people with potential claims to foreign nationality, ratcheting up rules requiring people to submit a declaration renouncing potential citizenship. People then had to produce foreign documentation to establish that they were not entitled to citizenship, and the government imposed strict deadlines for submitting these documents. The majority of the people affected by these laws were people born or whose parents were born in neighbouring countries.⁴

The government wilfully established impossible requirements, even in the best of cases. In 2001, the Mozambican High Commission in Zimbabwe announced it was overwhelmed with applications and was unwilling to supply documentation proving people were not eligible for citizenship. The Malawian High Commission could not provide documents to people who were unable to provide sufficient detail — meaning they did not have enough documentation to renounce the citizenship to which they supposedly had a claim. Many people lost citizenship based on their inability to satisfy extremely difficult — and in some cases non-existent — criteria. It proved impossible for many to renounce what they had never possessed.

¹Katinka Ridderbos 'Stateless former farmworkers in Zimbabwe' in *Forced Migration Review* (2009) FMR 32.

²Dewa Mavhinga 'Reversing Zimbabwe's Dismal Rights Record Since 1980' *Human Rights Watch* 20 April 2020, available at www.hrw.org/news/2020/04/20/reversing-zimbabwes-dismal-rights-record-1980

³Manby op cit note 32.

⁴Ibid.

According to Manby, these efforts impacted Zimbabwe's neighbouring countries. Hundreds of individuals moved from Zimbabwe to Mozambique, where they had ancestry but could not satisfy citizenship requirements for either country. Similarly, Malawi received an unknown number of returnees who had to undergo expensive and lengthy processes to prove their citizenship. Hundreds of thousands — possibly even millions — fled to neighbouring South Africa. Some received refugee status while others migrated or stayed illegally.

In response to pressure from neighbouring countries, in 2003, the government provided some small concessions that allowed people born in Zimbabwe who are descendants of farmworkers, mineworkers, domestic employees, or other unskilled labourers to apply for confirmation of their citizenship. Very few could access these concessions because they had already lost their citizenship, and the administrative burden was too high.¹

When the unity government began in 2009, citizenship laws were among the many battlegrounds between the MDC and ZANU-PF. The MDC successfully fought for expanded citizenship provisions in the new 2013 Constitution, including allowing dual citizenship for those who acquired more than one at birth.

To date, the Citizenship Act has not been amended to reflect these changes. Many people began re-applying for confirmation of citizenship with hopes of voting, crossing borders, and getting a bank account or a job, but their applications were denied. As recently as August 2019, the Zimbabwe Human Rights Commission has called for assistance for border communities in obtaining identification documents, noting that the Registrar-General is commanding high fees, demanding non-existent documents, and wrongly recording information on documents.²

(b) South Africa

South Africa has an unknown number of stateless people and does not report any statelessness statistics. However, statelessness is believed to be a substantial problem and threatens to grow as the country appears to be on a path to continue weaponising nationality and deepening xenophobia. While promising an Afrocentric orientation and policy platform, South Africa has become one of the most hostile destinations in the world for African migrants.³

Most of the stateless population in South Africa are believed to be migrants, asylum seekers, and refugees from neighbouring countries. Orphaned or abandoned children and children born to undocumented or irregular migrants are also at risk of increasing statelessness. A 2019 study conducted by the Scalabrini Centre of Cape Town found that 40% of foreign children in youth and care centres faced statelessness,

¹Ibid.

²*The Herald* 'ID nightmare for border communities' (13 August 2019), available at www.herald.co.zw/id-nightmare-for-border-communities/.

³Christopher Claassen 'Explaining South African xenophobia' Afrobarometer WP 173 (2017).

while an additional 47% were at considerable risk of it.¹ The report found that 34% of the foreign youth in care had no documentation. In the Limpopo province, near the borders of Mozambique, Zimbabwe, and Botswana, 82% had no documents. A further 23% of children held documentation as dependents under the Refugees Act, but many were no longer in contact with the principal applicant, whose presence is required to extend and finalise asylum claims.

Under colonial and apartheid rule, only white people were granted citizenship rights. Documentation was used as a means to control populations. Native inhabitants were denationalised and allocated to 'homelands' under the poorly-veiled guise that these areas were independent. Native inhabitants were documented and provided with 'passes' to control their movement and reduce their rights.

At the same time, labour migration played a fundamental role in the apartheid and colonial eras. South Africa's industrial development was built on labour migrants both from within and from neighbouring countries. South Africans from the 'homelands' were recruited to cities, mines, farms, and corporations. Mines could hire an unlimited number of foreign workers.²

Once apartheid was toppled, South Africa attempted to create equal access to socio-economic and citizenship rights for all and sought to reopen its borders and economy. It integrated with SADC and joined the African Union. All classes of migration expanded.³ Many African migrants perceived it as politically and economically stable. Most of the legal regimes for immigration and citizenship created in the two decades post-apartheid were drafted with a commitment to Afrocentric ideals and encompass relatively progressive measures.⁴

South Africa is the primary regional economic and mixed migration hub. Most migrants come from neighbouring countries. According to the 2011 Statistics South Africa Census, 68% of migrants are from SADC countries and 7% from other African countries. Many are low-skilled and seek temporary work. Currently, they do not have access to legal visa pathways. As such, many enter or stay irregularly.

Labour migration has shifted substantially from company-sponsored to mixed. According to the International Organization for Migration⁵ the proportion of foreign nationals in the mining workforce was estimated at 40% in the 1980s and rose as high as 60% in 2009. Increased restrictions and weakening mining and industrial sectors have caused male contract migration to fall substantially to 23% in

¹Lotte Manicom 'Foreign children in care: South Africa' Scalabrini Centre of Cape Town 2019, available at https://www.scalabrini.org.za/wp-content/uploads/2019/07/Scalabrini_Centre_Cape_Town_Foreign_Children_in_Care_Comparative_Report_South_Africa_2019.pdf

²Jonathan Crush & Clarence Tshitereke 'Contesting migrancy: The foreign labor debate in post-1994 South Africa' (2001) 48 *Africa Today* at 49.

³International Organization for Migration (IOM) 'The well-being of economic migrants in South Africa: Health, gender and development' Working Paper for IOM, World Migration Report (2013), available at www.iom.int/files/live/sites/iom/files/What-We-Do/wmr2013/en/Working-Paper_SouthAfrica.pdf

⁴Aimée-Noël Mbiyozo 'Aligning South Africa's migration policies with its African vision' Institute for Security Studies, available at <https://issafrica.org/research/policy-brief/aligning-south-africas-migration-policies-with-its-african-vision>

⁵IOM op cit note 42.

2013.⁶ Declining regular options have resulted in increased mixed and clandestine migration. Migrants using irregular and unregulated methods have increased, and more women, youth, and families migrate.

Immigration sentiments and policies have become increasingly restrictive as xenophobia has become more entrenched. The Department of Home Affairs (DHA) has been focused on applying a self-styled 'risk-based' approach to immigration legislation. Policy reforms have focused on implementing restrictive measures to reduce low-skilled immigration from neighbouring countries. While South Africa insists upon its commitment to Afrocentric ideals, it prioritises restrictive measures that disproportionately and negatively impact African migrants from neighbouring countries.⁷

There is also a substantial gap between legislative provisions and administrative practice. While legislation is increasingly passed to restrict entry and reduce the rights of foreigners inside South Africa, the legal frameworks that protect people and give them rights are not implemented as prescribed. Migrants in South Africa struggle to access their respective rights and report rampant xenophobia and corruption within the department. The DHA has widely been accused of wilfully creating administrative barriers to frustrate and deter irregular migrants.⁸

The DHA has litigated against citizenship cases, typically on the grounds that 'illegal' migrants are seeking legal loopholes that would compromise the country's security. In a 2019 case related to a former orphan of (presumed) Eswatini origin whose children have been rendered stateless despite having a South African father, the DHA director of travel documents and citizenship, Richard Sikakane, disputed statelessness itself, claiming, 'I seriously dispute that any person can be born stateless.'⁹

In 2018, the DHA proposed new regulations for the Births and Deaths Registration Act (BDRA), calling to replace birth certificates for children of foreign parents with 'birth confirmations'. Human rights advocates have argued against the proposed birth confirmations, claiming that — by Home Affairs' own admission — birth confirmations do not amount to birth certificates. They argue that several legal frameworks, including the South African Constitution itself, provide every child with the right to be registered immediately after birth regardless of the parents' immigration status.¹⁰

South Africa has the highest rate of birth registration in the region. Due to a

⁶Jonathan Crush Belinda Dodson Vincent Williams & Daniel Tevera 'Harnessing migration for inclusive growth and development in Southern Africa' Southern African Migration Programme (2017).

⁷Mbiyozo op cit note 43.

⁸Tove van Lennep 'The state of the South African refugee protection regime: Part II – Politics and policy' Helen Suzman Foundation, available at <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status>

⁹Tania Broughton 'Mother challenges Home Affairs' *Mail & Guardian* (16 August 2019), available at <https://mg.co.za/article/2019-08-16-00-mother-challenges-home-affairs>

¹⁰Centre for Child Law (CCL) & Lawyers for Human Rights (LHR) 'Comments on the draft regulations to the Births and Deaths Registration Act' (November 2018), available at <http://citizenshiprightsafrika.org/wp-content/uploads/2018/11/CCL-LHR-Comments-on-the-draft-regulations-to-the-BDRA-16-Nov-2018.pdf>

concerted effort to improve registrations, they rose from less than 25% of children under age 5 in 1998 to 95% in 2012. However, this rate declined to under 90% by 2018, coinciding with increased restrictions targeting children born of non-citizen parents.¹¹

The proposed regulations put children born to foreign parents at risk of statelessness. These regulations inaccurately presume that children can have their births registered at an embassy. Children of refugees and asylum seekers cannot approach embassies without jeopardising their status or, in some cases, exposing themselves to actual harm. Even in cases where harm is not a real risk, consular services are difficult to access. Lack of information about procedures, high costs related to travel and documents, or fear of interacting with authorities are additional barriers.

The proposed BDRA excludes stateless children from birth certificates altogether as they do not have an embassy to approach. This contradicts the existing citizenship law that claims that stateless children born in South Africa can be recognised as citizens, but only if their births are registered. Orphaned and abandoned children are unlikely to be able to prove a link to a country. The lack of a birth certificate will prevent them from being adopted.

Prior to proposing these regulations, South Africa's birth registration practices were already widely criticised for putting children at risk of statelessness. Human rights advocates have long observed and commented on the significant legal and administrative barriers to birth registration and nationality that perpetuate childhood statelessness for both South Africans and foreigners.

These measures form part of a larger immigration policy direction that is prioritising restrictive measures that disproportionately and negatively impact African migrants. The DHA has demonstrated a history of sometimes over-reaching to problematise asylum seekers and low-skilled Africans despite a lack of evidence.¹² They shift blame from a department rife with corruption and mismanagement onto foreign-born people who rely on it. These measures come at high financial and human rights costs that seek to distract from the real problems at hand.

These restrictive measures are occurring alongside rising xenophobic violence and antagonism. Claassen attributes poverty, relative deprivation, frustration with government, social mobilisation, and resource competition as the root frustrations for community xenophobia and concludes that scapegoating African immigrants leads to aggression.¹³

(c) Madagascar

Madagascar has a sizeable population of Muslims of Indo-Pakistani origin, often referred to as 'Karana'. Many arrived from pre-partition India in the 19th century

¹¹Manby op cit note 2.

¹²Mbiyozo op cit note 43.

¹³Claassen op cit note 39.

but are stateless despite having been in the country for multiple generations. Most are Muslim. When Madagascar gained independence from France in 1960, the nationality laws distinguished between those who were automatically Malagasy at birth and those required to apply. Non-French foreigners in the country were not granted citizenship and were left stateless.¹⁴

The Karana were not considered ethnically Malagasy so were generally not given citizenship. Most of the estimated 20,000 Karana are believed to be stateless despite being born in Madagascar and never knowing any other homes.¹⁵ The US Department of State indicated that up to 5% of the country's two million Muslims are stateless. In 2021, Madagascar had a total population of approximately 28.4 million.¹⁶

Other ethnic and religious minorities are similarly affected, including people of Chinese, Comorian, and mixed descent.¹⁷ Many have attempted to gain citizenship but have been denied or have faced discriminatory administrative practices. Even those who legally qualify, in practice face many obstacles in accessing nationality and are not considered nationals. Reports have emerged that Muslim-sounding names have been sufficient to deny a citizen application. People have claimed that officials will arbitrarily request non-existent proof that an individual is Malagasy, despite the presentation of all required documents if their names 'sound' foreign or if they suspect a person of not being Malagasy.

Statelessness has been passed on through generations among the Karana. Karana living in Madagascar are forced to pay for, obtain, and maintain residency permits that describe their nationality as 'undetermined'. People have also cited high levels of corruption, a lack of access, a lack of awareness, and limited judicial oversight as barriers to gaining documents, even if they qualify. While a lack of documentation has led to exclusion, hardship, and poverty for some, the Karana are still considered wealthy and powerful and contribute substantially to Madagascar — close to one-third of GDP.¹⁸ Preventing them from citizenship stymies economic development for the whole country as it discourages these same people from investing in growth.

Until 2017, only children born to Malagasy fathers were granted citizenship. Mothers were unable to confer citizenship to their children. Children born in marriage to Malagasy mothers and non-Malagasy fathers were not granted citizenship and had to apply, unless statelessness could be proven, which was exceptionally difficult to prove. Married women were only allowed to pass on nationality in very limited circumstances. As a result, many couples have avoided marriage as a means of

¹⁴Focus Development Association 'Global campaign for equal nationality rights and institute on statelessness and inclusion' Joint Submission to the Human Rights Council at the 34th Session of the Universal Periodic Review (2019), available at https://files.institutesi.org/UPR34_Madagascar.pdf

¹⁵Markku Aikomus 'Madagascar's Karana people still awaiting nationality' UNHCR (2017), available at www.unhcr.org/news/stories/2017/11/5a018ff44/%20madagascars-karana-people-still-awaiting-nationality.html

¹⁶World Bank 'Madagascar', available at <https://data.worldbank.org/country/madagascar>, accessed on 28 November 2022.

¹⁷Equal Rights Trust 'My children's future: Ending discrimination in nationality laws' (2015), available at www.equalrightstrust.org/resources/my-childrens-future-ending-discrimination-in-nationality-laws

¹⁸Caroline McInerney 'Accessing Malagasy citizenship: The nationality code and its impact on the Karana' (2014) *Tillburg Law Review*.

conferring citizenship to their children.¹⁹

Madagascar fell under international pressure, including being subjected to Universal Periodic Review by the Human Rights Council. The review included recommendations from several countries, including Germany, Spain, Brazil, and the United States, who called on Madagascar to ‘reform its nationality law to ensure that all citizens have equal right to confer nationality to their children and the children born to citizen mothers are no longer at risk of statelessness’.

Madagascar, along with Sierra Leone, became the first country since the launch of the UNHCR #IBelong campaign in 2014 to eliminate gender discrimination in its laws. In 2016, Madagascar promulgated a new nationality law that removed gender discrimination regarding the conferral of nationality to children. Since 2017, children born to either a Malagasy mother or father are to be recognized as citizens.

The law also has retroactive application, so that children born before the reform are covered by it. By April 2018, 1,361 families had benefitted from the law. However, the law still prohibits Malagasy women from passing their nationality to their spouses while men are able to pass their nationality on to their wives.²⁰ The 2017 amendment to bring gender equality to the nationality law in Madagascar is a welcome change. The UNHCR has labelled it an ‘encouraging and important step in preventing and reducing statelessness.’²¹

Despite this progress in gender equality, Madagascar has not addressed its ongoing Karana situation and its continued denial of citizenship rights. There are no signs to date of improvement for the Karana people.

V. CONTEMPORARY EXPRESSIONS OF EXCLUSION

Since colonialism, exclusionary politics have been the mainstay of African politics.²² To claim and maintain power and build wealth, colonial powers manufactured political and social boundaries and established the use of designated political ‘insiders,’ ‘outsiders,’ and ‘foreigners’ to dehumanise and exclude.²³ The distinctions of who constitutes each category have evolved and changed since colonialism and white minority rule, but the practice of manufacturing political and social boundaries entrenched under colonialism remains in place. In each of the case studies above, post-colonial powers have continued — and even expanded — these practices of exclusion to achieve different ends.

The Durban Declaration of 2001 recognises that ‘colonialism has led to racism, racial discrimination, xenophobia, and related intolerance, and that Africans and people of African descent ... and indigenous peoples were victims of colonialism and continue to be victims of its consequences.’ It further notes that colonial theories

¹⁹Equal Rights Trust op cit note 56.

²⁰Focus Development Association op cit note 53.

²¹Aikomus op cit note 54.

²²Klaas op cit note 8.

²³Paddy O’Halloran ‘Colonial xenophobia and fear of “foreign” politics in the nineteenth-century Cape Colony: Implications for analyzing borderless politics today in S O Abidde & E K Matambo (eds) *Xenophobia, Nativism and Pan-Africanism in 21st Century Africa*, available at https://link.springer.com/chapter/10.1007/978-3-030-82056-5_6

and practices of racial and ethnic superiority of certain cultures over others persist today in one form or another.²⁴

In Zimbabwe, the ruling ZANU-PF party has used systemic repression to cling to power despite severe socio-economic and political failures. The party's record of harassing, arresting, and even killing critics and opponents extends to but is not limited to, people with supposed foreign ancestry. To prevent them from voting against the ruling party, it has stripped them or blocked them from obtaining citizenship, creating and perpetuating statelessness to achieve political ends.

In post-apartheid South Africa, indigenous populations have become frustrated that their living standards have not improved under democracy as promised. Many locals see foreigners as competing for resources in the context of poverty.²⁵ Foreigners have become an easy 'outsider' to scapegoat for unemployment, food insecurity, crime, and health and education failures. Expressions of xenophobia have increased sharply and have led to riots, looting, destruction, violence, and death. Vernacular and accent 'tests' have been applied by citizens to determine if someone is local or foreign.²⁶ Politicians and communities have endorsed violence and exclusion and leveraged xenophobic rhetoric and scapegoating to distract from their own failings.²⁷

In Madagascar, the post-colonial government has leveraged nationality to uphold longstanding discrimination against a targeted group. Despite the disenfranchised group's willingness and ability to contribute socially and economically to society, the Madagascar government and some Malagasy people officially and unofficially continue to target and prevent the Karana from full participation under the pretence of not looking or acting 'Malagasy enough'.

These practices reflect a worrying rise in nationalism and nationality deprivation happening globally. In the post-colonial and globalisation era, nationality has emerged as a key determinant of who is designated as 'insiders' or 'outsiders'. In many cases, xenophobia has increased as a misguided expression of patriotism.

William Mpfu argues that the term xenophobia conceals rather than reveals the structural racism that motivates it. He argues that South Africa has not recovered from homeland racist nationalism that placed black natives as targets for hatred, discrimination, and exclusion. Instead, they have redirected the racism and exclusion toward Black African 'outsiders' from other countries.²⁸

Nations have not adequately addressed these colonial legacies or accounted

²⁴See 'World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration and Programme of Action' United Nations Department of Public Information (2002), available at www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf

²⁵Godfrey Mulaudzi Lizette Lancaster & Gabriel Hertis 'Busting South Africa's xenophobic myths starts at grassroots' ISS Today, available at <https://issafrica.org/iss-today/busting-south-africas-xenophobic-myths-starts-at-grassroots>

²⁶Citizen Reporter 'Trevor Noah applauds Malema's "perfect" views on xenophobic attacks' *The Citizen* 10 September 2019, <https://citizen.co.za/news/south-africa/news-xenophobia/2177225/watch-trevor-noah-applauds-malemas-perfect-views-on-xenophobic-attacks/>

²⁷Jean Pierre Misago & Loren B Landau 'Truck driver "war" about more than migration' *New Frame* 28 June 2019, available at www.newframe.com/truck-driver-war-about-more-than-migration/

²⁸William Mpfu 'Xenophobia as racism: The colonial underside of nationalism in South Africa' (2020) 3 *International Journal of Critical Diversity Studies*.

for how they contribute to ongoing inequalities and discrimination.²⁹ Far more work is required to sensitise societies that many people are perpetuating the very tactics previously used against themselves or their own ancestors and family members. Unfortunately, because statelessness is a forgotten issue and stateless people are invisible, they lack advocates to raise awareness of the costs.

VI. COSTS TO SOCIETY

Nationalism does not resolve social issues. It has proven successful in rallying political support, but increases long-term risks and problems.³⁰ Creating and perpetuating statelessness does not resolve any root issues of social discontent; it worsens them. Some of the costs include development, health, and security.

Statelessness deepens inequality and creates challenges to achieving development goals. Nationality is a key element to achieve all development goals, including economic growth, peaceful and inclusive societies, equality, and access to education.³¹ Statelessness further threatens the ability to measure progress. Low-income countries are under pressure to demonstrate results and promote accountability against development goals.³² It is impossible to assess how well a country or community is achieving development goals locally or regionally without accurate statistics that preclude large numbers of undocumented and unaccounted-for people. Adequately informed statistics and measurements are crucial to development.

No country or population within the region can develop independently. A country is most stable and prosperous if its surrounding countries are stable and prosperous. Regional cooperation is required. Subjugating and exposing fellow Africans to statelessness and preventing them from reaching their full potential hamper national and regional development.

Poor living conditions, displacement, and lack of access to services make stateless populations particularly vulnerable to health issues, including communicable diseases. The COVID-19 pandemic provided a stark reminder that public health affects all of society. COVID-19 disproportionately impacted the most economically disadvantaged communities and stateless people were excluded from or struggled to access vaccines.³³ People living outside the scope of state-sponsored health services and in subpar conditions have low immunisation rates and are vulnerable to infectious diseases.

It is in the collective interest to ensure everyone has access to healthcare,

²⁹United Nations Human Rights Council (HRC) 'Acting High Commissioner for Human Rights Nada Al-Nashif – Address to UN Human Rights Council Interactive Dialogue on the Rights of Indigenous Peoples' (28 September 2022), available at www.ohchr.org/en/press-releases/2022/09/acting-high-commissioner-addressing-legacies-colonialism-can-contribute

³⁰Ottilia Maunganidze 'The "illegal migrant" red herring' ISS Today (24 October 2018), available at <https://issafrica.org/iss-today/the-illegal-migrant-red-herring>

³¹Tendayi Bloom Bronwen Manby & Khadija Badri 'Why citizenship is relevant to sustainable development: Considerations for the 2019 High Level Political Forum' European Network on Statelessness (May 2019).

³²The Hague & WISER op cit note 21.

³³Mkhululi Chimoio 'COVID-19: Vaccinating stateless people in South Africa' Africa Renewal (21 January 2022), available at www.un.org/africarenewal/magazine/february-2022/covid-19-vaccinating-stateless-people-south-africa

regardless of citizenship or immigration status.³⁴ Denying healthcare as a means of exclusion is not in the interest of public health. Comprehensive information about population statistics, vital events and health information like immunisation status or infection history are in the public interest.³⁵

Statelessness can also drive insecurity and displacement. While deprivation of nationality in Southern Africa has not escalated to state conflict, nationality disputes have escalated to violent conflict in other parts of the continent and the world.³⁶ Nationality disputes and xenophobic behaviours have caused diplomatic tensions in the region. These could worsen if countries continue to weaponise nationality against people from neighbouring countries.

As evidenced in South Africa, where xenophobic violence has led to major destruction and spikes in crime, exclusion and xenophobia pose very real security threats and inspire crime and insecurity. Furthermore, evidence has repeatedly proven that there is no correlation between crime and immigration status.³⁷ 'Foreignising' criminality distracts from real criminal and security issues and inhibits states' abilities and willingness to address crime.

Lack of representation in civil and political affairs, lack of pathways for upward mobility, disenfranchisement and economic insecurity are driving forces of unrest and insecurity. Statelessness exposes vulnerable people, including children, to harmful practices, including child trafficking, child labour, sexual exploitation, early marriage, illegal adoption, and child military conscription.³⁸

Strong civil registration contains inherent security properties. Governments benefit substantially from better documenting their populations. A state does not have knowledge of or jurisdiction over people if they are undocumented and unaccounted for. People without names, nationalities or birth dates are difficult to investigate and bring to justice. National security improves when governments document their populations effectively.

VII. CONCLUSION

Exclusionary politics have been the mainstay of African politics since colonialism. Colonial powers used violence to 'divide and conquer,' creating and reinforcing racial, ethnic, and tribal clashes and subjugating native inhabitants for settlers' benefit. In its wake, nations promised to embody human rights for all and empower natives. In some cases, there has instead been a rise in xenophobia and nationalism as an emerging form of political exclusion that repeats previous discrimination but with

³⁴Institute on Statelessness and Inclusion (ISI) 'Stateless in a global pandemic' Impact Report (2020), available at https://files.institutesi.org/Covid19_Stateless_Impact_Report.pdf

³⁵The Hague & WISER op cit note 21.

³⁶United Nations High Commissioner for Refugees (UNHCR) 'The state of the world's refugees: A humanitarian agenda' (1997), available at www.unhcr.org/3eb7ba7d4.pdf

³⁷Loren Landau 'The foreign invasion? How the anti-immigrant backlash makes us all unsafe' News 24 (18 August 2019), available at www.news24.com/Analysis/analysis-the-foreign-invasion-how-the-anti-immigrant-backlash-makes-us-all-unsafe-20190818

³⁸ACERWC op cit note 24.

new categories. It continues the colonial legacy of weaponising a particular status against other human beings. Among many other adverse outcomes, these threaten to undo gains in the fight against statelessness and, in fact, create and perpetuate it instead of stopping or slowing it.

Statelessness comes at extreme costs, not only to individuals but to states. These costs are well established and have been repeated in this paper. The case to reduce and prevent statelessness is clear. Yet, some states in Southern Africa show a concerning propensity to continue to ignore, perpetuate, and even create statelessness to achieve short-term political ends.

Importantly, nationalism and xenophobia distract from true issues and threats. Southern African countries face limited resources. Measures to create barriers to citizenship or denationalise cost these countries time, money, and efficiency, all the while doing nothing to address critical security, migration, or crime threats. Resources dedicated to denationalising or depriving nationality would be far better used to address real problems and threats.

While countries in the region are taking steps to address and reduce statelessness through different legal and policy measures, they must guard against nationalist practices and platforms that increase it. Citizenship is a fundamental and essential human right. Access to citizenship for all is a necessary step for nations and the region to thrive. Countries in the region should prevent efforts to deny, deprive, or restrict nationality, at every turn.