



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Statelessness in Southern Africa

Bronwen Manby

Briefing paper for UNHCR Regional Conference
on Statelessness in Southern Africa
Mbombela (Nelspruit), South Africa
1-3 November 2011

This background paper was commissioned by the United Nations High Commissioner for Refugees (UNHCR) for a Regional Conference on Statelessness in Southern Africa, which was hosted by UNHCR in Mbombela (Nelspruit), South Africa 1-3 November 2011. The views expressed in the paper are those of the author only and do not necessarily reflect the views of UNHCR. The paper aims to be accurate up to 1 November 2011, and includes information on Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. The author thanks those State representatives at the meeting who provided comments on the draft versions of this paper circulated previously.

STATELESSNESS IN SOUTHERN AFRICA

Bronwen Manby

Nationality and statelessness	1
The right to a nationality in international and African law	1
Prohibition of discrimination.....	2
Naturalisation of refugees and stateless persons	3
African Commission jurisprudence.....	3
The principles of citizenship law.....	5
The causes of statelessness in southern Africa	5
The historical context of migration and discrimination.....	5
<i>Pre-independence</i>	5
<i>Post-independence</i>	6
Racial and ethnic discrimination	7
Gender discrimination and discrimination based on marital status of parents	8
Contemporary cross-border movements of refugees and migrants	9
Proof of nationality and birth registration	11
Comparative analysis of nationality legislation	14
The right to a nationality for children born in the country	14
<i>Jus soli, double jus soli and birth + residence</i>	14
<i>Children of citizens</i>	15
<i>Children of stateless parents or who would otherwise be stateless</i>	15
<i>Foundlings/ children of unknown parents</i>	16
<i>Adopted children</i>	16
Children born outside the country	17
Right to pass citizenship to a spouse	19
Acquisition of citizenship by naturalisation or registration.....	20
Loss, deprivation and renunciation of citizenship	24
<i>Loss and deprivation of citizenship from birth</i>	24
<i>Loss and deprivation of citizenship by naturalisation</i>	25
<i>Protection against statelessness</i>	25
<i>Renunciation of citizenship</i>	26
Due process in administrative decisions to recognise and revoke nationality.....	27
Dual nationality	29
Recommendations	32
International treaties	32
Law reform.....	32
Birth registration and identity documentation	32
Note on sources	33

Tables

Table 1: Birth registration rates in Southern Africa 13
Table 2: The right to a nationality for children born in the country 17
Table 3: Right to citizenship by descent..... 18
Table 4: Right to pass citizenship to a spouse 20
Table 5: Right to acquire citizenship as an adult by naturalisation or registration/declaration..... 23
Table 6: Criteria for loss or deprivation of citizenship..... 27
Table 7: Due process protections in nationality laws 29
Table 8: Countries permitting and prohibiting dual citizenship for adults 31

Nationality and statelessness

Nationality¹ is a legal bond between a state and an individual, and statelessness refers to the condition of an individual who is not considered as a national by any state.² Although stateless people may sometimes also be refugees, most stateless persons have never crossed a border.³

Statelessness occurs for a variety of reasons, which include gender discrimination and discrimination against minority groups in nationality legislation and practice, failure to include all habitual residents in the body of citizens when a state becomes independent (the provisions on state succession), deprivation of nationality and conflicts of laws between states. Statelessness is a problem that affects, on conservative estimates, approximately 12 million people worldwide.

Statelessness can have a terrible impact on the lives of individuals. Possession of a nationality, and official recognition of that nationality, is essential for full participation in society and the enjoyment of the full range of human rights. Although international human rights treaties allow for some rights to be limited to nationals, including in particular the right to vote and stand for public office,⁴ most rights are to be enjoyed by all human beings. In practice, however, many rights of stateless people are violated—they may be detained because they are stateless; they can be denied re-entry to or expelled from the country where they live; and they can be denied access to education and health services or blocked from obtaining employment. In 1954, the United Nations adopted the Convention relating to the Status of Stateless Persons in an attempt to protect the rights of stateless persons.

The problem can be prevented through adequate nationality legislation and procedures as well as universal birth registration. A first step is for States to accede to and implement the 1961 Convention on the Reduction of Statelessness, which establishes standards for the avoidance of statelessness through nationality provisions on acquisition, renunciation, loss and deprivation of nationality.

The right to a nationality in international and African law

Article 15 of the 1948 Universal Declaration of Human Rights provides that “(1) Everyone has the right to a nationality”, and that “(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” This right has been elaborated upon in subsequent treaties.

The 1961 UN Convention on the Reduction of Statelessness⁵, which entered into force in 1975, makes it a duty of states to prevent statelessness in nationality laws and practices. Article 1 mandates that “A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless”. Such nationality may be granted either at birth, by operation of law, or upon application, including at a date after birth (for example, at majority). The greatly preferred option is for the nationality to be granted at birth by operation of law.

¹ Although in some contexts they may have different meanings, in this paper citizenship and nationality are used interchangeably to refer to the legal relationship between an individual and a state, in which the state recognizes and guarantees the individual’s rights as a member of the national community.

² A stateless person is defined in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons as someone “who is not considered as a national by any State under the operation of its law”. For an interpretation of this definition, see UN High Commissioner for Refugees, *Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, 20 February 2012, HCR/GS/12/01 (forthcoming); UN High Commissioner for Refugees, *Expert Meeting - The Concept of Stateless Persons under International Law (“Prato Conclusions”)*, May 2010, available at: <http://www.unhcr.org/refworld/docid/4ca1ae02.html> [accessed 2 August 2012]

³ In situations where stateless persons are simultaneously refugees, they are to receive protection under the 1951 Convention relating to the Status of Refugees.

⁴ Precisely which rights the state guarantees to its citizens varies by state, but the most common rights that may be limited to citizens are the right to permanent residence within the state, the right to freedom of movement within the state, the right to vote and to be elected or appointed to public office, the right of access to some public services, and the right to diplomatic protection.

⁵ 1961 UN Convention on the Reduction of Statelessness, Article 1.

As of 1 November 2011, only ten African countries were party to the 1961 UN Convention on the Reduction of Statelessness, including Lesotho and Swaziland in southern Africa.⁶ Sixteen African countries were parties to the 1954 UN Convention relating to the Status of Stateless Persons, including, in southern Africa, Botswana, Lesotho, Malawi, Swaziland, Zambia, and Zimbabwe.⁷ Botswana, Lesotho and Zambia have entered reservations to some of the provisions of the treaty.

However, all African countries, with the exception of Somalia, have ratified the UN Convention on the Rights of the Child (CRC), which provides in Article 7 for every child to have “the right to acquire a nationality”, and for states to ensure the implementation of these rights, in particular where the child would otherwise be stateless. The CRC repeats the provision of Article 24 of the International Covenant on Civil and Political Rights, which has been ratified or acceded to by all States in southern Africa.⁸

At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) also provides, in Article 6, for the right to acquire a nationality. The ACRWC goes beyond the CRC to provide that:

“States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he [sic] has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”⁹

Forty-six countries have ratified, and the remainder have all signed the ACRWC. All southern African countries are parties, except for Swaziland, which has signed but not ratified the treaty. (As a signatory, the state is obliged under international law not to take actions undermining the “object and purpose” of the treaty).¹⁰

Finally, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also provides that “Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality” (Article 29). Only Lesotho among southern African countries is a party to this Convention.

Prohibition of discrimination

Since the adoption of the principal UN human rights treaties in the 1960s, gender discrimination is now prohibited to states that are parties to the main UN Conventions, in particular the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW provides in its Article 9 that women be granted equal rights with men in respect of citizenship. All African countries except Sudan and Somalia are parties to CEDAW.

The African Charter on Human and Peoples’ Rights prohibits discrimination and provides for equality before the law in general, although it does not refer to nationality in particular. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted in 2003

⁶ The others are Chad, Liberia, Libya, Niger, Nigeria, Rwanda, Senegal, and Tunisia. States Parties to the 1961 Convention on the Reduction of Statelessness, available at <http://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en>, accessed 26 October 2011. Nigeria is the most recent African State to have acceded to the two Conventions on 20 September 2011. Ahamfeula Ogbu, “Govt Accedes to UN Convention On Statelessness”, *This Day*, 22 September 2011.

⁷ The others are Algeria, Chad, Guinea, Liberia, Libya, Nigeria, Rwanda, Senegal, Swaziland, Tunisia, and Uganda. States Parties to the 1954 Convention relating to the Status of Stateless Persons, available at <http://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en>, accessed 26 October 2011.

⁸ ICCPR Article 24: 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality

⁹ African Charter on the Rights and Welfare of the Child, Article 6.

¹⁰ The other countries that have only signed are: Central African Republic, DRC, SADR, Somalia, São Tomé and Príncipe and Tunisia. See list of countries that have signed, ratified or acceded to the Charter, available at <http://www.au.int/en/treaties/status>, accessed 14 September 2011. For treaty obligations see Vienna Convention on the Law of Treaties, Article 18.

contains strong anti-discrimination measures, but it reflects continuing unease among some AU member states about gender equality in matters of nationality, and in fact contradicts both the Charter and CEDAW in its provisions. It allows national law to override the non-discrimination presumptions of the treaty in relation to passing citizenship to children, and it does not provide for the right of a woman to pass citizenship to her husband.¹¹ By October 2011, 30 countries had ratified the Protocol on the Rights of Women in Africa and another 19 had signed it.¹²

Racial discrimination is also prohibited by all the major human rights treaties, and in particular the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD). Under Article 5 of CERD, States Parties undertake to eliminate racial discrimination in the enjoyment of other rights, including the right to nationality. All southern African countries except Angola are parties to CERD. A prohibition on racial discrimination is also now regarded by lawyers as forming part of *jus cogens* international law, a “peremptory norm” that all states must respect.

One of the most recent UN human rights treaties, the Convention on the Rights of Persons with Disabilities, adopted in 2006, prohibits discrimination on the grounds of disability in relation to the acquisition, deprivation and use of nationality in its Article 18 on Liberty of movement and nationality. Lesotho, Malawi, Namibia, South Africa and Zambia are parties to this Convention, and Mozambique and Swaziland have signed it.

Naturalisation of refugees and stateless persons

Under international law, states have a duty to promote local integration of refugees where repatriation is not possible within a reasonable time. The 1951 UN Convention Relating to the Status of Refugees provides (Article 34) that states parties “shall as far as possible facilitate the assimilation and naturalisation of refugees” by such measures as expediting proceedings and reducing the costs of naturalisation. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa requires (Article II.1) that countries of asylum should use their best endeavours to “secure the settlement” of refugees who are unable to return home, which in the long term would need to include citizenship rights. Both Conventions require countries of asylum to issue travel documents to refugees. Almost all African countries are parties to the 1951 Refugee Convention,¹³ and the great majority to the 1969 OAU Refugee Convention.¹⁴

The 1954 Convention relating to the Status of Stateless Persons similarly requires states to “as far as possible facilitate the assimilation and naturalization of stateless persons”, especially by expediting and reducing costs of proceedings (Article 32).

African Commission jurisprudence

Although the African Charter on Human and Peoples’ Rights has no explicit provision on nationality, the African Commission has found that the provision of Article 5 of the Charter, that “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status”, applies specifically to attempts to denationalise individuals and render them stateless, in light of the consequences that flow from statelessness.

¹¹ Article 6 (g): a woman shall have the right to retain her nationality or to acquire the nationality of her husband; (h) a woman and a man shall have equal rights with respect to the nationality of their children, except where this is contrary to a provision in national legislation or is contrary to national security interests.

¹² The parties are Angola, Benin, Burkina Faso, Cape Verde, Comoros, Djibouti, DRC, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. The countries taking no action were Botswana, Egypt, Eritrea, and Tunisia. See status list available at <http://www.au.int/en/treaties/status>, accessed on 28 October 2011.

¹³ Excluding only Comoros, Eritrea, Libya, and Mauritius. Several countries have entered reservations to Article 34 of the UN Refugee Convention, including Botswana, Malawi, and Mozambique, indicating that they did not accept any obligation to grant more favourable naturalisation rights to refugees than to other foreigners.

¹⁴ Excluding Djibouti, Eritrea, Madagascar, Mauritius, Namibia, Somalia, and São Tomé & Príncipe, as well as the SADR.

Thus, in the long-running case of John Modise, who spent years confined either to the South African “homeland” of Bophuthatswana or the no-man’s land between South Africa and Botswana because of the Botswanan government’s refusal to recognise his nationality from birth, the Commission found against the Botswanan government and ruled, among other conclusions, that Modise’s “personal suffering and indignity” violated Article 5 of the African Charter.¹⁵ Similarly, in *Amnesty International v. Zambia*, the Commission considered the deportations of William Banda and John Chinula from Zambia to Malawi and found that “[b]y forcing [the complainants] to live as stateless persons under degrading conditions, the [Zambian] government . . . [had] deprived them of their family and [was] depriving their families of the men’s support, and this constitutes a violation of the dignity of a human being, thereby violating Article 5.”¹⁶

In addition, the Commission has held that Article 7(1)(a), with its reference to “the right to an appeal to competent national organs,” includes both the initial right to take a matter to court, as well as the right to appeal from a first instance decision to higher tribunals. In several cases relating to deportations or denial of citizenship, the Commission has held that the fact that someone is not a citizen “by itself does not justify his deportation” and that there must be a right to challenge expulsion on an individual basis.¹⁷

In the case of former president Kenneth Kaunda of Zambia, the African Commission found against the Zambian government’s constitutional amendment that required anyone who wanted to compete for the presidency to prove that both parents were Zambians from birth, and ruled that the provision violated Articles 2, 3, and 13 (non-discrimination, equality before the law, and participation in public life).¹⁸ The Commission noted that freedom of movement among the components of what had been the Central African Federation meant that it would be arbitrary to suggest that an indigenous Zambian could only be a person who himself was born in and whose parents were born in what later became the sovereign territory of the state of Zambia. The Commission found that the retroactive application of such a law could not be justified according to the Charter.

More recently, the African Commission considered the provisions in the 2000 Constitution of Côte d’Ivoire requiring a candidate for the presidency both to be Ivorian from birth him or herself and for both parents also to be Ivorian from birth. The Commission found the provisions “unreasonable and unjustifiable, and [...] an unnecessary restriction on the right to participate in government” as well as “discriminatory because it applies different standards to the same categories of persons, that is persons born in Côte d’Ivoire, are now treated based on the places of origin of their parents”.¹⁹

The very first decision on the merits of a communication to the African Committee of Experts on the Rights and Welfare of the Child, issued in 2011, concerns the nationality of children of Nubian descent born in Kenya. The Committee of Experts found the Kenyan state in violation of its obligations under Article 6 of the African Charter on the Rights and Welfare of the Child, despite the reforms of the new 2010 Constitution, since it does not provide that children born in Kenya of stateless parents or who would otherwise be stateless acquire Kenyan nationality at birth.²⁰ The Committee noted the “devastating” consequences of statelessness for children in relation to their socio-economic rights.²¹

¹⁵ Communication 97/93, *Modise v. Botswana*, African Commission on Human and Peoples’ Rights (ACHPR) 2000, paragraph 91.

¹⁶ Communication No. 212/98, *Amnesty International v. Zambia*, ACHPR 1999, paragraph 50.

¹⁷ *Amnesty International v. Zambia*, paragraph 33. See also Communication No.159/96, *Union Interafricaine des Droits de l’Homme and Others v. Angola*, ACHPR 1997; *Modise v. Botswana*; Communications Nos. 27/89, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and Others v. Rwanda* (ACHPR 1996; Communication No.71/92), *Rencontre Africain pour la Défense des Droits de l’Homme v. Zambia*, ACHPR 1996.

¹⁸ Communication 211/98, *Legal Resources Foundation v. Zambia* (2001) AHRLR 84 (ACHPR 2001).

¹⁹ Communication No. 246/02, *Mouvement ivoirien des droits humains (MIDH) v. Côte d’Ivoire* (ACHPR 25th activity report 2008).

²⁰ Communication 002/2009, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya*, African Committee of Expert on the Rights and Welfare of the Child, 22 March 2011, paragraph 53.

²¹ *Ibid.*, Paragraphs 42 and 46.

The principles of citizenship law

Both the common law and the civil law models of citizenship that came to be applied in Africa combine the two basic concepts known as *jus soli* (literally, law or right of the soil), whereby an individual obtains citizenship because he or she was born in a particular country; and *jus sanguinis* (law or right of blood), where citizenship is based on descent from parents who themselves are citizens. In general, a law based on *jus sanguinis* will tend to exclude from citizenship residents of a country who are descended from individuals who have migrated from one place to another. An exclusive *jus soli* rule, on the other hand, would prevent individuals from claiming the citizenship of their parents if they had moved away from their “historical” home, but is more inclusive of the actual residents of a particular territory.

In practice, another distinction is often more important in citizenship law, that between citizenship “from birth” (termed “of origin” in the civil law countries) and citizenship “by acquisition”. Citizenship from birth/of origin may be based either on descent (*jus sanguinis*) or on birth in the country (*jus soli*), but implies that a child has a citizenship from the moment of birth without having to undergo any further procedures to acquire it (in practice of course, procedures may be applied to obtain recognition of that nationality). Citizenship by acquisition relates to those who have become citizens later in life, as a result of naturalisation based on long-term residence, marriage or other criteria.²²

In many countries, the rights of those who are citizens from birth or by acquisition are the same; but others apply distinctions, especially in relation to the holding of public office. In addition, and very importantly, citizenship by acquisition may usually be far more easily withdrawn.

The causes of statelessness in southern Africa

The two main causes of statelessness in southern Africa, as in the rest of the continent, are a failure to integrate historical and contemporary migrants (whether forced or voluntary) and their descendants, and discrimination in law or in fact on the basis of gender, race or ethnicity (whether against migrants, or people who have never moved). These causes are intertwined, and must be seen within the historical context of the region, and the way in which the states were formed.

The historical context of migration and discrimination

Pre-independence

Africa shares two challenges with other post-imperial regions. On one hand the colonial powers set political borders that cut through the middle of communities which in the past formed one political unit. At the same time they promoted — or sometimes forced — migration within the new political units, moving unprecedented numbers of people away from their place of birth. This is as true in southern Africa as elsewhere on the continent. Africa is not unique in this situation — borders throughout the world have been established by war and conquest — but Africa is unusual in the abruptness of the transitions that occurred and the lack of regard by the colonial powers to pre-existing political borders.

In southern Africa, there was relatively free movement throughout the territories of the British-run Central Africa Federation (Northern and Southern Rhodesia and Nyasaland; that is, Zambia, Zimbabwe and Malawi). In addition, the British colonial government and the white minority governments of Rhodesia and South Africa created, sometimes through punitive tax regimes or other forms of coercion, powerful recruitment systems for long-distance migrant labour on mines and farms established on expropriated land. Swaziland and Lesotho also contributed thousands of workers within this system.

²² Note that the terminology is not consistent across legal systems, and that the division between nationality of origin and nationality by acquisition may seem more natural in the civil law countries. In countries using English as the official language, the law usually refers to citizenship “by birth” to mean “from birth”; but, confusingly, in some cases citizenship “by birth” is used to mean citizenship based on birth in the country (*jus soli*). Similarly, naturalisation is usually the term used (in English and in French/Portuguese) for acquisition of citizenship after long term residence; registration or option may be the term used for acquisition of citizenship based on marriage or other connection, under a procedure that gives less discretion to the state. In some Commonwealth countries, such as Zambia, the only process for citizenship by acquisition is known as registration.

Thanks to geographical separation, the southern Africa Portuguese colonies of Angola and Mozambique exchanged populations with each other to a much lesser extent; though many Mozambicans became mine or farm workers in South Africa and Rhodesia.

The European empires also left a legacy of legal systems that had created a many-tiered citizenship structure whose central feature was racial discrimination. The colonies were founded on a basis of racial and ethnic distinction that justified the gaps in standard of living and legal rights between rulers and ruled. On the one hand there were European settlers — who were full citizens with the same rights as their relatives who lived in the “home” country of the colonisers; and on the other there were African “natives” (*indigènes* or *indígenas* in French and Portuguese) — who were subjects. With the exception of a tiny minority admitted to full citizenship, the native or *indigène* was a subordinate being without full rights. This distinction was taken to its logical extreme in South Africa, where black South Africans were denationalised and purportedly allocated the nationality of nominally independent “homelands”, and was maintained within the region for several decades beyond the date of liberation elsewhere in the continent. Victims of forced removals from South Africa across international borders are among those whose citizenship has since been unresolved, as noted below.

Post-independence

At independence, the new states adopted citizenship laws largely based on models from the various colonial powers. Transitional rules were also needed to cater for the handover of legal authority from the colonial power to the new states.

In the former colonies of Britain, the constitutions of the new states of what was now called the Commonwealth were drafted according to a standard template, known as the “Lancaster House” model after the building in London where they were negotiated. These laws created three ways of becoming a citizen of the new state: some became citizens automatically; some became entitled to citizenship and could register as of right; while others who were potential citizens could apply to naturalise. Those who became citizens automatically were: firstly, persons born in the country at the date of independence who were at that time citizens of the United Kingdom and colonies (mainly those of European descent) or British protected persons (mainly those of African and Asian descent); and secondly, persons born outside the country whose fathers became citizens in accordance with the other provisions. Those persons born in the country whose parents were both born outside the country were entitled to citizenship by way of registration, based simply on proof of facts, and others who were ordinarily resident in the country could naturalise, generally through a discretionary process.

In both francophone and lusophone countries the civil code was adopted, based on their respective European models. In the former Portuguese colonies of southern Africa, most of the new national constitutions and political regimes were given a socialist content when independence was attained following the 1974 collapse of the *Estado Novo* in Portugal. However, all the lusophone countries kept Portugal’s civil law system, including the framework of the provisions on nationality that had been applied in Portugal itself. Some countries also established rules favouring the grant of nationality to those who had taken part in the liberation struggle and penalising those who had collaborated with the colonial regime. For example, individuals who had participated in the liberation struggle within the structures of FRELIMO were given the right to opt for Mozambican nationality, and nationality was excluded for people who had been members of “colonial-fascist political organisations”.

Though gender discrimination was a common feature of the laws adopted at the time of independence in southern Africa — as it was in the 1950s and 1960s in most European states — formal equality between races and ethnic groups was the norm. In some cases, however, the laws adopted reversed the system of discrimination, giving priority to persons of African race, or members of certain ethnic groups. In southern Africa, this remains the case in Malawi (see further below). In addition, the rules governing state succession were sometimes written or interpreted to exclude those who were asserted to have insufficient “historical” connection to the territory concerned.

The rules governing citizenship have often been most problematic in those countries where colonial-era migration and dispossession of land were most marked, where the numbers remaining after independence of those who had arrived during empire were largest, and where the political power of those affected was weakest. As happened later following the collapse of the Soviet Union, when the European empires in

Africa retreated, they left behind a legacy of resentment of incomers and their privileges that still reverberates. But the migration of the first half of the twentieth century was not only of Europeans, Asians or Middle Easterners: hundreds of thousands of Africans also moved, sometimes under duress, as a result of the political and economic changes brought by colonisation. The descendants of these migrants also find their right to citizenship and belonging questioned till today: among them are, for example, Zimbabweans whose ancestors came from Mozambique, Zambia or Malawi.

Some countries in southern Africa have made deliberate efforts to integrate pre-independence migrant or displaced communities that were not integrated through the rules governing state succession. For example, in 1991 Namibia supplemented its citizenship act by adopting a specific piece of legislation offering Namibian citizenship to those who would have been Namibian citizens if they or their ancestors had not fled persecution before 1915.²³ These people, largely Herero who had fled the German genocide of their people from 1904 to 1907, were given a five year period during which they could opt for Namibian citizenship. More recently, the Namibian government has negotiated with the Angolan, South African and Zambian governments to undertake a joint identification exercise among undocumented populations at risk of statelessness in its border regions; the process started in 2010, and by November 2011, more than 900 persons had been naturalised or officially recognised as Namibian through this process. Among them were around 200 people of Nama and Damara heritage removed in the 1970s by the South African government from the Riemvasmaak area of the Northern Cape to what was then South West Africa.²⁴ The new government that took power in South Africa in 1994 granted a series of amnesties to several categories of migrants and refugees, as a transitional measure.²⁵

Racial and ethnic discrimination

Related to the history of colonisation, half a dozen countries in Africa limit citizenship from birth to members of ethnic groups whose ancestral origins are within the particular state or within the African continent. Liberia and Sierra Leone, both founded by freed slaves, take the position that only those “of Negro descent” may be citizens from birth. Meanwhile, citizenship is legally linked to ethnicity and “indigeneity” (or “autochthony”) in Uganda, Democratic Republic of Congo (DRC) and Somalia, and to some extent in Nigeria. Discrimination on ethnic grounds in relation to citizenship is common in practice in many places, even if not explicitly stated in law.

In southern Africa, Malawi’s 1966 nationality law provides that citizenship from birth is restricted to those who have at least one parent who is not only a citizen of Malawi but is also “a person of African race”.²⁶ In Swaziland, the law does not specifically refer to ethnicity in relation to those born after the Constitution came into force, but a strong ethnic preference, reflected in a reference in the Constitution to “the class of persons generally regarded as Swazi by descent” and the provision of the 1992 Citizenship Act providing for citizenship “by KuKhonta” (that is, by customary law), has in practice ensured that

²³ Namibian Citizenship Special Conferment Act, No.14 1991.

²⁴ Information provided at the UNHCR regional statelessness meeting 1-3 November 2011.

²⁵ Even before comprehensive legislative changes to the immigration regime were passed, a series of immigration amnesties were offered to particular groups of foreigners from the region: contract mine workers (1995); a broader category of people from the SADC region who had lived in South Africa for at least five years and had economic or family ties in the country (1996); and finally Mozambicans displaced by the civil war in that country who had been refused refugee status by the apartheid government (1999). An estimated 1 to 1.5 million people became eligible for South African citizenship in this way, though only 51,000 applications were received from miners, and just over 200,000 for others from the SADC region. A discussion of these amnesties can be found in Bronwyn Harris, “A Foreign Experience: Violence, Crime and Xenophobia during South Africa’s Transition”, *Violence and Transition Series*, Vol. 5, South Africa, Centre for the Study of Violence and Reconciliation, August 2001. See also essays in Jonathan Crush and Vincent Williams (eds.), *The New South Africans? Immigration Amnesties and their Aftermath*, Cape Town, Idasa, 1999; Human Rights Watch, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa*, New York, March 1998.

²⁶ Malawi Citizenship Act, 1966, sections 4, 5 and 12-15.

those who are not ethnic Swazis or are of mixed ethnicity can find it very difficult to obtain recognition of citizenship.²⁷

Such laws and practices obviously create the danger of statelessness for persons born in the country who have citizenship in no other state but do not fulfil the explicit or implicit racial or ethnic conditions imposed. The failure of the state to recognise the nationality of whole groups of people is also a central cause of some conflicts in Africa, for example the wars in Côte d'Ivoire and DRC.

Gender discrimination and discrimination based on marital status of parents

Gender discrimination is one of the commonest causes of statelessness, especially in the case of children who cannot obtain their mother's nationality because of gender discrimination and who cannot otherwise acquire the nationality of the State of birth or of their father (for example, because the child was born out of wedlock, the inadequacy of civil registration procedures or other challenges).

Nonetheless, gender discrimination was until recently the norm in citizenship laws across the world; some of the older international treaties on nationality law in fact assumed that gender discrimination would be applied, while trying to minimise statelessness that could result.²⁸ In Africa at independence and until recently, most countries discriminated on the basis of gender in granting citizenship. Female citizens were not able to pass on their citizenship to their children, if the child's father was not also a citizen, nor to their foreign spouses.

In Southern Africa today, however, gender neutrality in the right of a parent to transmit his or her nationality to a child is the norm (see Table 3: Right to citizenship by descent). Southern Africa also contributed a leading case for the continent, in the 1993 *Unity Dow* ruling in Botswana, where the Court of Appeal upheld a woman's right to pass Botswana citizenship to her children.²⁹ The law was subsequently amended to conform with this ruling.

In Zimbabwe, advocacy by the women's movement, including a successful Supreme Court challenge³⁰, led to the removal of discrimination on grounds of gender and marital status of the parents in 1996. It only had effect from that date, however, and children born between 1980 (attainment of majority rule) and 1996 could not claim Zimbabwean citizenship if only their mother was Zimbabwean, unless born out of wedlock.³¹ In 2009, as part of a constitutional amendment allowing for the installation of a government of national unity, gender discrimination was completely removed from the Constitution in relation to citizenship by birth and marriage.³²

A few countries providing unequal rights for men and women in relation to nationality also discriminate additionally on the basis of whether a child is born in or out of wedlock; the provisions generally provide stronger, though not absolute, rights to the mother if a child is born out of wedlock. Among these countries is Swaziland. Discrimination on the grounds of birth in or outside marriage creates additional risks of statelessness, by providing one further condition before citizenship can be claimed and creating confusion over the rights of parents to transmit their nationality.

²⁷ "A person who has Khontaed, that is to say, has been accepted as a Swazi in accordance with customary law and in respect of whom certificate of Khonta granted by or at the direction of the King is in force, shall be a citizen of Swaziland." Swaziland Citizenship Act No.14 of 1992, section 5. See also Constitution of Swaziland, Article 42, which appears to provide that persons born before the Constitution came into effect are citizens "by operation of law" if either parent is a citizen and also if the person is "generally regarded as Swazi by descent." Article 43 of the Constitution removes this (not entirely clear) ethnic basis for children born after the Constitution came into effect, but entrenches gender discrimination, providing that citizenship is only passed by a father who is a Swazi citizen.

²⁸ For example, the 1957 Convention on the Nationality of Married Women.

²⁹ *Attorney General vs. Unity Dow*, certified judgment of the Court of Appeal Civil Appeal, No. 4/91, Botswana, June 11, 1992

³⁰ *Rattigan and Others v. the Chief Immigration Officer, Zimbabwe and Others* (Supreme Court of Zimbabwe, 1995)

³¹ Constitution of Zimbabwe Amendment (No. 14) Act, 1996; see also Tandeka C. Nkiwane, "Gender, Citizenship, and Constitutionalism in Zimbabwe: The Fight Against Amendment 14", *Citizenship Studies*, Vol. 4, No. 3, 2000.

³² Constitution of Zimbabwe Amendment (No.19) Act, 2009. The Citizenship Act (last amended in 2003) continues to quote the pre-1996 version of the Constitution; however it is to be presumed that the courts would substitute the current version of the Constitution in their interpretation.

In practice, many children of mixed nationality relationships in southern Africa, especially those born outside marriage, find that they cannot obtain recognition of their nationality, even if the law of both or either country is on the face of it gender neutral.

Achieving gender equality in the right of a woman to pass citizenship to her husband has proved even more difficult than ensuring citizenship for children on a gender neutral basis. More than two dozen countries in Africa today still do not allow women to pass citizenship to their non-citizen spouses, or apply discriminatory residence qualifications to foreign men married to citizen women who wish to obtain citizenship. In southern Africa these countries are Lesotho, Malawi, and Swaziland.³³ These provisions are particularly problematic when a husband is stateless or at risk of statelessness.³⁴ (See Table 4: Right to pass citizenship to a spouse.)

Contemporary cross-border movements of refugees and migrants

Across the globe, migration is increasing, and creating challenges for the integration of new citizens. While there is no right to citizenship as such for people who are themselves migrants, there is an urgent need to ensure that law and practice do not exclude their children from acquiring citizenship in one of the countries to which they have a connection. It is desirable that children born in a country who remain resident there until majority have the right to acquire citizenship in that country, even if they technically have the legal right to another citizenship; and essential if they would otherwise be stateless.

In addition, refugees and stateless persons have particular needs because they have lost the protection of their state of origin. Appropriate laws are necessary to this process, though of course there are formidable challenges that cannot be solved by law reform alone. In practice, as the United Nations High Commissioner for Refugees (UNHCR) puts it, with restraint: “Progress has been rather modest in terms of local integration throughout the continent.”³⁵ While the laws of many countries in principle allow for the naturalisation of refugees and stateless persons on the same or similar terms as other foreigners, through the normal procedures, naturalisation can be very difficult to access in practice for refugees, leaving some at risk of statelessness. The laws of some countries, including Botswana, specifically provide that a refugee is not regarded as being ordinarily resident (other than for the purposes of taxation), and thus exclude refugees from normal naturalisation procedures.³⁶ Few countries globally have undertaken effective measures to facilitate integration specifically for stateless persons, as required under the 1954 Convention relating to the Status of Stateless Persons; though in southern Africa Malawi and Lesotho, for example, have specific measures in place (on which see below).

While most recent economic migrants or refugees will not themselves be stateless, a failure to act to integrate them, and especially their children, creates the risk of multi-generational statelessness of whole communities who are no longer in any sense connected to any other country and yet are not fully integrated in the country where they live. For these “settled” migrants, it is particularly important that the state where they are resident takes measures for their naturalisation; and in addition that the law provides for the right to nationality for persons born in the country who are still resident there at majority, or, preferably, after a shorter period of residence, and that the state respects these provisions through the issue of documents in practice. Without this minimum right, there is a risk of creating a class of persons who are excluded from citizenship, even if they are living in the only country they have ever known and to which they have by far the strongest connections.

³³ The other countries are Benin, Burundi, Cameroon, Central African Republic, Comoros, Republic of Congo, Côte d’Ivoire, Egypt, Equatorial Guinea, Guinea, Libya, Madagascar, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, and Tunisia.

³⁴ For example, a person who is a naturalised citizen of another state may lose that nationality if he resides outside the country for a number of years, under a provision common to many nationality laws.

³⁵ United Nations Secretary-General, *Assistance to refugees, returnees and displaced persons in Africa*, report to the General Assembly, A/61/301, 29 August 2006.

³⁶ Botswana Refugees (Recognition and Control) Act, Laws of Botswana, chapter 25:01. See Jonathan Klaaren and Bonaventure Rutinwa, “Towards the Harmonisation of Immigration and Refugee Law in SADC,” *Migration Dialogue for Southern Africa (MIDSA), Report No.1*, 2004, pp.90-91.

Since independence, southern Africa has seen large outflows of refugees from Angola and Mozambique during their civil wars, as well as from DRC into countries further south. Although the majority of these refugees have now been able to return home, some have remained in the neighbouring countries where they sought refuge. Many of these people, and especially their children, may be at risk of statelessness: they cannot obtain the nationality of the country where they have now established their lives and families, while at the same time they have lost all connection to their country of origin, both in fact and as a matter of legal documentation. The lack of clarity about their nationality status creates perceptions of security risks for the state authorities concerned, while also ensuring that the members of these groups do not feel secure in their place of residence.

For example, hundreds of people who fled from Angola to Namibia and have lived in Namibia for decades may not be recognised as citizens of either country.³⁷ Meanwhile, UNHCR is advocating for the naturalisation in Angola of a group of up to 15,000 Congolese refugees originally from Katanga Province who have been in Angola for more than three decades and have achieved “a significant level of socio-economic integration in the country”.³⁸ Alternatively, refugees returning to their country may find their rights to nationality challenged. Again in the case of Angola, refugees returning from DRC, and their children born in DRC, have in some cases found it difficult to have their nationality recognised.³⁹ Even the internally displaced who never left the country have faced problems in establishing their identity.⁴⁰ The Angolan Government has now established “11 Commitments for Children”, which include birth registration⁴¹, though there are still many difficulties in practice, including for returned refugees and their children. Many returnees are still without any documentation, most importantly the *cedula pessoal*, or “personal record” that ensures access to schooling for children, and other rights, and is the basis for issue of a passport or identity card. Equally, UNHCR has been engaged in finding legal solutions for children born in the DRC of mixed Angolan and Congolese parentage who have been denied registration as citizens despite nationality legislation granting citizenship of the DRC to a child with one Congolese parent.⁴²

Botswana made a modest move toward granting citizenship to long-standing Angolan refugees in 2006. In a tripartite agreement signed between UNHCR and the governments of Botswana and Angola to facilitate the return of Angolan refugees following the end of the civil war, it was agreed that those refugees not wishing to return to Angola would be processed for residency and citizenship in Botswana.⁴³ In November 2006 it was reported that, after many delays, Botswana President Festus Mogae had approved the grant of citizenship to 183 long-term Angolan refugees resident in Botswana since the 1970s who had not repatriated to Angola.⁴⁴

In Mozambique, returnees from Zimbabwe and other countries where they have resided for decades are similarly at risk of statelessness. For example, UNHCR has identified hundreds of stateless individuals who were mainly returnees from Zimbabwe and who did not have either their Mozambican or their Zimbabwean citizenship recognized. These persons have difficulties in accessing basic services and are also reported sometimes to be victims of harassment by authorities, especially the police, due to their lack of documentation. Mozambicans still abroad also face problems in establishing their nationality, and UNHCR is assisting the Mozambican authorities in an exercise to identify and provide

³⁷ See, for example, Michael Liswaniso, “Some Opuwo Residents Stateless”, *New Era*, 9 April 2009.

³⁸ UNHCR, 2011 Regional Operations Profile: Southern Africa, www.unhcr.org/pages/49e45abb6.html, accessed 29 September 2011.

³⁹ See *Evaluation of UNHCR’s returnee reintegration programme in Angola*, August 2008; Jean-Michel Mabeko-Tali, “« Congolenses », « Congoleuses », « Zairenses » : L’immigration centre-africaine et la problématique identitaire angolaise”, in Catherine Coquery-Vidrovitch et al, *Etre Etranger et Migrant en Afrique au XXe Siecle: Politiques identitaires et modes d’insertion, Vol.1*, Paris : Harmattan, 2003, pp.189-206.

⁴⁰ Human Rights Watch, *Struggling through Peace: Return and Resettlement in Angola*, August 2003.

⁴¹ Steve Felton, “With free birth registration, Angola promotes a child’s right to legal identity”, UNICEF, 10 August 2010, available at http://www.unicef.org/infobycountry/angola_55501.html accessed 29 September 2011.

⁴² UN High Commissioner for Refugees, *Africa Newsletter*, third quarter 2006.

⁴³ See information on Botswana country page of the UNHCR website at <http://www.unhcr.org/>.

⁴⁴ “183 Angolan refugees get citizenship,” *Government of Botswana Daily News Online*, 2 November 2006.

documentation to Mozambican migrants and their children in South Africa and other neighbouring countries.⁴⁵

Malawi has restored citizenship to 85 persons during the period 2008 to 2011, but the process is expensive and difficult to access. An unknown number of diaspora returnees from Zimbabwe or elsewhere do not have citizenship documents.⁴⁶

Tanzania provides a good example in relation to the grant of citizenship to refugees, especially refugees it has received from Rwanda and Burundi over the years, and has reaped the benefit in social peace. In 2007, Tanzania offered naturalisation to Burundian refugees resident in the country since 1972 and their descendants; of those eligible, 80%, or 172,000 people, expressed their desire to remain in Tanzania, and the remaining 20% were to receive assistance with repatriation from March 2008. There have been legal ambiguities and problems in practice with this process, and it is still not clear how effectively it will be implemented in practice, but it remains a positive effort to resolve such issues.⁴⁷

In recent years, refugees and migrants have also reached southern Africa from further afield, including from the conflict in Somalia, whose status is particularly difficult because of the lack of any functioning state in that country. There have also been vastly increased unregulated flows of economic migrants from across the continent, especially to South Africa.

The economic and political crisis in Zimbabwe since the turn of the millennium has led to large outflows of people to neighbouring countries. Though statistics are highly contested, according to some official estimates up to one million undocumented Zimbabwean migrants may be living in South Africa.⁴⁸ Revisions to Zimbabwe's citizenship laws and policies that have withdrawn citizenship from persons with the alleged possession of or right to claim citizenship of another country, mean that an unknown number of emigrants from Zimbabwe are stateless or at risk of statelessness.⁴⁹ In 2010, the South African government responded positively to the situation of undocumented Zimbabweans by providing an opportunity for them to regularise their residence in South Africa (thus also providing a potential long term pathway to South African citizenship). Around 275,000 Zimbabweans had applied for residence by the 31 December 2010 deadline. Processing the applications depends on cooperation from the Zimbabwean authorities in providing passports or birth certificates to those applying for residence in South Africa, effectively excluding those who cannot obtain these documents from the Zimbabwean authorities. The Zimbabwe registrar-general did, however supply documentation to 72,000 Zimbabweans in South Africa.⁵⁰ By October 2011, the Department of Home Affairs had issued permits to just over half of those who applied for them through this process.⁵¹ A moratorium on deportations was lifted.

Proof of nationality and birth registration

The systems for proof of nationality are in practice often as important as the provisions of the law on the qualifications in principle. If there are onerous requirements or costs attached to proof of nationality, or discrimination in practice means that proof is not obtainable, then the fact that a person actually fulfils the conditions laid down in law may be irrelevant.

⁴⁵ UNHCR, "Fighting Statelessness: Findings In Mozambique", 2011. A pilot project in South Africa is already under way, with other exercises planned in Zimbabwe and Malawi.

⁴⁶ Information provided at UNHCR regional statelessness meeting, 1-3 November 2011.

⁴⁷ *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, Citizenship and Forced Migration in the Great Lakes Region Working Paper No. 1, November 2008, Centre for the Study of Forced Migration (Dar es Salaam), International Refugee Rights Initiative (Kampala), Social Science Research Council (New York).

⁴⁸ Aurelia Segatti and Loren B. Landau (eds.), *Contemporary Migration to South Africa: A Regional Development Issue*, Agence Française de Développement and the World Bank, 2011, pp.146-149.

⁴⁹ Similar policies have also been applied in Botswana. See Lawrence Seretse, "Thousands of Batswana become foreigners overnight", *Mmegi*, 18 November 2011.

⁵⁰ Information provided at UNHCR regional statelessness meeting, 1-3 November 2011.

⁵¹ "Speaking notes for briefing to the media by the head of the Zimbabwe Documentation Project, Jacob Mamabolo" <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=19609&tid=36304> 30 June 2011; "Deportations of Zimbabwean migrants set to resume", IRIN, 7 October 2011.

In principle, recognition of citizenship should start immediately after birth, with registration of the birth itself.⁵² Birth registration establishes in legal terms the place of birth and parental affiliation, which in turn serves as documentary proof underpinning acquisition of the parents' nationality (*jus sanguinis*), or the nationality of the state based on where the child is born (*jus soli*). Birth registration (while not itself conferring citizenship) is usually fundamental to the recognition of nationality itself, and thus of all other citizenship rights: lack of birth certificates can prevent citizens from registering to vote, putting their children in school or entering them for public exams, accessing health care, or obtaining identity cards, passports, and other important documents. Yet, according to UNICEF, the UN Children's Fund, 55% of African children under five years old have not been registered, with the situation much worse in rural areas. In a few countries more than 90% of children are not registered.⁵³

In some countries, the registration of births is not even compulsory. For example, as of 2004 in southern Africa, registration of births was compulsory for all children in South Africa, Swaziland, Zambia, and Zimbabwe; but not in Botswana and Malawi. In Malawi the requirement to register was racially based: registration was compulsory only if one or both parents were of European, American, or Asiatic "race" or origin.⁵⁴ In Zambia only an average 14% of children are registered, as reported by UNICEF. For Malawi figures are not even available from UNICEF, but a campaign on birth registration led to the adoption of a new law in 2011 requiring universal birth registration, without racial discrimination. This campaign is believed to have increased the rate of registration from less than 5% of under-fives to around 10% in 2009, with further progress anticipated.⁵⁵

Mozambique adopted a national plan of action on birth registration in 2004 to address the fact that only 6% of children under five years had a birth certificate. Since then, about 4.2 million children under the age of 18 have been registered. This represents almost 50% of all children in Mozambique.⁵⁶ Refugees and asylum seekers also have full access to civil status documentation, such as birth, marriage and death certificates. However, the fact that nationality legislation has not been updated since the current Constitution was adopted in 2003 leads to inconsistent practices at different civil registry offices.

In Angola, the 2005 nationality law provides that nationality of origin is proved by a birth certificate; yet UNICEF estimates that only 29% of Angolan children are registered overall, and only 19% in rural areas.

Similarly in South Africa, the Citizenship Act provides that citizenship is granted to children born on the territory who would otherwise be stateless, provided that birth is documented through a birth certificate.⁵⁷ The Births and Deaths Registration Act states that birth registration is a right for all children. Within southern Africa, South Africa has the highest rates of registration, after a major drive to improve registration rates led to an increase from less than 25% of under-fives in 1998 to 72% in 2005, and 92% by 2009. Even so, a substantial proportion of births are registered late.⁵⁸ Moreover, those who are most likely not to be registered are children whose parents cannot produce a passport or South African identity card. This means that asylum seekers, refugees, stateless persons and undocumented migrants may be

⁵² "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents." Convention in the Rights of the Child, 20 November 1989, Article 7(1). The African Charter on the Rights and Welfare of the Child repeats this provision (Article 6(2)).

⁵³ For birth registration statistics for individual countries, follow links from the UN Children's Fund (UNICEF) index page to statistics for each country, which are currently updated as of March 2010: <http://www.unicef.org/infobycountry/esaro.html>. See also concluding observations of the UN Committee on the Rights of the Rights for the relevant countries, available at <http://www.unhcr.ch/tbs/doc.nsf>, in which concern at low birth registration rates is frequently expressed.

⁵⁴ Jonathan Klaaren and Bonaventure Rutinwa, "Towards the Harmonisation of Immigration and Refugee Law in SADC" *Migration Dialogue for Southern Africa (MIDSA), Report No.1*, 2004, pp.40-41.

⁵⁵ See Plan International country case study, available at: <http://plan-international.org/birthregistration/resources/country-case-studies/malawi>.

⁵⁶ See information from UNICEF at http://www.unicef.org/mozambique/protection_4904.html and Plan International at <http://plan-international.org/birthregistration/resources/country-case-studies/mozambique>.

⁵⁷ South African Citizenship Amendment Act, 2010 Article 2(2).

⁵⁸ *The coverage and quality of birth registration data in South Africa: 1998–2005*, Report no. 06-03-01 (2007), Statistics South Africa, 2007; 2009 figure from UNICEF.

unable to obtain birth registration for their children, and thus the child may be unable to claim a parent's nationality or his or her rights to South African nationality either at birth (if otherwise stateless) or potentially at a later date, under recent amendments to the Citizenship Act (see below under heading "The right to a nationality for children born in the country").⁵⁹ Even children with one South African parent face difficulties if the child is born out of wedlock. In a recent case, the Public Protector found that the Department of Home Affairs' failure to register a the birth of a child with a South African father and non-South African mother was "procedurally and substantively flawed" and in violation of the Constitution; and in a similar case the High Court ordered that the details of the South African father be entered on the birth certificate for a child born out of wedlock to a non-South African mother and the child declared to be a South African citizen.⁶⁰ Home Affairs regulations also prevent a father from registering a child out of wedlock without the mother's consent and presence to acknowledge paternity, leaving children abandoned by their mothers at risk.⁶¹

Chronic inefficiency, incomplete geographical coverage, and temporary or prolonged suspension in access to civil registry services affect many countries across the region. As a result of these problems, many thousands of persons are placed at risk of statelessness. In all countries, orphans, children born in deep rural and frontier areas, children of refugees and recent migrants, and children of the poorest families are at greatest risk of not being registered and facing problems in proving their nationality as a result.

There is a major initiative at African level to improve civil registration and vital statistics (CRVS) systems. In August 2010, African ministers responsible for civil registration endorsed landmark resolutions that urged all member States to take appropriate political and policy measures to reform and improve CRVS systems in their respective countries. Subsequent ministerial and expert meetings have taken this agenda forward.⁶² However, while there are encouraging signs of recognition of this problem through action at national level, much more remains to be done.

Table 1: Birth registration rates in Southern Africa

Country	% birth registration children <5 (2000-2009)		
	Urban	Rural	Total
Angola	34	19	29
Botswana	78	67	72
Lesotho	39	24	26
Malawi	-	-	10
Mozambique	39	28	31
Namibia	83	59	67
South Africa	-	-	92
Swaziland	38	28	30
Zambia	28	9	14
Zimbabwe	83	71	74

Source: UNICEF (as of March 2010) and Plan International (for Malawi)⁶³

⁵⁹ *Towards Universal Birth Registration in South Africa: A Briefing Paper*, Lawyers for Human Rights, Pretoria, 2011.

⁶⁰ *Report on an investigation into allegations of failure to register the birth of a child and the naturalisation of the mother by the Northern Cape Department of Home Affairs*, Report No.38 of 2011, Public Protector of South Africa; *Steven Sikhumbuzo Moyo and another v. Minister Home Affairs*, North Gauteng High Court case number 44424/09.

⁶¹ *Towards Universal Birth Registration*, *op. cit.*

⁶² See information on UNECA website, at <http://ecastats.uneca.org/acsweb/en-us/focusareas/crvs.aspx>.

⁶³ Some states assert that these figures may be in lower than the actual totals in their cases (including Namibia and Zimbabwe); however, in the interests of using comparable figures based on the same methodology, the UNICEF figures are quoted here for all.

Comparative analysis of nationality legislation

Southern Africa shows the same variety in its citizenship laws as the rest of the continent. Some states are still using laws that were adopted at or soon after independence and have been little changed since, while others have undertaken comprehensive reforms, often in the context of a general constitutional review. Other States have adopted a series of amendments to their existing laws — most often to introduce partial or total gender equality — sometimes leading to complex provisions that seem to contradict themselves and create corresponding difficulties in determining an individual's position. In some countries, there is conflict between the constitution and legislation: for example, in Mozambique the nationality law dates from 1975 (amended in 1987), but the 2004 Constitution provides different (and improved) provisions on nationality. In addition, of course, the provisions of the law may well not be implemented in practice, in the individual low level administrative decisions related to recognition of nationality (birth registration, issue of ID cards etc). The rights guaranteed in theory may be far from the rights afforded in fact. These complexities should be born in mind in reading the tables below, which are based on the laws listed at the end of this paper.

The right to a nationality for children born in the country

Despite the provisions of the ACRWC, most African countries fail to provide in their constitutions or in legislation for an explicit right to nationality for children who would otherwise become stateless. Seven African countries fail to make any default provision for children with no other option to acquire a nationality under their citizenship law, even at majority: the southern African States among this number are Botswana, Swaziland, Zambia and Zimbabwe (see Table 2: The right to a nationality for children born in the country).⁶⁴

Jus soli, double jus soli and birth + residence

The countries with the strongest protections against statelessness for children born on their territory are those that follow a *jus soli* rule, granting citizenship automatically to any child born on their soil (usually with an exception for the children of diplomats or other state representatives).

Few countries in Africa (including Lesotho, as well as Chad and Tanzania) base their law on *jus soli* in the first instance.⁶⁵ However, more than 20 countries, mostly in the civil law tradition, have adopted a half measure between requiring descent from a citizen and a *jus soli* rule. These countries provide either that children born in their territory of non-citizen parents can claim citizenship from birth (“by origin” in the civil law usage) if they are still resident there at majority, or that children born in the territory of at least one parent also born there are citizens from birth (a provision often known as “double *jus soli*”). In southern Africa, Mozambique, Namibia, and South Africa, all include provisions allowing for a child born in the country to have the right to citizenship either immediately or following residence until majority, and Mozambique also provides for double *jus soli*.⁶⁶ (See Table 2: The right to a nationality for children born in the country.)

In Mozambique the Constitution provides that a child born in the country is Mozambican, whatever the status of the parents (unless in the employment of their own country), if his or her legal representative

⁶⁴ The others are Gambia, Libya, Nigeria, Seychelles, and Sierra Leone.

⁶⁵ Some countries previously applied a *jus soli* rule but have since changed the law to remove this provision: Côte d'Ivoire in 1972, Mauritius in 1995, and Gambia in 2001, all at the same time as they removed gender discrimination in citizenship by descent. Botswana also ended *jus soli* in 1984, but substituted a rule that discriminated on the basis of gender (until challenged in court in the *Unity Dow* case).

⁶⁶ In the case of Mozambique, the parents of a child born in the country may declare that they wish the child to be Mozambican, within one year of the child's birth, or the child may claim nationality within one year of majority (Constitution, 2004, Article 24). In the case of Namibia, the child of parents who are “ordinarily resident” (excluding those who are illegal immigrants or diplomats etc) in the country are Namibian citizens from birth by operation of law (Constitution, 1990, Article 4(1)(b)). African countries including conditional or double *jus soli* provisions are: Benin, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo Republic, Equatorial Guinea, Gabon, Ghana, Guinea, Mali, Mauritania, Morocco, Mozambique, Niger, Rwanda, Senegal, South Africa, Togo, Tunisia, Uganda, and Zambia.

makes a declaration within one year of their birth, or if the child makes a declaration within one year of attaining majority.⁶⁷ A child born in the country of one parent also born there is Mozambican without any further procedures necessary.⁶⁸ In Namibia, the parents must be “ordinarily resident” in the country and must not be in the employment of another country or “illegal immigrants” (unless the child would otherwise be stateless).⁶⁹

In South Africa, the Department of Home Affairs had established a practice of granting citizenship from birth to children with only one parent who was a permanent resident, even though the law until 2010 provided for citizenship from birth to a child with both parents who were permanent residents (or with one who was a citizen).⁷⁰ Since the 2010 amendments to the law, which now require the child of permanent residents to remain resident until majority, rather than granting citizenship at the time of birth,⁷¹ children of permanent residents are being given handwritten “foreigner” birth certificates rather than computerised certificates with a national ID number.⁷² However, under a further amendment to the law, a child born in the country of parents who were not permanent residents still qualifies to naturalise as a citizen if he or she remains resident in the country at majority.⁷³

Children of citizens

All southern African countries, with the exception of Swaziland and Malawi, provide on paper for every child born in the country of one citizen parent to have the citizenship of that country, whether or not the parent is the father or mother, and whether or not the child is born in or out of wedlock. (See Table 3: Right to citizenship by descent). Since 2009, Zimbabwe’s Constitution provides this right for a person born in or outside Zimbabwe with one grandparent who is or was a citizen.⁷⁴

In the case of Swaziland, the law discriminates on the grounds of both gender and marital status. The child of a Swazi father born in the country is a Swazi national, whether born in or out of wedlock. The child of a Swazi mother and a non-national father has no right to Swazi nationality if the parents were married; if born out of wedlock and not claimed by the father, the child is a national by birth.⁷⁵

As noted above, the Malawi Citizenship Act of 1966 discriminates in granting citizenship on the grounds of race.⁷⁶ Persons not “of African race” cannot under this law obtain Malawian nationality from birth, and may only naturalise as citizens, leaving those with no other nationality stateless.

Children of stateless parents or who would otherwise be stateless

Very few states in Africa have an explicit safeguard in their nationality legislation in line with article 6(4) of the ACRWC according to which they grant nationality to children born on their territory who

⁶⁷ Constitution of Mozambique, 2004, Article 24.

⁶⁸ Constitution of Mozambique, 2004, Article 23(1)(a).

⁶⁹ Constitution of Namibia, 1990, Article 4(d).

⁷⁰ South Africa Citizenship Act (No. 88 of 1995), section 2(3), prior to 2010 amendments. See Jonathan Klaaren, ‘Post-Apartheid Citizenship in South Africa’, in A. Aleinikoff (ed.) *From Migrants to Citizens: Membership in a Changing World* (Brookings Institution Press, 2000) pp.221-252.

⁷¹ South African Citizenship Amendment Act No.17 of 2010, amending section 2 of the principal act on citizenship by birth.

⁷² Information presented by Lawyers for Human Rights at UNHCR regional statelessness meeting 1-3 November 2011.

⁷³ South African Citizenship Amendment Act No.17 of 2010, amending section 4 of the principal act on citizenship by naturalisation. The difference between being born in the country of parents who are permanent residents and those who are not is thus slight, resting on the greater discretion given to the state in case of citizenship by naturalisation.

⁷⁴ Constitution 1981, as amended 2009, article 5 and 6.

⁷⁵ Constitution of the Kingdom of Swaziland, 2005, article 43; Citizenship and Immigration Act No.14 of 1992 sections 6 and 7 (prior to 1992 either parent could pass nationality). Other countries in Africa that discriminate in this way include Benin, Burundi, Guinea, Liberia, Libya, Madagascar, Mali, Mauritania, Senegal, Sierra Leone, Somalia, Sudan, Togo, and Tunisia.

⁷⁶ Citizenship Act 28 of 1966. Other African countries that discriminate on the basis of ethnicity or race include the Democratic Republic of Congo, Egypt, Liberia, Libya, Sierra Leone, Somalia, and Uganda. Liberia and Sierra Leone also restrict citizenship from birth to those of “negro African descent”. For this and other comparative information see *Citizenship Law in Africa: A comparative study*, Open Society Foundations, 2nd edition, 2010.

would otherwise be stateless. In southern Africa, and indeed in Africa as a whole, South Africa stands out both for stating in its Constitutional Bill of Rights that every child has “the right to a name and nationality” and also, critically, including in the South African Citizenship Act a provision granting citizenship to any child born on its territory who does not have the citizenship of any other country or the right to any other citizenship.⁷⁷ In addition to its general *jus soli* provision, which excludes the children of diplomats, Lesotho provides that a child born on the country covered by the exception relating to diplomats will be a citizen if he or she would otherwise be stateless. Namibia also provides that the exceptions⁷⁸ to the right to citizenship from birth of a child born in the country of parents who are ordinarily resident do not apply if the child would be stateless.⁷⁹ Angola also provides for a child born on the territory who would otherwise be stateless to have its nationality on request.⁸⁰ Mozambique, in addition to conditional and double *jus soli*, also provides that a child of stateless parents or parents of unknown nationality born on its territory has its nationality.⁸¹

Foundlings/ children of unknown parents

Under Article 2 of the 1961 UN Convention on the Reduction of Statelessness “A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State”. This provision is important for orphans of unknown parentage, especially in a post-conflict situation. In southern Africa, Angola, Mozambique and Swaziland grant citizenship to children born in the country of unknown parents and/or recently-born children found in the territory, Swaziland providing that the child may be up to the age of seven when found. Other southern African countries do not provide citizenship to foundlings. This includes South Africa, despite the many other protections its nationality legislation has against statelessness.

Adopted children

Most countries provide for children adopted from abroad to become nationals. In Angola, Mozambique, South Africa, Swaziland, Zambia, and Zimbabwe such children acquire citizenship automatically, without further procedures. In Botswana the procedure is discretionary if the adopted child is older than three years old, while in Namibia the child becomes a citizen through non-discretionary registration. Adopted children are not explicitly mentioned in the citizenship laws of Lesotho or Malawi.

⁷⁷ Constitution of the Republic of South Africa, 1996, article 28(1)(a); South Africa Citizenship Act (No. 88 of 1995, as amended 2010), section 2(2)(a).

⁷⁸ The exceptions to the right to citizenship from birth of children born in the country to parents ordinarily resident in Namibia include where the parents are illegal immigrants, or have diplomatic or similar status.

⁷⁹ Constitution of Namibia, 1990, Article 4(1)(b).

⁸⁰ A child born in Angola of unknown or stateless parents or who would otherwise be stateless must request nationality rather than having nationality by operation of law. Lei No.1/05 da nacionalidade, article 14.

⁸¹ Constitution of Mozambique, Article 23(1)(b).

Table 2: The right to a nationality for children born in the country

Country	Birth in the country	Otherwise stateless	Parents stateless (s) or unknown (u)	Foundlings ⁸²	Relevant legal provision (date of latest amendment in parentheses)
Angola		(x)	s + u	x	L2005Arts9&14
Botswana					-
Lesotho	JS	x			C1993Art38 L1971Art5
Malawi	~	(x)			C1994Art47 L1966Art18
Mozambique	(JS) JS/2		s + u		C2004Art23&24 L1975(1987)Art2
Namibia	(JS)*	x			C1990(2010)Art4(1)(d)
South Africa	C (JS)	x			C1996(2009)Art28 L1995(2010)Art2
Swaziland				x	C2005Art47 L1992Art17
Zambia					-
Zimbabwe					-

C / L: right to nationality provided for in constitution or legislation
(x): grant is based on an application procedure
JS: right to nationality based on birth in country alone (with exclusions for children of diplomats & some other categories)
(JS): child born in country of non-citizens is eligible to apply for citizenship at majority and/or after residence period
(JS)*: child born in country of parents who are legal residents has right to citizenship
JS/2: child born in country of one parent also born in the country has right to citizenship
~ racial or ethnic discrimination in law

Countries indicated in bold have particularly weak legal protections against statelessness

Children born outside the country

In most African countries, a child born to a citizen acquires citizenship, wherever that child is born. However, a handful of African countries allow for citizenship to be passed for only one generation outside the country: a citizen from birth born in the country can pass his or her citizenship to a foreign-born child but that child cannot pass his or her citizenship on in turn. Provisions to this effect are in force in Lesotho and Malawi in southern Africa.⁸³

In some cases, though nationality may be passed, there are additional requirements either to take positive steps to claim the right to nationality or to notify the authorities of the birth, if a child is born outside the country (See Table 3: Right to citizenship by descent). These provisions, while in principle acceptable, may leave some children stateless, since they are often little known and if nationality is not claimed

⁸² There is significant overlap between provisions on children of unknown parents or on foundlings; however, a foundling in some jurisdictions is interpreted to be restricted to a new-born or very young infant, while a child of unknown parents would generally not have the same age restrictions.

⁸³ And also in Gambia, Mauritius, Tanzania, and Uganda, and permitted to be established by legislation according to the Kenyan 2010 Constitution, though not in fact implemented under the new Kenya Citizenship and Immigration Act 2011. In Lesotho, the 1971 law discriminates on the basis of gender in relation to children born abroad, providing that only the father may pass nationality to children if they are not born in Lesotho; but the 1993 Constitution provides for equal rights. In Malawi, the racially discriminatory provisions of the Citizenship Act equally provide to those born abroad.

within the relevant time limits the right may be lost. It may also be very difficult to fulfil the requirements in practice, especially where the country of the parents' nationality has no diplomatic representation in their country of residence.

For Mozambique, children born outside the country must declare their intention of remaining Mozambican within one year of majority (unless their parents were abroad in service of the state). The nationality law but not the Constitution also requires that they renounce any other nationality to which they are entitled.⁸⁴ For Swaziland, a child born abroad of a father also born abroad must notify the authorities of his or her desire to retain Swazi citizenship within one year of majority; if this is not done, the person ceases to be a citizen.⁸⁵

Namibian and South African children born abroad must only be registered with a consulate⁸⁶ (this lesser requirement is not recorded in Table 3, though arguably this exclusion is too generous). Under its 2009 constitutional amendments, Zimbabwe requires birth registration in Zimbabwe of children born abroad (unless the parents were ordinarily resident in Zimbabwe or posted abroad on state duties).⁸⁷

Table 3: Right to citizenship by descent

Country	Born in country				Born abroad				Legal provision (date of latest amendment in parentheses)
	In wedlock		Out of wedlock		In wedlock		Out of wedlock		
	+ Father (F) &/or Mother (M) is citizen		+ Father (F) &/or Mother (M) is citizen		+ Father (F) &/or Mother (M) is citizen		+ Father (F) &/or Mother (M) is citizen		
	F	M	F	M	F	M	F	M	
Angola	R	=	=	=	=	=	=	=	L2005Art9
Botswana	R	=	=	=	=	=	=	=	L1998(2004) Arts4&5
Lesotho†	R	=	=	=	Rx1	=	=	=	C1993Art38&39 L1971Art5&6
Malawi	R~	=	=	=	Rx1~	=	=	=	L1966Arts4&5
Mozambique	R	=	=	=	C	=	=	=	C2004Art23 L1975(1987) Art1
Namibia	R	=	=	=	=	=	=	=	C1990(2010) Art4(1)(c)&(2)) L1990Art2
South Africa	R	=	=	=	=	=	=	=	L1995(2010) Art2
Swaziland †	R	-	R	C*	Rx1(C)	-	Rx1(C)	C*	C2005Art43 L1992Art7
Zambia	R	=	=	=	=	=	=	=	C1991(1996) Art5
Zimbabwe †	R ^	=	=	=	=	=	=	=	C1981(2009) Art5&6 L1984(2003) Art5

= same as column to the left

⁸⁴ Constitution 2004, Art.23(3); Lei da nacionalidade, 1975, Art.8(1).

⁸⁵ Constitution, 2005, Art.43(3).

⁸⁶ Constitution 1990, Art.4; Citizenship Act No.14 of 1990, Art.2.

⁸⁷ Constitution 1981, as amended 2009, Art. 6.

- no rights

R: child is citizen from birth as of right

Rx1: child is citizen from birth as of right only if parents born in country / citizens from birth

~ racial / ethnic discrimination in citizenship law: specified groups listed for preferential treatment

C: can claim citizenship following an administrative process (including to establish parentage but excluding birth registration)

* mother (or father) passes citizenship only if father (or mother) of unknown nationality or stateless or if father does not claim

† the position is ambiguous in that legislation conflicts with the constitution—the constitutional provisions are noted here unless they provide only general principles and the detailed rules are established by legislation

^ Rights to citizenship from grandparents: if born in or outside the country & one grandparent is a citizen

Right to pass citizenship to a spouse

Gender discrimination remains quite widespread in southern Africa in relation to the rights of spouses to transmit nationality. Although most spouses affected by this provision will not be stateless, the risk of statelessness is increased, and may affect their children (especially where, as is sometimes the case, gender discrimination also applies to transmission of nationality to children, and the children are born in the mother's state of nationality). The laws of Angola, Namibia, South Africa and Zimbabwe all facilitate the acquisition of nationality by spouses of nationals, and also give equal rights of men and women for acquisition of nationality by a foreign spouse. In Mozambique, the Constitution is gender neutral, but conflicts with the nationality law, which provides that women married to Mozambican men (but not vice versa) acquire nationality if they renounce their former nationality. The laws of Lesotho, Malawi and Swaziland, however, explicitly restrict the grant of nationality on the basis of marriage to the wives of male citizens. In the case of Malawi, the grant of nationality remains highly discretionary, so that it hardly gives any additional rights over naturalisation. The Citizenship Act additionally requires every female Malawian citizen who marries a non-Malawian citizen and acquires another citizenship to formally state her intention to either retain her Malawian citizenship and renounce any foreign citizenship acquired by virtue of her marriage or lose her Malawian citizenship (section 9). There is no equivalent requirement in respect of male Malawian citizens. Swaziland specifically provides that a foreign woman who acquired Swazi citizenship through marriage may be deprived of that citizenship where the marriage was entered into merely for the purpose of acquiring citizenship (though perhaps in other countries this eventuality might be covered by provisions on fraud).⁸⁸

In Botswana, Zambia and Zimbabwe the struggle of women to obtain equal rights successfully removed discrimination in the grant of citizenship to spouses — but only to put a spouse on the same conditional terms as other applicants for naturalisation, or simply reducing the period of residence required (in the case of Botswana and Zimbabwe). Simple registration for spouses was restored in Zimbabwe by 2009 constitutional amendments.⁸⁹ In 2010, Namibia amended its Constitution to change the period for acquisition of citizenship by marriage from two to 10 years.⁹⁰ South Africa requires that a spouse be admitted for permanent residence (which usually takes a minimum of five years but may be issued immediately to a spouse) in addition to a minimum period of marriage — the original act provided for a two year period of marriage and ordinary residence in the country, but 2010 amendments simply refer to “a prescribed period” (official websites still refer to a two year period).⁹¹ Only Mozambique provides a specific waiver in relation to the marriage period for stateless spouses.⁹²

⁸⁸ Constitution 2005, Article 49(2). The Constitution also makes specific provision for (voluntary) renunciation of Swazi citizenship in case of women who are or are about to be married to a citizen of another country.

⁸⁹ Constitution, 1981, as amended 2009, article 7(4).

⁹⁰ Namibian Constitution Second Amendment Act, 2010 (Act No. 7 of 2010), section 1.

⁹¹ South African Citizenship Act, 1995, section 5(5) as amended by South African Citizenship Amendment Act No.17 of 2010; South Africa Immigration Act, No.13 of 2002, section 26.

⁹² Constitution, 2004, article 26.

Table 4: Right to pass citizenship to a spouse

Country	Citizenship by marriage	Res. period (if any)*	Marriage period (if any)	Relevant legal provision(s) (date of latest amendment in parentheses)
Angola	=		5 yrs (waived if loses other nat.)	L2005Art12
Botswana	-			L1998(2004)Art14
Lesotho	m			C1993Art40 L1971Art7
Malawi	m			L1966Art16
Mozambique†	=		5 yrs (waived if stateless)	C2004Art26 L1975(1987)Art10
Namibia	=	10 yrs		C1990(2010)Art4(3) L1990Art3
South Africa	=	2yrs?		L1995(2010)Art5(5)
Swaziland	m			C2005Art44 L1992Art8
Zambia	-			
Zimbabwe†	=	5yrs		C1981(2009)Art7 L1984(2003)Art7

* If residence period noted then residence is after marriage
 = Equal rights for men and women to pass citizenship
 m Only men are permitted to pass citizenship to their spouses
 - No additional rights in case of marriage (though residence period may be reduced: see table on naturalisation)
 † the position is ambiguous in that legislation conflicts with the constitution

Acquisition of citizenship by naturalisation or registration

Most African countries permit, in principle, the acquisition of citizenship by naturalisation, at the discretion of the authorities, based on long-term residence in the country, intention to remain there, and various other criteria. In addition, some countries provide for less burdensome terms for acquisition of nationality by a foreign spouse (sometimes only wives); and in some cases also for stateless persons, in line with the obligations in the 1954 Convention relating to the Status of Stateless Persons.⁹³

For example, Malawi provides in law acquisition of nationality by discretionary registration of Commonwealth citizens; citizens of other African countries; persons with a “close connection” to Malawi, including those born in the country; and stateless persons born in the country or with a Malawian parent.⁹⁴ The applicant must also satisfy the authorities that he or she has been ordinarily resident in Malawi for three years, intends to remain there, and has no serious criminal convictions.⁹⁵ Lesotho similarly provides for discretionary registration of stateless persons lawfully resident for three years in the country, without a criminal conviction.⁹⁶ Zambia provides for discretionary registration of

⁹³ In accordance with Article 32 of the 1954 Convention relating to the Status of Stateless Persons, “(..) Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such procedures”.

⁹⁴ Malawi Citizenship Act 1966, Articles.12-14.

⁹⁵ Malawi Citizenship Act, 1966, section 18.

⁹⁶ Lesotho Citizenship Order, 1971, section 10.

children (only) who have “associations by way of descent, residence or otherwise” with Zambia, though it provides no specific entitlement in case of stateless children.⁹⁷

In some countries, acquiring citizenship by naturalisation on the basis of long residence is relatively straightforward, at least in theory. More than 20 African countries provide on paper for a right to naturalise based on residence of five years; though in some countries the period is longer. In southern Africa, the majority of countries go with a ten year period to be able to apply for naturalisation, some raising the period to that length in recent years.⁹⁸ South Africa provides a two-step process. A person must first become a permanent resident, a process which usually takes five years (except when married to a citizen); a further five years’ residence is required to become a citizen.⁹⁹

Conditions applying to persons wishing to naturalise vary, but often leave a high level of discretion to the authorities, which may allow for discrimination and fail to provide access to nationality for individuals in need of protection, including stateless persons and refugees. Naturalisation conditions often include very vaguely defined components requiring “good character” or related to integration to the local community. For example, in Malawi, a person wishing to naturalise or register as a Malawian citizen must satisfy the responsible minister that, among other things, he or she is “of good character” and “would be a suitable citizen of Malawi”.¹⁰⁰ In general, such restrictions should be limited to more objective requirements in relation to a clean criminal record. Botswana requires knowledge of Setswana or another language spoken by a “tribal community” in Botswana.¹⁰¹ Again, such language requirements may be reasonable to ensure the integration of new citizens, but they should not be overly onerous, especially for those naturalising as adults. Even where there are no such rules on paper, cultural criteria may be applied. In Swaziland, for example, persons who are not of Swazi ethnic origin often find it very difficult to obtain citizenship.¹⁰²

In the case of prevention of statelessness, a requirement to renounce other nationalities before naturalising can be particularly problematic: in southern Africa, this is required by the laws of Lesotho, Malawi, Namibia and Zimbabwe. Amendments to the South African Citizenship Act in 2010 added a requirement that a person applying for naturalisation must satisfy the minister that they are either a citizen of a country that allows dual nationality, or that, if their presumed other nationality is with a country that does not allow dual nationality, they have renounced that nationality.¹⁰³ If a person has renounced another nationality as part of the process of applying for naturalisation and the application is then denied, they may remain stateless for a significant period of time because they are unable to reacquire the former nationality. This means that where requirements to renounce other nationalities exist, safeguards should be built in to ensure that persons renouncing one citizenship to acquire another do not become stateless, even temporarily.

Perhaps most importantly, such provisions could adversely affect asylum seekers and refugees or their children, who may not be requested to contact the authorities of their country of origin. There are also persons who, while they have not sought or acquired refugee status, cannot be reasonably expected to acquire proof that they have renounced their previous nationality. This could either be because the administrative authorities in their country are non-functional or inaccessible, or because they are stateless. It is desirable to exempt similar categories of persons from a requirement to renounce their citizenship.

It is important that the naturalisation process also provide that minor children resident with the person naturalised acquire citizenship at the same time. While Lesotho, Malawi, Mozambique, Namibia and South Africa provide for children to be naturalised, this is a separate application procedure, subject to its own conditions, and discretionary. Other countries have no explicit provision. This leaves such children

⁹⁷ Zambia Citizenship Act, 1975, section 12.

⁹⁸ Namibia in 2010 and Mozambique in 2003 raised the period to ten from five years.

⁹⁹ South African Citizenship Act (No. 88 of 1995), section 5.

¹⁰⁰ Citizenship Act, section 13(1)(c) and (d) and section 21(1)(c) and (d).

¹⁰¹ Citizenship (Amendment) Act, 1995, section 5, amending section 12 of the Citizenship Act, 1982.

¹⁰² See, for example, annual human rights reports of the U.S. Department of State.

¹⁰³ South African Citizenship Act, 1995, as amended 2010, section (5)(1)(h). This may lead some individuals to become stateless in order to apply for South African citizenship.

Statelessness in Southern Africa

at the risk of statelessness, in particular where the children have lost any previous nationality they held together with their parents.

Statelessness in Southern Africa

Table 5: Right to acquire citizenship as an adult by naturalisation or registration/declaration¹⁰⁴

Country	Res. period	Language / cultural requirements	Character	Ren. other	Other	Relevant legal provisions (date of latest amendment in parentheses)
Angola	10 yrs	Civic and moral guarantees of integration into Angolan society	No crime against state or ordinary crime of more than 8 years in prison		Means of subsistence; Nat.Ass. can grant in case of 'relevant services to the state'	L2005Arts13&17
Botswana	11 yrs (10+1) 5 yrs for spouse	Sufficient knowledge of Setswana or any language spoken by any "tribal community" in Botswana	Good character		No qualifications needed if "distinguished service" to Botswana; language requirement may be waived in "special circumstances"	L1998(2004)Arts 12-14
Lesotho	5 yrs	Adequate knowledge of Sesotho or English	Good character	Yes	Financially solvent, no mental incapacity	L1971Art10-12
Malawi	7 yrs	Knowledge indigenous language or English	Good character, "suitable citizen"	Yes	Financially solvent	L1966Art21
Moz.	C: 10 yrs L: 5 yrs	C: Knowledge of Portuguese or a Mozambican language L: integrated into Moz society	C: Civic probity L: excluded if member of colonial-fascist political organisations, officials/informers of foreign political police/sentenced by courts for crimes against Mozambican people or against decolonization ; no convictions against state security		Means of subsistence; residence and language can be waived if the person has provided "relevant services" to the state	C2004Art.27 L1975(1987)Art. 11
Namibia	10 yrs	Adequate knowledge of the responsibilities and privileges of Namibian citizenship	Good character; no convictions in Namibia	Yes		C1990(2010)Art 4(5) L1990Art5
South Africa	5 yrs	Communicate in one of 11 official languages; adequate knowledge of the privileges and responsibilities of citizenship	Good character	Yes if no dual nat.	Must first acquire permanent residence, which usually takes 5 years, unless special skills or a spouse.	L1995(2010)Art5
Swaziland	5 yrs	Adequate knowledge siSwati or English; separate procedure for those sponsored by a chief	Good character		Adequate means of support; has contributed to the development of Swaziland; immediate if investment	C2005Art45 L1992Art9

¹⁰⁴ Most countries require the person to be habitually resident and to intend to remain so if they wish to naturalise; this provision is not included here.

Statelessness in Southern Africa

Zambia	10 yrs	Adequate knowledge of English or any other language commonly used by indigenous inhabitants in Zambia	Good character	Yes	Not of unsound mind	C1991(1996)Art 6 L1975(1994)Art16
Zimbabwe	C: 10 yrs L: 5yrs	-	Good character; "fit and proper person"; sound mind"	Yes	Residence period can be reduced by the president under 'special circumstances"	C1981(2009)Art 7 L1984(2003)Art4

Loss, deprivation and renunciation of citizenship¹⁰⁵

Under international law, citizenship cannot be revoked against a person's will except in restricted circumstances, and in accordance with due process of law. Well established principles, as expressed in Article 9 of the Convention on the Reduction of Statelessness, forbid deprivation of nationality on racial, ethnic, religious, political or other discriminatory grounds and require that the individual affected should have the right to challenge such decisions through the regular courts.

Article 8 of the 1961 Convention on the Reduction of Statelessness states as a first principle that "A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless." However, it does go on to provide some exceptions, including that deprivation of nationality may be permissible in case of misrepresentation or fraud, acts of disloyalty (which entail rendering services to or receiving emoluments from another State and conduct in a manner "seriously prejudicial to the vital interests of the State") and oaths and declarations of allegiance to another State. Later human rights treaties and interpretations of these exceptions indicate that they should be restrictively interpreted, in particular by the application of rules of proportionality — the harm done by deprivation of citizenship balanced against the seriousness of the transgression alleged — and the requirement of due process.¹⁰⁶

The constitutions of only two countries in Africa, South Africa and Ethiopia, prohibit the state from removing citizenship, however acquired, against a person's will; and even in those two cases the protection is not as far-reaching as it appears on first sight. In the case of South Africa, the citizenship legislation is in conflict with the Constitution. Article 20 of the South African Constitution states simply that "No citizen may be deprived of citizenship".¹⁰⁷ However, the Citizenship Act does in fact provide for automatic loss or deprivation of citizenship pursuant to administrative or judicial decision, including citizenship from birth. The original version of the South African Citizenship Act No. 88 of 1995, provided for loss of citizenship of a citizen from birth or by acquisition if he or she is also a citizen of another country and served in the armed forces of that country in a war against South Africa, and if a person acquired another citizenship without the permission of the government.¹⁰⁸ In 2010, the act was amended to introduce a further ground for automatic loss of nationality of a naturalised citizen (not a citizen from birth), if he or she "engages, under the flag of another country, in a war that the Republic does not support."¹⁰⁹

Loss and deprivation of citizenship from birth

Most of the Commonwealth states in Africa provide that citizens from birth cannot be deprived of citizenship by executive act, and can only lose citizenship from birth (if at all) if they acquire another nationality. While the possibility of depriving a person of citizenship from birth (of origin) is more common among the civil law countries, some of them also provide for deprivation only of acquired

¹⁰⁵ Under the 1961 Convention on the Reduction of Statelessness, loss of citizenship refers to automatic loss (for example on obtaining another nationality), while deprivation refers to loss through an executive or judicial act.

¹⁰⁶ UN Human Rights Council, *Human rights and arbitrary deprivation of nationality: report of the Secretary-General*, 14 December 2009, A/HRC/13/34, paragraph 25.

¹⁰⁷ Constitution of the Republic of South Africa, 1996, article 20.

¹⁰⁸ South African Citizenship Act, No. 88 of 1995, section 6 (in 2004 an amendment act, No.17 of 2004, removed a provision in the 1995 Act that had provided for deprivation of citizenship on use of another passport).

¹⁰⁹ South Africa Citizenship Amendment Act, No.17 of 2010, adding subsection 6(3) to the principal act.

citizenship. In southern Africa, Namibia and Swaziland do not allow for loss or deprivation of birth nationality in any circumstances. Zimbabwe's 2009 constitutional amendments state that parliament may only provide for loss of citizenship by descent (two generations born outside the country) or registration; though also that parliament can prohibit dual citizenship (which is the current situation).¹¹⁰

Countries where citizenship from birth can only be lost by voluntarily acquiring another citizenship include Botswana, Lesotho, Malawi, Zambia, and Zimbabwe. In principle, such a provision should not result in statelessness. The case of Zimbabwe does show, however, how citizenship laws can in certain circumstances be changed to affect a large number of people: from 2000, the government applied ever stricter rules on dual nationality which excluded from Zimbabwean nationality anyone with a purported right to claim another nationality. Many of those affected had in fact no provable claim to citizenship in any other country, rendering them stateless.¹¹¹

Angola, Mozambique and South Africa all have provisions allowing citizenship from birth to be taken away by executive act. In the case of the South African provisions described above, the law requires the person to have another nationality. In the case of Mozambique and Angola a person can lose birth nationality whether or not he or she has another nationality if he or she exercises functions for another state without permission.¹¹²

Loss and deprivation of citizenship by naturalisation

Almost all African countries provide for deprivation of citizenship by naturalisation under some circumstances, such as a conviction on charges of treason or a similar crime against the state, conviction on charges of ordinary, but still serious, crimes, or a finding that citizenship was acquired by fraud. In Malawi, for example, which has provisions that were typical for Commonwealth countries but have by now been reformed in many other countries, the grounds are very broad and the decision highly discretionary. Citizenship can be revoked where the minister "is satisfied" that the person "has shown himself by act or speech to be disloyal or disaffected towards the Government of Malawi"; when he has traded or associated with or assisted an enemy during war; when within five years of receiving citizenship he is sentenced to a prison term exceeding 12 months; when he resides outside Malawi for a continuous period of seven years without being in the service of Malawi or an international organization or without registering annually at a Malawian consulate his intention to retain his citizenship; or when Malawian citizenship was obtained through fraud, misrepresentation, or concealment of any material fact.¹¹³

In Commonwealth countries, laws generally provide for an individual to lose naturalised citizenship if he or she stays outside the country for seven years without notifying the authorities of an intention to retain citizenship. The only countries in Southern Africa where this is not the case are Zambia, South Africa, Mozambique and Angola. This rule, despite being a provision of international law (Article 7 of the 1961 Convention on the Reduction of Statelessness), effectively means that a naturalised citizen without dual citizenship cannot move to another country without risking statelessness. One country, Namibia, allows naturalised citizens to lose their citizenship after a shorter period of time than the one allowed by the 1961 Convention on the Reduction of Statelessness (two years).

Quite a large number of countries in Africa — including Lesotho in southern Africa — allow nationality by naturalisation to be revoked only during a fixed period after it has been acquired, and not indefinitely. This provides greater protection against disproportionate and arbitrary use of the law, especially in case of minor irregularities discovered long after the fact.

Protection against statelessness

No country in southern Africa provides an absolute prohibition on deprivation of nationality if the person would become stateless; in the case of South Africa, for example, that protection applies only to birth citizens deprived of nationality for fighting in a war against South Africa, and in the case of a naturalised

¹¹⁰ Constitution 1981, as amended 2009, article 9.

¹¹¹ See Bronwen Manby, *Struggles for Citizenship in Africa*, Zed Books, 2009, pp. 39-50.

¹¹² In the case of Mozambique this is only in the 1975 nationality law but is not repeated in the current Constitution.

¹¹³ Malawi Citizenship Act 1966, section 25.

citizen who is convicted of an ordinary crime, but not naturalised citizens who fight “in a war the Republic does not support”, nor where naturalisation was obtained by fraud (with no exceptions allowed for).¹¹⁴ Swaziland includes a statement only that the decision to deprive nationality “shall endeavour not to render the person stateless”.¹¹⁵ Zimbabwe has a provision on avoiding statelessness, but the law’s next subsection removes the protection by stating that the minister can still revoke naturalised citizenship if “he is satisfied that it is not conducive to the public good that the person should continue to be a citizen of Zimbabwe.”¹¹⁶ Similarly, Namibia appears at first sight to prohibit deprivation of nationality from a person who would thereby become stateless, but then states that this is “unless the minister is satisfied that it is not conducive to the public interest that the person should continue to be a Namibian citizen”.¹¹⁷ (See Table 6: Criteria for loss or deprivation of citizenship.)

Renunciation of citizenship

In case of voluntary renunciation of citizenship, it is important that the law and administrative procedures include a check that the person has acquired or will acquire another nationality, and the possibility of reinstatement of citizenship if a new nationality is in fact not acquired.

All southern African countries allow renunciation of nationality (though some require permission of the authorities). Only Zimbabwe does not provide explicitly that citizenship may not be renounced if the person would not become citizen of another country. However, in the case of Namibia, the law does not provide a full safeguard against statelessness, as it only says that a person who has not become a citizen of any foreign country within one year from the date of registration of his or her declaration of renunciation, shall be deemed to have remained a Namibian citizen.¹¹⁸ In Malawi and Zambia, renunciation is allowed if the person either is a citizen of another country or if the person “satisfies the board/minister that he will become a citizen of another country”, which may allow for statelessness to occur, depending on its interpretation.¹¹⁹

¹¹⁴ South African Citizenship Act 1995, as amended 2010, Articles 6 and 8.

¹¹⁵ Swaziland Constitution 2005, Article 49(5).

¹¹⁶ Citizenship of Zimbabwe Act, Chapter 4:01 Laws of Zimbabwe, section 11(3).

¹¹⁷ Namibian Citizenship Act, 1990, section 9(4). The Namibian courts have affirmed that the provision in Article 4(8)(b) of the Namibian Constitution allowing government to enact legislation depriving people serving in foreign forces of their citizenship was subject to the specific proviso in the Constitution that a citizen by birth cannot be deprived of citizenship. See summary of *Alberts v Government of Namibia & Another*, 1993 NR 85 (HC) available at http://www.hrcr.org/safrica/citizenship/alberts_gov.html and references at footnote 130.

¹¹⁸ Citizenship Act 1990, section 8(5).

¹¹⁹ Citizenship of Zambia Act, 1975 (last amended 1994), Art 23(2); Malawi Citizenship Act, 1966, Art. 23(1).

Table 6: Criteria for loss or deprivation of citizenship

Country	citizenship from birth				citizenship by naturalisation						protection vs statelessness		legal provisions (date of latest amendment in parentheses)
	dual citizenship	Work foreign state /army	crime vs state	Permit require to renounce	Fraud	crime vs state	ordinary crime	disloyal behaviour	Work for foreign state/army	res. out of country	dep.	ren.	
Angola		x			x	x			x			x	L2005Art15
Botswana	x			X	x	x		x		x		x	L1998(2004)Art 16&18
Lesotho	x				x		x	x		x	x	x	C1993Art42(2) L1971Art23
Malawi	x			X	x	x	x	x		x		x	C1994Art47 L1966Art23-26
Mozambique †		x							x			x	C2004 Art 31(a) L1975Art14
Namibia					x	x	x	x		x		x	C1990(2010)Art 4(7)&(8) L1990Art7-9
S. Africa†	(x)	x			x	x	x					x	C1996(2009)Art 20 L1995(2010)Art 6-8
Swaziland					x					x		x	C2005Art49&50 L1992Art10&11
Zambia†	x			x ^{MS}	x							x	C1991(1996)Art 7&9 L1975(1994)Art 22&23
Zimbabwe	x			x ^{MS}	x	x	x	x		x			C1981(2009)Art 9 L1984(2003)Art 11

shaded: citizenship from birth cannot be revoked

bold x in dual citizenship column if the only reason citizenship from birth can be removed is acquisition of another citizenship

(x) dual nationality allowed only with permission

† Constitution and law conflict; constitutional provisions noted here except where law supplementary

MS permission required to renounce nationality only during period for which may be called for military service

Due process in administrative decisions to recognise and revoke nationality

Among the most important protections against statelessness is the right of an individual to appeal decisions relating to the right to a nationality through both administrative and judicial channels. This applies both to recognition of nationality (for example the denial of an identity card, passport or voter registration) and deprivation of nationality (the positive decision to remove a person's citizenship, but also potentially represented by administrative decisions such as failure to renew any of the above documents). Some African countries provide good protections in this regard: in Ghana, for example, the deprivation of citizenship can only be done by a court on application of the minister and not by administrative fiat. In many cases, however, these decisions are made in law by the minister, and in practice by officials of the relevant ministry, some at the lowest level.

Many African countries have a system of compulsory identity documentation for adults. Possession of an identity card is key to accessing all sorts of other rights, including not only voting and other rights formally restricted to citizens, but also health care and education, as well as participation in the formal economy. Though it may not be legally identified as such, the system for obtaining this documentation is often the main system for obtaining confirmation of nationality. In practice, there are often major problems of state capacity and discrimination at low-level administrative offices in issuing identity cards.

The civil law countries usually provide an automatic right to challenge an administrative decision of this type in the administrative courts. However, the process tends to be more difficult in the common law system, where the rules often do not provide for effective due process. A number of southern African countries specifically exclude the right to challenge a decision under the citizenship law in the normal courts. This is the case in Botswana, Lesotho, Malawi, and Zambia, and is highly problematic, due not only to the risk of statelessness, but the consequences for the person's other rights that are attached to his or her nationality. In Malawi's case, the provisions in the (1966) Citizenship Act appear to violate a (1994) constitutional prohibition on arbitrary deprivation or denial of citizenship.¹²⁰

Botswana, Swaziland, and Zambia establish an administrative procedure by which the decision to grant or deprive citizenship is made by a citizenship "board" appointed by the relevant minister or the president; though providing a measure of protection from abuse, it should not justify the exclusion of review by the normal courts. Lesotho, Malawi and Zimbabwe do not establish a citizenship board for these decisions, though they provide for review of a decision to deprive nationality by an "enquiry" conducted by persons appointed by the minister.¹²¹ The Namibian Citizenship Act also provides for an administrative review of deprivation of nationality, but, though it does not explicitly provide for judicial review as well, this is permitted under the Constitution. However, in relation to denial of naturalisation, no challenge is permitted.¹²²

Even if a legal challenge in the normal courts is possible — for example, in South Africa section 25 of the Citizenship Act specifically provides that any decision of the minister may be reviewed by the High Court — such an application is likely to be costly.

Many countries provide for an individual to obtain a "certificate of nationality" in case of any doubt around their status. This is a useful protection against a situation of undetermined nationality, which, if it persists over time, can mean that the person is stateless. In southern Africa, many countries have such a provision — including Angola, Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe. However, the issue of the certificate is at the administrative discretion of the authorities, and not provided through a process that is subject to sufficient due process guarantees. Ideally, a person should be able to go to a court with relevant documentation and testimony, to obtain a legal ruling on whether he or she is a national.

The other common form of proof of nationality is a passport: essential for travel, but often used domestically also. Deprivation or refusal to renew passports has been a fairly common political tool, in southern Africa as in other parts of the world. Historically, British law regarded the grant of travel documentation as being within the "crown prerogative," a privilege and not a right, though this position has changed in recent years. African jurisprudence in the Commonwealth countries has regrettably often followed this rule. But litigation in some countries and new laws in others have begun to push back the tide of absolute administrative discretion: the courts in Nigeria, Kenya and Zambia, for example, have ruled that a citizen is entitled to a passport, even though this is (or was) not provided for in legislation.¹²³

¹²⁰ Constitution 1994, section 47.

¹²¹ Lesotho Citizenship Order 1971, section 23(5); Malawi Citizenship Act, section 25(4); Zimbabwe Citizenship Act section 11(4).

¹²² Namibian Citizenship Act, sections 5(8), 9(5) and 17; Constitution, Art.12 (right to a fair trial).

¹²³ *Deepak Chamanlal Kamani v. Principal Immigration Officer and 2 Others* [2007] eKLR; see also Peter Mwaura, 'Passport is a right for every citizen, not a privilege' *The Nation* (Nairobi), 7 July 2007; Obiora Chinedu Okafor, 'The fundamental right to a passport under Nigerian law: An integrated viewpoint', *Journal of African Law*, Vol.40, No.1, 1996; *Cuthbert Mambwe Nyirongo v Attorney-General* (1990-1992) ZR 82 (SC). The new Kenyan 2010 Constitution provides in Art 12 that "Every citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens".

In southern Africa, only the South African Constitution provides explicitly for citizens to have a right to a passport.¹²⁴

Table 7: Due process protections in nationality laws

	Explicit right to go to court	Explicit exclusion of court review	Administrative review	No right to reasons	Legal provisions
Angola	x		x		L2005Art28&29
Botswana		x		x	L1998(2004)Art22
Lesotho		x	x	x	L1971Art23(5)&26
Malawi		x	x		L1966Art25(4)&29
Mozambique					-
Namibia		(x)	x		L1990Art5(8)&9(5)
S. Africa	x				L1995(2010)Art25
Swaziland			x		C2005Art53(1)
Zambia		x	x	x	L1975(1994)Art9
Zimbabwe			x	x	L1984(2003)Art16

(x) exclusion applies only to decisions on naturalisation

Dual nationality

At independence, many African countries took the decision that dual citizenship should not be allowed: they wished to ensure that those who might have a claim to another citizenship — especially those of European, Asian, or Middle Eastern descent — had to choose between the two possible loyalties. Increasingly, however, an African diaspora with roots in individual African countries, in addition to the earlier involuntary diaspora of slavery, has grown to match migrations from Europe and Asia. These diasporas are often keen to retain the link to their countries of birth, and may provide an important source of inward investment for African states. Today 33 countries allow dual nationality, though some with restrictions. There are five countries which allow for dual citizenship in southern Africa with certain caveats. A prohibition on dual nationality creates a risk of statelessness where a person is obliged to renounce one nationality in order to obtain another, but then is not in fact granted that other nationality.

The law in Angola is somewhat ambiguous, stating that a person loses nationality if he or she voluntarily acquires another nationality *and* demonstrates that they no longer wish to be Angolan (*manifestem a pretensão de não querer ser angolanos*). In practice, dual nationality is allowed.¹²⁵

In some other countries, the courts have re-interpreted laws against dual nationality. In Lesotho, the Constitution provides that an adult citizen cannot be a citizen of another country (unless he or she acquires this dual citizenship by marriage). However, in a 2005 case the High Court found that the provision on loss of Lesotho citizenship in case of dual nationality under Article 8 of the Lesotho Citizenship Order of 1971 “does not deal with a Lesotho citizen who is domiciled in Lesotho but acquires a citizenship of the Republic of South Africa while he is working there. If the intention was that such a person should lose his residence and domicile, then Parliament should have specified this. It would be wrong to read into such a person’s act an intention to terminate rights of domicile and residence into the Order.” Thus, citizenship by birth could not be lost by acquisition “of another citizenship to get a job while his domicile remains in Lesotho.”¹²⁶ A case decided by the Lesotho Court of Appeal in 2008, however, ruled that citizenship by birth could be lost if the person involved acquired another citizenship; though the court also urged the Lesotho Parliament to enact legislation permitting

¹²⁴ Article 21(4), Constitution of the Republic of South Africa.

¹²⁵ Lei da nacionalidade, no.1/05 de 1 de Julho, art. 15(1)(a); information provided by Angolan delegates at the UNHCR regional statelessness meeting 1-3 November 2011.

¹²⁶ *Mokoena vs. Mokoena and Others* CIV/APN/216/2005 (unreported); see also *Mokoena vs. Mokoena and Others* C of A (CIV), No.2 of 2007.

Lesotho citizens to hold dual nationality with at least South Africa, given what the court characterised as “the economic interdependence of the two countries.”¹²⁷

A handful of countries provide in their laws for dual citizenship to be allowed only for citizens from birth: they include Namibia and Swaziland.¹²⁸ In Zambia, in 2008, a National Constitutional Conference resolved to approve this idea; though a new Constitution has yet to be adopted.¹²⁹ Several High Court rulings in Namibia have affirmed that under the Constitution a citizen from birth can only lose his or her nationality by voluntary renunciation and that dual nationality is permitted for citizens from birth, despite section 26 of the Citizenship Act, which states that no Namibian citizen may also be a citizen of a foreign country.¹³⁰

Some governments, however, have moved in the opposite direction. This is most evident in Zimbabwe, where, in recent years, persons with a potential claim on another citizenship have been required to renounce it, even if they have never had any legal relationship with the second state.¹³¹ A constitutional amendment adopted in early 2009 as part of the process of installing a government of national unity opened up the possibility of dual citizenship, by stating that parliament “may” provide for the prohibition of dual citizenship; the issue remains under discussion. Meanwhile, the rules on presumed dual nationality are still being applied, despite court orders to the contrary.¹³²

¹²⁷ *Director of Immigration and others vs. Pholoana Adam Lekhoaba and Anor.* C of A (CIV) No.22/07 (unreported), available on the website of the Southern African Legal Information Institute (SAFLII) at <http://www.saflii.org/ls/cases/LSCA/2008/4.html>.

¹²⁸ As well as Comoros, Gambia, São Tomé and Príncipe, and Uganda.

¹²⁹ Constitution of Zambia Bill 2007. See also debates on the *Zambian Economist* blog for June 2008, available at <http://zambian-economist.blogspot.com>.

¹³⁰ *Tlhoru v Minister of Home Affairs* (Case No. (P) A159/2000) [2008] NAHC 65 (2 July 2008), reaffirmed by *Le Roux v Chief of Immigration and Others* (A 322/2010, High Court of Namibia). See also Werner Menges, “Court confirms legality of dual citizenship for some Namibians,” *The Namibian*, 9 July 2008; Werner Menges, “Dual citizenship legal for born Namibians,” *The Namibian*, 7 June 2011.

¹³¹ See Bronwen Manby, *Struggles for Citizenship in Africa*, Zed Books, 2009, pp.39-50.

¹³² See Alex Bell, “Registrar General faces court action after refusing Zim man passport”, *SWRadio*, 26 October 2011; “Lawyers dump Mudede again: Registrar-General Tobaiwa Mudede has changed lawyers for the third time in five months in a matter in which he faces jail for allegedly defying a High Court order”, *ZLHR Legal Monitor*, 2 November 2011.

Statelessness in Southern Africa

Table 8: Rules on dual citizenship

Country	Is dual citizenship permitted?		Relevant legal provisions
	Yes	No	
Angola	X		L2005Art15(1)(a)
Botswana		x*	L1998(2004)Art15
Lesotho		x *	C1993Art41
Malawi		x	L1966Arts6-8
Mozambique†	x		C2004Art33 L1975(1987)Art14
Namibia	x **		C1990(2010)Art4(8)(a) L1990Art7(1)(a)
South Africa	(x)		L1995(2010)Art5(1)(h)&6
Swaziland	x **		C2005Art49(1)(c) L1992Art10(1)(c)
Zambia		x *	C1994Art7&9 L1975(1994)Art16(2)(f)&19
Zimbabwe		x	C1981(2009)Art9 L1984(2003)Art4(1)(iv)&9
† constitution conflicts with legislation: constitutional provisions noted here (x)permission of government required *dual citizenship permitted if automatically acquired by marriage (of woman) to foreign spouse ** dual citizenship allowed for citizens from birth only			

Recommendations

A comprehensive set of recommendations on the content of nationality law, drafted with the input of leading nationality experts, is available in the report *Citizenship Laws in Africa: A Comparative Study*, published by the Open Society Foundations (2nd edition, 2010)¹³³. The most important recommendations for countries in southern Africa to take immediate action to reduce statelessness would be:

International treaties

1. States that have not yet done so should take immediate steps to accede to relevant treaties, in particular the 1954 UN Convention relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness.

Law reform

2. In line with the African Charter on the Rights and Welfare of the Child, to which all southern African states are parties, national constitutions and nationality laws should provide for an explicit and unqualified right to a nationality from birth for all children born on their territory who would otherwise be stateless.
3. National constitutions and nationality laws should not discriminate on the basis of race, ethnicity, religion, gender, or any similar category, and should not discriminate on the basis of marital status in relation to a parent's right to pass nationality to a child.
4. The law should provide that a young child (foundling) found in the territory of the state shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that state.
5. The law should facilitate the naturalisation of stateless persons, relaxing the rules applied to them.
6. The law should protect against arbitrary denial and deprivation of nationality, providing for due process protections, including the right to seize a court, in relation to any administrative decision on nationality; and providing limited grounds for loss or deprivation of nationality that protect against statelessness.
7. Nationality laws and constitutions should be brought into line with each other and with the international treaties. Up-to-date regulations should provide the necessary details for the implementation of legal provisions in administrative decision-making.

Birth registration and identity documentation

8. States should take all necessary measures to ensure that all children born in the country are registered at birth, without discrimination, including those children born in remote areas and in disadvantaged communities, as well as those in the country as refugees, stateless persons or migrants regardless of migratory status; and that children not registered at birth can be registered later during childhood or adulthood. These measures should include, for example, the use of mobile birth registration units, registration free of charge and flexible systems of proof where it is not reasonable to meet the standard requirements. Children whose births have not been registered should be allowed to access basic services, such as health care and education, while waiting to be properly registered.
9. States should take measures to strengthen their civil registry systems in general, in particular for the issue of identity cards, ensuring that services are accessible across the entire country, staff are trained, discrimination is minimised in administrative decision-making, and administrative and judicial review and appeal mechanisms are in place.

¹³³ The full text is available here:

http://www.soros.org/initiatives/justice/articles_publications/publications/citizenship_20091009.

Note on sources

This analysis in this paper is based on the laws listed below. All comments are welcome.

Angola	Constitution 1992 Lei No.1/05 da nacionalidade, de 1 de julho
Botswana	Constitution 1966 Citizenship Act Cap 01:01, Act 8 of 1998 (as amended to 2004)
Lesotho	Constitution 1993 Lesotho Citizenship Order No. 16 of 1971
Malawi	Constitution 1994 Citizenship Act 1966
Mozambique	Constitution 2004 Lei da Nacionalidade de 20 de Junho de 1975 alterada pela Lei No.16/87 de 21 de Dezembro
Namibia	Constitution 1990, as amended to 2010 Namibian Citizenship Act No. 14 of 1990
South Africa	Constitution 1996, as amended to 2009 South African Citizenship Act No. 88 of 1995, as amended to 2010
Swaziland	Constitution 2005 Swaziland Citizenship Act No. 14 of 1992
Zambia	Constitution 1991 as amended to 1996 Citizenship Act No.26 of 1975 (Chapter 124) as amended to 1994
Zimbabwe	Constitution 1980, as amended to 2009 Citizenship of Zimbabwe Act No.23 of 1984 (Cap 4:01), as amended to 2003.