



NAME OF ASSIGNMENT: A STUDY ON STATELESSNESS AND RISKS OF STATELESSNESS IN  
MALAWI

### FINAL REPORT

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## 1.0. CHAPTER 1: INTRODUCTION

### 1.1. Background and context

The Ministry of Homeland and Security's Department for Refugees which is responsible for managing refugees and asylum seekers engaged the Consultant to undertake a study on statelessness and the risks of statelessness in Malawi. The engagement followed the Malawi Government's pledge made in November 2019 at the High-Level Segment on Statelessness hosted by the United Nations High Commissioner for Refugees (UNHCR). During the engagement in Geneva Malawi pledged to undertake and publish a qualitative study on statelessness by June 2020. The Government of Malawi's aim for the study was to better understand the situation of groups and individuals that are stateless or at risk of statelessness in Malawi with the aim of finding a solution to their situation. The pledge was also a response to the UNHCR #IBelong Campaign to End Statelessness by 2024 which was launched in November 2014. The Department for Refugees has also been concerned with the high numbers of stateless persons that are currently approximated at 10 Million worldwide.

### 1.2. Objectives of the study

The objectives of the study were threefold as follows:

- a. To study and analyse the legal, policy, and administrative and institutional framework impacting on access to nationality and statelessness with a view to identify gaps and obstacles.
- b. To identify groups of populations that may be stateless and/or undetermined nationality or at risk of statelessness and provide further details of these group; and
- c. To assess the causes and consequences of being stateless in Malawi and recommend measures or actions necessary to help prevent and reduce statelessness in the country.

This Report is the outcome of the study on statelessness and the risk of statelessness in Malawi. It is a product of the review of the law on citizenship;<sup>1</sup> literature on the subject of statelessness, generally; and recent developments on citizenship in Malawi. Domestic policy and institutional framework on citizenship and statelessness have been analyzed and benchmarked with international minimum standards for the protection of stateless persons.

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<sup>1</sup> The terms "citizenship" will be used throughout this report interchangeably with the term "nationality" in line with the approach adopted by the UNHCR and also the prevailing practice internationally. See UNHCR, *Citizenship and Statelessness in the Member States of the Southern African Development Community*, December 2020, p 1 (hereinafter referred to UNHCR SADC Statelessness Report"); See also Bronwen Manby, *Citizenship and Statelessness in the East African Community*, Geneva, UNHCR, September, 2018, p 2.

The Analysis was aimed at identifying gaps, and obstacles on citizenship law as it applies to stateless persons in Malawi that may be considered for review. Some notable challenges faced by the study included some potential KIs, particularly, at Dzaleka Camp, and some chiefs in surrounding areas of the said Camp being unwilling to cooperate with the SS due to the perceptions of risk for participants despite assurances of full anonymity. Even on occasion when the Social Scientist attempted to find alternative safe ways of collecting information, no responses were received from some of these KIs to participate in the study. They attributed the fear engendered by the government's anti-off refugee camp rhetoric and hardline on illegal immigration.

The Report incorporates inputs and recommendations of a stakeholder engagement which took place on 19 October 2022 at Capital Hotel, Lilongwe. The stakeholder engagement which was convened by the Department of Refugees validated the draft report with the involvement of various stakeholders including officials from government, civil society groups, members of the academia, UNHCR, lawyers, and refugee/ asylum seeker community members, faith leaders and other stakeholders.

### **1.3. Summary of findings**

The Report has embraced the definition of statelessness under Article 1 of the 1954 Convention relating to the status of stateless persons ("Statelessness Convention"). Under that Article, a stateless person is one "who is not considered as a national by any state under the operation of law". This definition recognises Statelessness from the perspective of national laws (i.e. de jure), but as the UNHCR provides in their Handbook on the Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons ("UNHCR Guidelines on Statelessness"), the question of statelessness is a mixture of both facts and law.<sup>2</sup> Consequently, stateless persons, for purposes of this Report, include persons who, after consideration of both national laws and practical situations or circumstances that arise or are known later in a persons' life qualifies as such.<sup>3</sup>

#### **1.3.1. Extent of Statelessness**

The study has established that it is difficult to quantify the number of people who are either stateless or at risk of being stateless in Malawi. However, evidence suggests that the phenomenon of statelessness exists. As Malawi does not have the legal framework for determining statelessness, a significant number of people who are potentially stateless may not be aware that they are in fact stateless.

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<sup>2</sup> UNHCR, *Handbook on the Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, p 6, para 23, Geneva, United Nations, 2014 (hereinafter referred to as "UNHCR Guidelines").

<sup>3</sup> UNHCR, *Nationality and Statelessness: Handbook for Parliamentarians No. 22*, Geneva, (2014) p 12, also available online at <https://www.refworld.org/pdfid/53d0a0974.pdf>, last accessed on 4 January 2022.

### 1.3.2. Causes of statelessness in Malawi

The major contributing cause of statelessness or risk of being stateless in Malawi is gaps in the law; administrative barriers; and lack of nationality documentation. The study has shown that large proportion of the population does not yet have, and others have difficulties accessing nationality documents including national identity cards; birth and other forms of civil registration. With respect to refugees; asylum seekers and long-term migrants, the legal framework does not create a procedure for protecting both vulnerable children and adults including those that are forcibly removed from their country of origin into Malawi due to conflicts and other factors. Where the law has created a framework for naturalisation of such groups of people, the process is rather lengthy and expensive leading to their failing to process naturalisation documents which are critical for nationality or identification.

Another potential cause of statelessness is the shifting of borders or the international boundary lines between Malawi and its neighboring countries. Some people residing along these border areas have resorted to live on land that is between the boundaries of the countries thereby not knowing which country they belong to. An example are the people that live along the border areas of Dedza, Ntcheu, Mwanza, Mchinji, Mzimba, Rumphi, Karonga, and Chitipa Districts. Generations of people have lived along these areas which, either they did not know about which nationality they belong to, or they have not ever attempted to verify their nationality to confirm the country they belong to.

### 1.3.3. Groups at risk of statelessness in Malawi

The groups identified as being most at risk of statelessness in Malawi is reflective of a majority of the groups identified as being at risk of statelessness in most countries including the SADC region. The list includes children born to foreign nationals who are raised in Malawi but whose countries of birth do not recognise them as citizens and who, according to the Citizenship Act cannot qualify for citizenship.

Vulnerable or abandoned and orphaned children including those born from mixed parentage; border populations particularly those affected by the shifting of the international boundary between Malawi and its three neighboring countries of Zambia, Mozambique and Tanzania are highly at risk of being stateless.

Refugees and their descendants, particularly those who have been in long-term residency in Malawi are another group that is at risk of being stateless in Malawi. Long term refugees do not know what to make of their status including that of their descendants. They have married and have children who only know Malawi as their country. If the children were born in Malawi after 2010 they may qualify for the national identity card but if they were born earlier they do not. Qualification for national identity cards does not, however, entitle them to acquire nationality documents.

Another group is the third or fourth generation children of Malawian parents who emigrated outside the country particularly to South Africa and Zimbabwe but decided to return to Malawi

after the death of their parents. Some of the parents' or the returning children may have lost links with Malawi due to the length of time they lived abroad. All these run the risk of being stateless in Malawi.

#### **1.3.4. Impact of statelessness in Malawi**

As statelessness is a human rights issue, it impacts significantly on the fundamental human rights of those affected. The enjoyment of rights or ability to access services usually requires some form of nationality recognition. The study established that, at the informal level, namely day-to-day living, a majority of those who are at risk of statelessness in the country do not feel its impact as they live and integrate normally with nationals thereby enjoying most of the social amenities that are available to nationals and other documented foreign migrants. However, at a formal level, the introduction of measures that require the production of national identity cards like accessing banking services, licenses and acquisition of property, impacts and will likely continue to negatively affect those who are stateless or at risk of statelessness.

Some groups of people who are most at risk of being stateless including refugees and asylum seekers who reside in urban areas and other migrants in long term migratory context face significant human rights violations and discrimination in the country. The absence of nationality documents like national identity cards; and birth certificates makes it difficult for some groups of people to prove their connection to Malawi which in turn impacts negatively on their rights.

### **1.4. Outline of the Report**

The Report is structured in the following way: Chapter 1 provides for an introduction; it outlines the background and context of the study; the objective; the summary of the findings; outline; acknowledgement of resource persons; and key recommendations of the study.

Chapter 2 of the report provides the outcome of the qualitative study on statelessness in Malawi. The Chapter narrates the methodology used for data collection and the findings of the study including the causes; groups at risk of statelessness; and the impact that statelessness in Malawi.

Chapter 3 of the Report discusses the minimum international standards of protection of stateless persons and internationally; the issue of due process of the law and transparency; acquisition of nationality by naturalization or registration; civil registration and identification; and Malawi's efforts to combat statelessness.

Chapter 4 of the Report provides a rendition of the nationality law. The chapter provides a historical perspective and evolution of the law from the colonial times to the current law including discussions on acquisition of citizenship by registration and naturalization; the legal framework on the right to nationality for stateless persons; minimum standards of protection for foundlings; renunciation, deprivation and restoration of citizenship; oversight mechanisms or naturalization decisions; nationality administration in practice including discussions of the law on acquisition of national identity cards; and consular registration of births and the issuance of passports. The chapter also assesses the domestic institutional framework on statelessness in



Malawi including recommendations on how to design and locate institutions to undertake statelessness determination procedures (SDPs); nationality campaigns; principles on proving statelessness in a non-migratory context; and developments on statelessness in other jurisdiction. The also summarises key development that generated issues of statelessness in Malawi from the colonial to the current law won citizenship in Malawi.

Chapter 5 of the Report concludes by providing recommendations on how to combat statelessness or risk of statelessness. Some of the recommendations include undertaking a quantitative study on statelessness; data sources and prioritisation; legal reforms; SDPs; mandatory birth registration across the country including refugee camps; revision of fees for nationality documents; consular registration for children born to Malawi nationals based abroad; and ratification of the Convention on the Reduction of Statelessness .

### **1.5. Acknowledgement**

The Report has been prepared with the assistance of William Yakuwawa Msiska, Judge of the High Court of Malawi, an experienced law reform and drafting Expert. Special mention should also go to Nozgechi Phiri, Social Scientist, for undertaking and facilitating the primary data collection, analysis and reporting the findings of the study which is annexed hereto as **Annex 1**. Ms, Ivy Mpina Chihana, Legal Officer, Department of Refugees, is greatly appreciated for her invaluable support throughout the study. I am also grateful for the support received from Dr. Herbert Mankhwala and his entire team at the Department of Refugees. Special thanks should also go to the UNHCR Malawi Country and Regional Office's team for their insightful and invaluable support and contribution during the study.

The Report was shared with the client, the Department of Refugees, which is also the Government focal point on statelessness in Malawi, with the assistance of relevant UNHCR office, for their comments and feedback. It is hoped that the findings of this study will inform further studies on statelessness and risk of statelessness in Malawi, particularly, in quantifying the population of statelessness persons and those at risk of statelessness in the country.

### **1.6. Key recommendations**

Malawi should strengthen its nationality laws and systems to avert the risk of statelessness caused by gaps in the law; administrative barriers; and lack of access to nationality documentation by undertaking the following:

- A quantitative study on statelessness and risk of statelessness will assist to identify the extent of statelessness in Malawi. Quantifying statelessness as a primary obligation for Malawi will assist Malawi's implementation of both domestic and international obligations towards stateless persons. However, caution must be noted that quantifying statelessness is challenging due to several reasons including difficulty in: defining statelessness itself; addressing gaps in data collection tools; and addressing apathy as people may be

unwilling to participate or are just unaware that they are stateless hence not interested in confirming the said status.

- There is, therefore, need for thorough preparations and care before commencing any quantitative study on statelessness. Lessons can be drawn from similar studies in other countries particularly across Africa or assistance from the UNHCR who may have expertise on the subject.
- Reform the legal and institutional framework on citizenship, naturalisation and management of statelessness in the country. Legal provisions that discriminate on grounds of sex or any other grounds should be aligned with international human rights standards particularly the minimum standards for the protection of statelessness. This entails allowing the granting of nationality to minority groups including stateless persons; foundlings and refugees in long-term residence and their dependants.
- Malawi should also remove laws that grant strong discretionary powers to Ministers in favour of an independent Body that should be entrusted with the responsibility of nationality issues including statelessness. Where the law has established mechanisms for resolution of disputes on statelessness, access to such mechanism should be less costly and the dispute resolution mechanism must also resolve matters speedily, guaranteeing applicants' rights to judicial remedies; free legal aid services; and paralegal support.
- Malawi should set up standards and due process for determining statelessness or undertaking nationality campaigns. This will assist in identifying populations at risk of statelessness; determine nationality of individuals where their status is in doubt; provide, as an interim measure, a status of "stateless person" where an existing nationality cannot be determined; and facilitate naturalisation of those who are stateless.
- Malawi should continue its policy of registering all birth in the country including at refugee camps. .
- The current policy and legal framework on nationality registration aims at achieving universal birth registration only. As birth certificates do not grant nationality, children who do not qualify for nationality despite being born in Malawi are still at risk of statelessness. Malawi should ensure that registration of children in the refugee data base indicates if there are issues with the determination of their nationality.
- Whilst reforming the legal framework, Malawi should revise the prescribed fees for accessing Nationality documents. The current prescribed fee of USD\$75, 000 for a

stateless person to apply for citizenship is unreasonably high considering that most people in this group have little or no means. Government should, therefore, scrap the above prescribed fees and grant citizenship to stateless persons *gratis*.

- Malawi should commence Consular Registration of children born to Malawi nationals abroad. National identity cards may also be issued to Malawians abroad at the country's Embassies. This will help nationals residing outside the country to renew their identity documents with ease.
- Malawi should consider acceding to the Convention on the Reduction of Statelessness as this cement the country's position at the international level in the fights against statelessness.

## 2. CHAPTER 2: REPORT ON THE OUTCOME OF THE QUALITATIVE STUDY ON STATELESSNESS

### 2.1. Overview of Data Collection and Methodology

The primary data collection component of the study is a culmination of a combined method of literature review and in-depth semi-structured interviews with various key informants (KIs). The method used for this study was qualitative research designed to explore statelessness and risk of statelessness in Malawi. The study adopted this design because the aim, as is the case in qualitative research, is to understand a phenomenon *rather than measuring it*. Qualitative research answers the questions of why, what and how.<sup>4</sup> A quantitative method of research was excluded at this stage of the study.

The Consultant reviewed literature on the subject including the UNHCR's mapping statelessness studies for SADC; and Eastern and Southern Africa; UNHCR literature on statelessness in Cote d'Ivoire; UNHCR literature on statelessness generally; academic articles; studies from other countries; statutes on citizenship and naturalization, migration, identify registration, and adoption of the laws of Malawi; the Constitution; and policy reports. To contextualize the study, the literature review produced a draft profile of groups in Malawi that could potentially be considered stateless or at risk for statelessness so that they are prioritized for interviews. These were presented to the Social Scientist who was engaged to undertake the qualitative component of the study, for fine-tuning. She then came up with a profile of primary KIs for interviewing.

Using a convenient sample, the Social Scientist collected data after conducting seven (7) key informant interviews (KIIs) and two (2) focus group discussions (FDGs). The two methods were adopted as a way of triangulating the data. In total 24 participants, both men and women participated in the KIIs. The study used a snowballing technique to help in identifying the participants. Participants identified through fellow participants were people that could add more depth to the topic under study. Participants were identified in Lilongwe and Dowa districts in the central region of Malawi. Strength of the study comes from the snowballing method because it identified different types of people and made the data rich.

Participants were identified based on a constituency to ensure that they present and offer different perspectives on the topic of statelessness and risk of statelessness. These participants were drawn from the Department of Immigration and Citizenship; Malawi National Statistical Office; National Registration Bureau; refugees; and chiefs from around the two districts. Interviews were also conducted with an official from the UNHCR; Lilongwe and Dowa District Councils; lawyers; and persons believed to be stateless or at risk of stateless.

Originally the study had intended to include the police but the snowballing technique that was deployed did not identify them as KIs hence they were left out. Similarly, orphanages and

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<sup>4</sup> Judith Green, *Qualitative Methods for Health*, SAGE Publications, Kings College, (2013).

refugees outside of Dzaleka camp were left out because the snowballing technique through the Department of Refugees could not identify them as key to the study.

The sample size was driven by saturation point; a point where the KIs or FGDs were not producing any new information about the topic of the study. The data collection stopped when the saturation point was reached. Since the study was exploratory with the intention of understanding the phenomena, the groups of people who are stateless and what causes statelessness, the data collected was enough to answer the aims of the study.

The study was done through the Department of Refugees which facilitated in getting the authorization and credentials for the team to talk to different KIs. Data collection was conducted by the social scientist with the support of a research assistant. Data was collected from 2<sup>nd</sup> of February, through 11<sup>th</sup> of February 2022.

The interviews were conducted in private spaces with just the social scientist and the participant. The FDG were conducted in a hall with just the participants, the research assistant and the KIs. The participants were given sufficient information about the study and an opportunity to ask questions before commencing the KI or FGDs. The participants were also asked to give consent to take part in the study either through written or verbal request. They were informed that consent was voluntary and that they could withdraw at any time without affecting any of their rights. The interviews were conducted in English while the FGDs were conducted in Chichewa as the preferred language. Interviews and FGDs were conducted under strict confidentiality; names were not included and the data was stored using random numbers.

The KIs or FGDs used a semi-structured guide which started with general questions to get to know the participants. This was designed in this way in order to break the ice so that the participants were comfortable. Based on the guide, each participant was asked to describe themselves and, for persons identified as being at risk of statelessness; they were asked questions around the situation they found themselves in; whether they understood the subject of nationality; whether they had nationality documents; whether they understood the subject of statelessness; and the risks of statelessness. The participants who considered themselves as either stateless or at risk of being stateless were also asked about what they think about their status, rights and changes they would prefer to be made by authorities. The FGD also discussed solutions to statelessness. KIs from policy makers and other stakeholders were asked generally about their understanding of nationality law including procedures, challenges, the cost of obtaining documents; their understanding of statelessness; their involvement in any SDPs or nationality campaigns; and any ideas on changes to the law.

As a backup, the interviews were recorded using a Sony recorder and a Samsung Galaxy S2. The media files were transcribed verbatim and what represents the data to support this study is annexed to this report as **Annex 2**. The data collected was stored in a password protected laptop. A coding framework based on the guide that was used to collect the data was developed. The transcripts were coded manually. Using thematic analysis, the social scientist came up with 5 themes which produced a descriptive summary of the codes while highlighting codes to explain

specific points, namely, definition of statelessness, causes of statelessness, impact of statelessness, importance of statelessness in Malawi and solutions to statelessness.

The study has established the following findings:

### 2.1.1. Extent of Statelessness

The number of people who are either stateless or at risk of being stateless in Malawi may be very difficult to quantify. A KI from the Malawi National Statistical Office confirmed that Malawi has not quantified the number of stateless persons either at the level of national census or other quantitative studies. The fact that Malawi does not have the legal framework to determine statelessness makes the process of systematically measuring the extent of this phenomenon very difficult. People who are potentially stateless may not be aware that they are in fact stateless, and this is compounded by the rising numbers of people who are undocumented in the country. However, the phenomenon of statelessness exists in Malawi.

Generally, statelessness in Malawi can be assessed from two levels, namely, the informal level, ie how citizens perceive groups that are either stateless or potentially stateless in their day-to-day lives; and the formal level ie how authorities perceives such groups. At the informal level, the general populace share residences with people who are potentially stateless but find no problem associating with them including sharing other social amenities like hospitals. The reason for this development can be attributed to either ignorance that such people are stateless or because the subject of statelessness does not matter or is irrelevant to their daily livelihood. As commented by one KI,

*"Legally they could be others that are stateless but because they are integrated into society... they have been there all along but may not be considered as stateless after all, Malawian social services can be accessed by almost anyone Malawian or not, so it is not really an issue". Lawyer 2*

In view of the foregoing, statelessness is not a problem in Malawi at the informal level because most people who are potentially stateless or at risk of being stateless are treated or considered Malawian because they have been intergrated in the local communities. In that sense, Statelessness is not yet felt by those who are potentially stateless or at risk of statelessness because a majority of the people including those that would fall within the acceptable definition of statelessness have at present unlimited access to some of the crucial social amenities like hospitals. Formally, it seems the issue of statelessness may negatively impact these groups of people.

The foregoing notwithstanding, the situation is different at the formal level, where the subject of statelessness may slowly become topical particularly with the recently introduced national identity cards by government. As more service providers including banks, and mobile operators continue to demand their production, it will not be surprising to see other crucial social sectors of government like hospitals introduce the requirement for the productio of national identity cards.

### 2.1.2. Causes of statelessness in Malawi

The major contributing cause of statelessness or risk of being stateless in Malawi are gaps in the law; administrative barriers; and lack of documentation. The study has shown that a lot of people who qualify for the acquisition of nationality documents including national identity cards; birth certificates; or other forms of civil registration either do not, or have difficulties to access them. With respect to those in long-term non-migratory context like refugees; asylum seekers and other migrants in long-term residence, the legal framework does not create conducive environment for facilitating their nationality including that of their vulnerable children. Where the law has created a framework for naturalisation of such groups of people, the process is rather lengthy and expensive leading to their failing to process nationality documents which are critical for nationality or identification.

With respect to nationality identification particularly for adults, the problem is compounded by the fact that national identity card registration system in Malawi relies, among others, on applicants producing a birth certificate or other proof of nationality to confirm identification. If a person cannot produce a birth certificate, then the other option which is available is for their Malawian parents to vouch for their nationality. Alternatively, it is the local chief who is required to write a letter in support of their applications.

Another accepted evidence of identification is for the applicant to be accompanied by two Malawian nationals who already have a national identity card to witnesses or vouch for their nationality. If these requirements are not met then the person or child cannot access national identity cards and, arguably, other nationality documents like passport. For children or a person who does not have any other nationality, then they stand the risk of being undocumented and stateless if they do not belong to any other state. A KI explains this below:

*"So like according to NRB, the way NRB proves that the person is indeed a Malawian, we require that the person must have let's say, a birth certificate. That will indicate that the person is indeed a Malawian Born of Malawian parents. And in other circumstances if that documentation is not available, we require that that person must have like a letter from the chief vouching that that person is indeed a Malawian. And maybe resides in my village. On top of that the parents of the person might also attest to the fact that yes indeed this is a Malawian. If the parents are not available, for those that have just turned 16, we require that... we normally insist that it should be the parents that accompany them but if a person is a grown-up and they don't have parents then we require at least two witnesses who already have a national ID to vouch for them. So, on top of the letter from the chief, we're also supposed to have two witnesses who already have a national ID who can vouch that this is a Malawian".* **Government Official 2**

Another potential cause of statelessness is the shifting of borders or the international boundary lines between Malawi and its neighboring countries. Malawi borders Tanzania to the north and northeast; Zambia to the west and some parts of north-east; and Mozambique to the east, south and parts of south-east. The border districts along these boundaries are Dedza, Ntcheu,

Mangochi, and Mwanza for the boundary with Mozambique; Mchinji, Mzimba, Rumphu and some parts of Chitipa for the boundary with Zambia; and Chitipa and some parts of Karonga for the boundary with Tanzania. The territorial boundaries of Malawi are a product of the Anglo-German Treaty of 1 July 1890, also known as the Helgoland Treaty. Contrary to popular perception, the 1890 Treaty did not delimit boundaries between Malawi and its neighboring countries. Rather it just delimited “spheres of influence” leaving the actual delimitation of the boundaries subject to subsequent agreement<sup>5</sup> which exercise is currently ongoing. Following the resolution of the African Union in 2004 requiring Member States to reaffirm their boundaries by clearly marking their boundaries by the end of 2010,<sup>6</sup>

Malawi and Zambia established a Joint Survey Commission to demarcate their boundaries and address the lack of detailed boundary definition. The exercise was completed in 2011 but the demarcation commission remains active today to respond to new boundary survey efforts. The resulting physically demarcated land led to some parts of Malawi including Mchinji, Mzimba, Kasungu, and Rumphu districts being declared as Zambian territory and the vice-versa.<sup>7</sup> According to KI, there is a stretch of approximately 3kms of the M1 road<sup>8</sup> of Malawi which was built in Zambian territory between Ekwendeni and Jenda in Kasungu District. Some people who had established residence on both sides of this stretch of land and other parts in between the two boundaries particularly in the districts of Mchinji, Kasungu, and Mzimba from the Malawi side reside on land that is between the two boundaries. There are also other Zambian nationals who cultivate on land that is in Malawi territory particularly along the Mchinji boundary line. There is also a Malawian “plantation which stretches into Zambian territory along the entire Malawi-Zambia border as far as the Nyika Plateau”<sup>9</sup>. Several generations of people have lived on land around these contested locations that they sometimes do not know the nationality to which they belong to. This, notwithstanding, the two governments encourage the affected people not to change their nationality and remain in the areas they resided before the

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<sup>5</sup> Tiyanjana Maluwa, “Oil under Troubled Waters?: Some Legal Aspects of the Boundary Dispute Between Malawi and Tanzania over lake Malawi” (2016) 37(3) *Michigan J Int'l L*, 352

<sup>6</sup> See The Executive Council, *Decision on the Conference of African Ministers in Charge of Border Issues held in Addis, Ababa, on 7<sup>th</sup> June 2007*, AU Doc.EX.CL/353 (XI); See also 11<sup>th</sup> Ordinary Session of the Executive Council of the African Union Commission held in Accra, Ghana from 25<sup>th</sup> to 29<sup>th</sup> June 2007; See also The African Union, 2<sup>nd</sup> ed *Delimitation and Demarcation of Boundaries in Africa: General Issues and Case Studies*, African Union Commission (2014), also available online at [https://archives.au.int/bitstream/handle/123456789/5042/Delimitation%20and%20Demarcation%20of%20Boundaries%20in%20Africa%20-%20General%20Issues%20and%20Case%20Studies\\_E.pdf?sequence=1&isAllowed=y](https://archives.au.int/bitstream/handle/123456789/5042/Delimitation%20and%20Demarcation%20of%20Boundaries%20in%20Africa%20-%20General%20Issues%20and%20Case%20Studies_E.pdf?sequence=1&isAllowed=y), last accessed on 22 April 2022.

<sup>7</sup> Nontobeko Mlambo, “Malawi: 25 years on, Malawi and Zambia still struggling with Borders” *AllAfrica*, 6 December 2018, available online at <https://allafrica.com/stories/201812070638.html>, accessed on 12 April, 2022.

<sup>8</sup> This is the main road of Malawi which runs the country length of the country from the North to the South and is known as “the M1”.

<sup>9</sup> Malawi Ministry of Economic Affairs, “Records of the Geological Survey of Malawi” Vol. VII, 1965, p 22



demarcation.<sup>10</sup> The people who reside in these areas are at a high risk of statelessness or lack of documentation in the absence of deliberate government effort to grant them nationality documents.

A similar boundary reaffirmation exercise is ongoing between Malawi and Mozambique with their Joint Survey Commission commencing with the reaffirmation of the land boundary along such districts as Mangochi; Phalombe; Mulanje; Machinga; Ntcheu; Liwonde; and Mwanza. The Malawi-Mozambique boundary was at first delimited in 1891 and adjusted through various treaties until 1963 resulting in the current clarified boundaries comprising sections of rivers, watersheds, straight lines and even roads.<sup>11</sup> The current reaffirmation of their boundary is creating situations of people residing on land which changed territory after the reaffirmation exercise, particularly in such districts as Mulanje and Machinga.<sup>12</sup>

The most contentious boundary is the one with Tanzania, particularly on the lake side which remains unresolved. However, for purposes of this study, the relevant stretch of land is located along the Songwe River which fluctuates during the rainy season thereby changing its course. The changing of the course of the river affects the livelihood of the local population thereby making either country lose and gain some territory depending on the season which in turn affects the local population. According to KI, Malawi and Tanzania concluded the Convention on the Establishment of the Songwe River Basin with an aimed of, among others, stabilising the course of the Songwe river. As the fluctuation of the river has been taking place for decades, generations of people residing along this stretch of land may have challenges to ascertain the country to which they belong to particularly if they remain undocumented. On border populations, one KI explained as follows;

*"I will give an example where we had an operation in the southern part where we were dealing with an influx of Mozambicans but when you asked them do you consider yourself as a Mozambican? Some of them would say yes and others would say no because "my parents were from Malawi and I was born in Mozambique. I do not have any identification but my parents were from Malawi and they have Mozambican identification so I am not sure what to consider myself but I have lived most of my life in Mozambique" but they do not have any identification either from Malawi or Mozambique. So you say what do you consider them to be?"* **Government Official 4**

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<sup>10</sup> See Lusaka Times, "Some parts of Malawi declared to belong to Zambia-Malawi Lands Minister" 6 December, 2018, online at <https://www.lusakatimes.com/2018/12/06/some-parts-of-malawi-declared-to-belong-to-zambia-malawian-lands-minister/>, last visited on 13 April, 2022.

<sup>11</sup> Harvey A. Bootsma, Lake Malawi/Nyasa: experience and Lessons Learned Brief", online at [https://www.ilec.or.jp/wp-content/uploads/pub/16\\_Lake\\_Malawi\\_Nyasa\\_27February2006.pdf](https://www.ilec.or.jp/wp-content/uploads/pub/16_Lake_Malawi_Nyasa_27February2006.pdf), last accessed on 24 April, 2022.

<sup>12</sup> Information sourced from interviews with the Surveyor General of Malawi on 6 February, 2022, Lilongwe, Malawi.

In summary, therefore, there are several people who reside along the borders between Malawi-Mozambique; Malawi- Zambia and Malawi-Tanzania that may be at risk of statelessness. The recent border reaffirmation programme between Malawi and Mozambique, on one hand, and Malawi and Zambia on the other which is almost coming to an end has led to the shifting of the original positions of the boundaries. The border between Malawi and Tanzania is affected along the Songwe River where the river shifts its course every rainy season leading to migration of local inhabitants' dependent on the course of the said river. Due to the foregoing developments some people reside on land that is in-between the boundaries of Malawi and its neighbouring countries thereby not knowing which country they belong to.

The above findings confirm that the traditional factors continue to potentially cause statelessness or risk people to statelessness in Malawi. This study has established that gaps in the law including the continued inclusion of discriminatory laws,<sup>13</sup> systems of documenting national identities;<sup>14</sup> administrative barriers and lack of documentation may contribute to statelessness and risk of being stateless.<sup>15</sup> Forced movement of people due to the reaffirmation of boundaries involving Malawi and its neighbouring countries, and conflicts leading to asylum and refugee status<sup>16</sup> still continue to be the major causes of statelessness and the risk of statelessness in Malawi.

### 2.1.3. Groups at risk of statelessness in Malawi

The groups identified as being most at risk of statelessness in Malawi is reflective of the groups identified as being at risk of statelessness in most countries including the SADC region. The list includes children born to foreign nationals who are raised in Malawi but whose countries of birth do not recognise them as citizens and who, according to the Citizenship Act cannot qualify for citizenship. Malawi has a significant number of people who have remained in the country for a long time like refugees; asylum seekers; long-term migrants. As of December 2021, Malawi hosted refugees and asylum seekers totaling to 52, 678; 30, 900 of whom being asylum seekers and 21, 530 already granted refugees status. From the total number of 52, 678 approximately 238 remain

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<sup>13</sup> UNHCR, *SADC Citizenship and Statelessness*, supra, fn 1.

<sup>14</sup> UNHCR, "About Statelessness", 2014, online at <https://www.unhcr.org/ibelong/about-statelessness/>, last accessed on 12 January 2022.

<sup>15</sup> PR Chari, Joseph Mallika and Siuba Chandran, D, eds (2003),, *Missing boundaries: Refugees, Migrants, Stateless and Internally Displaced Persons in South Asia*, Manohar Publishers, (2016); Migration Policy Institute, "Internally Displaced Persons (IDP), Stateless Person, and Other UNHCR Population of Concern, 2000-12", online at <https://www.migrationpolicy.org/programs/data-hub/charts/internally-displaced-persons-idp-stateless-persons-and-other-unhcr#:~:text=IDPs%20are%20people%20who%20have,not%20crossed%20an%20international%20border.&text=Stateless%20persons%20are%20individuals%20who,the%20operation%20of%20its%20law>, last accessed on 12 January 2022.

<sup>16</sup> UNHCR, *SADC Statelessness Report*, supra, fn 1, p 16.

as persons of concern<sup>17</sup> and these number may have likely increased by now. A small number of asylum seekers have had their applications rejected requiring the government to either repatriate them back to their country of origin or third country. A KI explains this development in this way:

*"I cannot go back to my country of origin, at the same time the country that has received me will not give me citizenship. We are indeed stateless! Things are hard, things are hard indeed!"*

*"Legally yes [that is their country] but using other [social] parameters, No. Because if we use social context, we can say 'if I can't go back, how can it be my country'."* **Refugee**

The current Malawi Government Policy's turnaround time for asylum and refugee status determinations is three months but cases take longer than the prescribed period. One KI explained that as of the year 2020, outcomes of cases would take on average two years. After 2021 the turnaround period has been reduced to one year. If applications are rejected, asylum seekers or refugee applicants may appeal and if not successful then such applicants stand the risk of being stateless if they do not have another nationality.

Malawi also has a large number of undocumented people, both nationals and non-nationals thereby heightening the risk of statelessness. Some of the undocumented people include descendants of refugees or asylum seekers who do not know whether they are nationals or not because they know no other state where they belong to; are just ignorant about the procedure for accessing nationality documents; and cannot afford to pay the prescribed fees for nationality documents. Long term refugees do not know what to make of their status including that of their descendants. They have married and borne children who only know Malawi as their country. If the children were born in Malawi after 2010 they may qualify for the national identity card but if they were born earlier than 2010 they do not. If they or their dependants remain in this status for long periods of time they stand the risk of being stateless in the country particularly where they have no other country that recognises their citizenship.

Another group is the third or fourth generation children of Malawian parents who emigrated outside the country particularly to South Africa and Zimbabwe but decided to return to Malawi after the death of their parents. Some of the parents of the returning children may have lost links with Malawi due to the length of time they lived abroad and all these run the risk of being stateless. This KI explains in detail as follows,

*"It happened here in Dowa, there was a person that was originally from here but was living in South Africa. He had children while he was there. The children came back here but found it difficult to trace where they were from. There in South Africa, they were told to go back to their home. Life was difficult for them here until a senior chief got involved but also another chief, until they found their clan. And*

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<sup>17</sup> UNHCR, "Malawi", online at <https://www.unhcr.org/malawi.html>, last accessed on 12 April 2022.

*then they were received but it took a lot of work. So, there are indeed people that are stateless here in Malawi.*" Chief 3

#### 2.1.4. Impact of statelessness in Malawi

As statelessness is a human rights issue, it impacts significantly on the fundamental human rights of those affected. The enjoyment of rights or ability to access certain social services usually requires nationality documents. The study established that at an informal level, a majority of those who are at risk of statelessness in the country do not feel its impact as they live and integrate normally with nationals thereby enjoying most of the social amenities that are available to nationals and other documented foreign migrants. However, the recent introduction of national identity cards for such services by banks and mobile phone operations will most likely, at a formal level, negatively impact on those who are stateless or risk of statelessness. For migrants and undocumented people, the implication of not having nationality documents like passports, national identity cards; and birth certificates is that they are unable to access certain services. It is also difficult for them to convince State authorities that they have connections to Malawi; and prove place of birth or parentage which are crucial elements for the acquisition of nationality documents in the country. One KI explained this situation in the following way:

*"Because what is happening now, for example, with the coming of the national IDs, most of the services are demanding that if you want to access the services, they are demanding that you must have a national ID, e.g. banking services and the like. So even when you want to get a sim card..."*

**Government Official**

Some groups of people who are most at risk of being stateless including refugees and asylum seekers who reside in urban areas and other migrants in long term residence face significant human rights violations and discrimination in the country. They regularly face arbitrary detention by the Immigration and Police officers; frequent harassment and intimidation from locals who feel threatened by their economic activities. Some refugees and asylum seekers' movements are restricted. They also constantly receive threats of expulsion from the country and fail to participate in political and other economic activities in the country even though they have been in the country for over 20 years.<sup>18</sup>

Recently, banks and mobile service providers introduced mandatory requirements for accessing their services including production of national identity cards. Mandatory requirement

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<sup>18</sup> See Malawi Law Commission, Report of the Special Law Commission on Review of the Malawi Citizenship Act, Law Commission Report No. 36 dated 11 June 2021, Government Printer, Lilongwe, p 79, para 5.7.4, hereinafter referred to as "the Special law Commission Report"). The Report is also available online at <https://www.lawcom.gov.mw/sites/default/files/REPORT%20OF%20THE%20LAW%20COMMISSION%20ON%20THE%20REVIEW%20OF%20THE%20MALAWI%20CITIZENSHIP%20ACT.pdf>, last accessed on 12 January 2022.

for the production of identity cards has seriously impacted on the rights of some of the above groups of people including refugees and asylum seekers as they do not qualify for their acquisition. The fact that these groups of people are stateless also deprives them of the right to vote or participate in political activity which is usually restricted to citizens.<sup>19</sup> Stateless persons who have resided in the country for a long period of time are also affected regardless of the length of time they have been in the country. They cannot seek employment; hold or inherit property as the Lands Registrar now demands the production of the national identity card or nationality documents before registering any transfer.

Stateless people or those at risk of statelessness in Malawi face constant discrimination and segregation. They are also vulnerable to human trafficking as they are tempted to look for greener pastures when they feel that they cannot earn a living due to restrictions that are regularly introduced. The foregoing situations impact on their groups of people from participating in social and economic activities. For descendants of *in situ* populations, the biggest challenge is the lack of opportunities of employment; protection from various abuses; and lack of participation in political and social sectors including voting and generally, politics. With the introduction of national identity cards, they may have challenges in inheriting property, opening bank accounts or getting loans as these are strictly demanded. Unless government deliberately takes steps to document these groups of people, these challenges will continue for generations to come.

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<sup>19</sup> See Article 25 of the International Covenant on Civil and Political Rights, G.A. Res 2200A (XX), 1976.

### 3.0. CHAPTER 3: INTERNATIONAL STANDARDS AND PROTECTION AGAINST STATELESSNESS IN MALAWI

#### 3.1. Minimum standards for the protection of statelessness

The Constitution of the Republic of Malawi is solidly anchored under a foundation of protecting and promoting human rights and freedoms for all people in the country.<sup>20</sup> The Constitution also guarantees the right to nationality for every person residing in the country. In furtherance of these fundamental rights, Malawi ratified the following international human rights instruments:<sup>21</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>22</sup> the Convention on the Nationality of Married Women (Status of Women Convention);<sup>23</sup> the International Convention on Elimination of All Forms of Racial Discrimination (CERD);<sup>24</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>25</sup> the Convention on the Rights of the Child;<sup>26</sup> the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict;<sup>27</sup> the International Covenant on Civil and Political Rights;<sup>28</sup> the Optional Protocol to the International Covenant on Civil and Political Rights;<sup>29</sup> the Convention on Rights of Persons with Disabilities;<sup>30</sup> and the 1951 UN Convention on Certain Questions Relating to the Conflict of Nationality laws.<sup>31</sup>

The above international instruments provide for various safeguards and protection against statelessness and loss or deprivation of nationality. They also support and complement the protection regime set out in the 1954 Statelessness Convention. Apart from the 1954 Statelessness Convention which provides for “important minimum standards of treatments”<sup>32</sup> towards stateless persons, the 1961 Convention on Statelessness provides for protective measures aimed at reducing

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<sup>20</sup> See section 12(d) and section 15 of the Republic of the Malawi’s Constitution.

<sup>21</sup> For the Human Rights Treaties deposited with the United Nations Secretary General, status of ratification for Malawi can be found online at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=104&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=104&Lang=EN), last accessed on 30 January 2022.

<sup>22</sup> Acceded on 12 March 1987.

<sup>23</sup> Acceded on 8 September 1966.

<sup>24</sup> Acceded on 11 June 1996

<sup>25</sup> Acceded on 22 December 1993.

<sup>26</sup> Acceded on 2 January 1991

<sup>27</sup> Ratified on 21 September 2010 and signed on 7 September 2000

<sup>28</sup> Acceded to on 22 December 1993

<sup>29</sup> Acceded on 11 June 1996.

<sup>30</sup> Signed on 27 September 2007 and ratified on 27 August 2009.

<sup>31</sup> Acceded on 11 July 1967

<sup>32</sup> UNCHR, “Introductory Note to the 1954 Convention Relating to the Status of Stateless Persons”, p 3, available online at [https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons\\_ENG.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf), last visited on 20 January 2022.

statelessness including protections for persons born in a territory of a state;<sup>33</sup> foundlings,<sup>34</sup> protection against loss<sup>35</sup> and deprivation of nationality.<sup>36</sup>

International human rights instruments, by their very nature, guarantee higher standards of treatment in favour of stateless persons as compared to the 1954 Statelessness Convention. One of the fundamental rights protected by both international human rights instruments and the 1961 Convention on Statelessness is the right to nationality. The right to nationality for stateless persons ought to be enjoyed at all times including during public emergency.<sup>37</sup> Article 15 of the Universal Declaration of Human Rights (UDHR) also guarantees the right to nationality for everyone. It also prohibits arbitrary deprivation of nationality and forceful change of everyone's nationality. Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) proscribes arbitrary deprivation of a person's right to enter his own country.

The right to nationality is also applicable to aliens who have been allowed to reside in a territory regardless of whether they entered the country lawfully or not. The UN Human Rights Committee in *General Commentary No. 27 (freedom of Movement)* clarified this principle in the following way:

"[...] an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12. Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for article, paragraph 3."<sup>38</sup>

Article 12 of the ICCPR guarantees the right to liberty of movement and freedom to choose residence including the right to freely leave any country including his own. The right is relevant for stateless persons particularly those who entered the country illegally and are now in a long-term non-migratory context. According to the UN Human Rights Committee, every person who is lawfully in the territory of a state has a right to nationality regardless of the manner in which they entered the territory. Accordingly, if a person entered Malawi illegally he may still qualify for nationality provided his or her stay has been regularised in accordance with national laws.

With respect to the prevention of statelessness, the Convention on the Rights of the Child (CRC) is instructive as it imposes an obligation on states to register every child immediately after

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<sup>33</sup> Article 1 of the 1961 Convention on the Reduction of Statelessness.

<sup>34</sup> Article 2 of the 1961 Convention on the Reduction of Statelessness.

<sup>35</sup> Article 5 of the 1961 Convention on the Reduction of Statelessness.

<sup>36</sup> Article 8 of the Convention on the Reduction of Statelessness.

<sup>37</sup> See Article 31 of the 1954 Convention of Statelessness.

<sup>38</sup> See OHCHR, Human Rights Committee, *General Comment No. 27 (Freedom of Movement)*, CCPR, C/21/Rev.1/Add.9, 2 November 1999, available online at <https://www.refworld.org/pdfid/45139c394.pdf>, last accessed on 2 February, 2022. Footnotes omitted.

birth;<sup>39</sup> and also guarantee their right to nationality,<sup>40</sup> enjoyment of which, is expected to be implemented "in accordance with their national law and their obligations under the relevant international instruments in this field, in particular, where the child would otherwise be stateless."<sup>41</sup> Article 8 of the CRC obliges states to "respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference".

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) imposes an obligation on States to,

"[...] prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...the right to nationality."

Article 1(1) and 1(2) of the CERD while prohibiting discrimination of all forms, also obliges States to guarantee equality before the law including the enjoyment of the right to nationality.<sup>42</sup> Article 24(3) of the International Convention on Civil and Political Rights (ICCPR) explicitly provide that every "child has the right to acquire a nationality". Discrimination on the basis of nationality is also proscribed under the provisions of Article 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in the following way:

"State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband."

The Convention also obliges Contracting States to "grant women equal rights with men with respect to the nationality of their children."<sup>43</sup> Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families guarantees the right to nationality for children of migrant workers in the following way: "Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality." Article 18 of the Convention on the Rights of Persons with Disabilities obliges States Parties to "recognize the right of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others".

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<sup>39</sup> Article 7 of the CRC.

<sup>40</sup> See Article 7 of the CRC.

<sup>41</sup> Article 7(2) of the CRC

<sup>42</sup> See Article 5 of the CERD.

<sup>43</sup> Article 9(2) of the CEDAW.



At the regional level, the African Commission on Human and Peoples' Rights interpreted the provisions of the African Charter on Human and Peoples' Rights progressively in order to affirm peoples' right to nationality. The Executive Council of the African Commission also welcomed these developments including the adoption by the Commission of the draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.<sup>44</sup> The Executive Council also requested the Commission to take the required steps to ensure the processing of the draft instrument in line with the procedures for the development of the African Union legal instruments.<sup>45</sup> The importance of the above decision lies in the fact that whilst the African Charter on Human and Peoples' Rights omitted the issue of statelessness thereby leaving member states to use their national laws to deprive people of their nationality, the Commission's interpretation affirmed that the right to nationality is implicit within Article 5 of the AfCHPR and hence essential to the enjoyment of other fundamental rights under the African Charter.<sup>46</sup>

With respect to African minimum standards on nationality, Malawi is a party to the following human rights instruments: the African Charter on Human and Peoples' Rights;<sup>47</sup> the African Charter on the Rights and Welfare of the Child (ACRWC);<sup>48</sup> and the Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>49</sup> The right to nationality commences from birth and not at age of majority. In the *Children of Nubian Descent in Kenya v The Republic of Kenya* (hereinafter referred to as "*the Kenyan Nubian Case*"), the African Committee of Experts on the Rights and Welfare of the Child interpreted Article 6 of the African Charter on the Rights and Welfare of the Child which provides for the right of every child to a name, birth registration and a nationality as follows:

"[...] children should have a nationality beginning from birth. [...] Moreover, by definition, a child is a person below the age of 18 (Article 2 of the African Children's Charter), and *the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the State Party to comply with its children's rights obligations.*"<sup>50</sup>

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<sup>44</sup> See *Decision on the Report of the Activities of the African Commission on Human and Peoples' Rights*, Doc.EX.CL/968/(XXIX), 15 July 2016, paragraph 5 where the Commission interpreted the provisions of Article 5 of the African Charter on Human and Peoples Rights to confer protection against denationalization and rendering persons stateless.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Malawi ratified the instrument on 17 November 1989

<sup>48</sup> Malawi ratified the instrument on 16 September 1999.

<sup>49</sup> Acceded on 4 November 1987.

<sup>50</sup> *Children of Nubian Descent in Kenya v The Republic of Kenya*, Communication No 002/Com/002/2009, Decision of 22 March 2011, paragraph 42. Emphasis added.

The right to nationality cannot be limited unlawfully or taken away from a person. In the case of *Anudo Ochieng Anudo v the United Republic of Tanzania* (hereinafter referred to as "*The Anudo case*"), which involved deprivation of nationality, the African Court on Human and Peoples' Rights (AfCHPR) held that United Republic of Tanzania had unlawfully rendered the applicant stateless by declaring him "illegal immigrant". The declaration, the court held, denied him of his Tanzanian nationality without the possibility of appeal before a national court yet he enjoyed the same until the said declaration.<sup>51</sup> The AfCHPR held that "the deprivation of the applicant's nationality was arbitrary, contrary to Article 15(2) of the Universal Declaration on Human Rights";<sup>52</sup> his expulsion from Tanzania was arbitrary; a denial of the right to appeal the decision violated Article 7(1) (a) and (c) of the ICCPR,<sup>53</sup> and article 13 of the ICCPR.<sup>54</sup> Although the AfCHPR noted that no general provision on nationality exists in the ICCPR or ACHPR, it filled the gap by drawing on article 15(2) of the UDHR, which states that "[n]o one shall be arbitrarily deprived of his nationality".<sup>55</sup> Crucially, the court held that although "conferring of nationality to any person is the sovereign right of states"<sup>56</sup>, depriving a person of one "has to be exercised with[in] international standards, to avoid the risk of statelessness."<sup>57</sup> In order for nationality to be deprived, the Court held, a State must fulfil several conditions including that the loss:

"i) must be founded on clear legal basis; (ii) must serve a legitimate purpose that conforms with International Law; iii) must be proportionate to the interest protected; iv) must install procedural guarantees which must be respected, allowing the concerned to defend himself before an independent body having a clear legal basis; a legitimate purpose conforming with international law; proportionality to the interest protected; and having procedural guarantees allowing the person concerned to defend himself or herself before an independent body."<sup>58</sup>

Protection against deprivation of nationality does not only apply to those who acquire it formally through, for example, birth or descent; it also applies to those who acquire it through

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<sup>51</sup> *Anudo Ochieng Anudo v United Republic of Tanzania*, App No. 012 of 2015, African Court on Human and Peoples Rights, Judgment of 22 March 2018, (*Anudo case*) paragraph 115; Also available online at <https://www.african-court.org/en/images/Cases/Judgment/-012%20-%202015%20-%20Anudo%20Vs.%20Tanzania%20-%20Judgment%2022%20March%202018%20-%20Optimized.pdf>, last accessed on 18 January 2022.

<sup>52</sup> *Anudo Case*, *ibid*, paragraph 88.

<sup>53</sup> *Anudo case*, *supra*, fn 51, paragraph 115.

<sup>54</sup> *The Anudo Case*, *supra*, fn 51, paragraph 100 and paragraph 106.

<sup>55</sup> *Anudo case*, *supra*, fn 51, paragraph 88.

<sup>56</sup> *Anudo case*, *supra*, fn 51, paragraph 74.

<sup>57</sup> *Anudo case*, *supra*, fn 51, paragraph 78.

<sup>58</sup> *Anudo case*, fn 51, paragraph 79 citing The Report of the Secretary General, Human Rights Council, Twenty-Fifth Session, 19 December 2015; see also Brownwen Manby, *Anudo Ochieng Anudo v Tanzania (Judgment) (African Court on Human and Peoples' Rights)*, application number 012 of 2015, a case not, 22 March 2018, p173-174, available online at <https://statelessnessandcitizenshipreview.com/index.php/journal/article/view/75/25>, last accessed on 19 January 2022.

other legal means including long social ties with the host country. The right to nationality can only be restricted if the said restriction is “provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the rights recognized in the present Covenant.”<sup>59</sup>

The 1954 Statelessness Convention comprehensively provides for the right of stateless persons to housing; association; education, employment; access to courts; and primary education.<sup>60</sup> Article 27 of the 1954 Statelessness Convention obliges Contracting States to issue identity documents to stateless persons on their territory and travel documents unless they cannot do so due to reasons of security, and public order.<sup>61</sup> Article 31(2) of the 1954 Statelessness Convention prohibits States from expelling stateless persons without following due process of the law.

One of the criticisms of the 1954 Statelessness Convention relates to the provisions of Article 31 which guarantees minimum standards of protection for persons who are *lawfully* in the territory unlike Article 31(1) of the 1951 Convention on the Status of Refugees which guarantees the right to every person.<sup>62</sup> The other criticism of the 1954 Statelessness Convention is that it conditions the enjoyment of specific rights of refugees to various degrees of attachment to the State.<sup>63</sup> According to the Robinson Commentary to the 1954 Convention, “it is to be assumed that the expression ‘lawfully in the country’ as used in [the 1954 Convention] has the same meaning as the one in the Refugee Convention”.<sup>64</sup>

The concept of “lawful” stay for the purposes of the 1951 Convention on the Status of Refugees has been interpreted as follows and, in light of the shared drafting history of the 1951 and 1954 Conventions, also applies to the interpretation of the 1954 Statelessness Convention:

“[...] ‘lawful’ normally is to be assessed against prevailing national laws and regulations; a judgment as to lawfulness should nevertheless take into account all the prevailing circumstances, including

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<sup>59</sup> See Article 12(3) of the ICCPR

<sup>60</sup> See Articles 16, 15, 17, 21, 22 and 23 of the 1954 Convention Relating to Statelessness in that order.

<sup>61</sup> See Article 27 and 28 of the Convention Relating to Stateless Persons.

<sup>62</sup> International Justice Center, “Citizenship & Nationality”, online at <https://ijrcenter.org/thematic-research-guides/nationality-citizenship/#:~:text=N.B.%3A%20Although%20the%20terms%20nationality,use%20the%20two%20terms%20interchangeably>, last accessed on 16 January 2022.

<sup>63</sup> See UNHCR, “Note on International Protection”, 7 September 1994, Doc. A/AC.96/830, at para 29, available at: <http://www.unhcr.org/refworld/docid/3f0a935f2.html>, last accessed on 3 June 2022.

<sup>64</sup> See Convention Relating to the Status of Stateless Persons: Its History and Interpretation-A Commentary by Nehemiah Robinson Institute of Jewish Affairs, World Jewish Congress 1955 see note 5,, online at <https://www.refworld.org/docid/4785f03d2.html>; also see UNHCR, “Lawfully Staying” – A Note on Interpretation, 1988, in particular paragraph 23, available at: <http://www.unhcr.org/refworld/docid/42ad93304.html>, last accessed on 4 June 2022.

the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person”.<sup>65</sup>

The UN Human Rights Committee has also decided that an individual with an expulsion order that was not enforced, who was allowed to stay in Sweden on humanitarian grounds was “lawfully in the territory” for the purposes of enjoying the right to freedom of movement protected by Article 12 of the ICCPR.<sup>66</sup> Consequently, Article 31 of the 1954 Stateless Convention is restrictive in the sense that it protects only those who find themselves in the territory of a state through legal means. Article 32 of the 1954 Stateless Convention obliges States to, “as far as possible facilitate the assimilation and naturalisation of stateless persons.” On the other hand, Article 1(2) of the 1961 Convention on Statelessness provides minimum guarantees for stateless persons including the period of habitual residence which is placed at five years. However, Malawi has not yet ratified the following important Conventions: the 1961 Statelessness Convention; and the Hague Convention on Intercountry Adoptions, which are crucial instruments when it comes to protection of the rights of stateless persons and those at risk of statelessness. Malawi must seriously consider ratifying the 1961 Statelessness Convention for a number of reasons. The Convention obliges Contracting States to grant nationality to stateless persons at “birth, by operation of law” or by application in accordance with national law.<sup>67</sup> The Convention also provides for minimum protection for foundlings by obliging Contracting States to consider them as having been born within the territory “of parents possessing the nationality of that State.”<sup>68</sup> The Convention also protects against loss of nationality where nationality law permits renunciation of nationality unless the person holds another nationality.<sup>69</sup>

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<sup>65</sup> See Convention Relating to the Status of Stateless Persons: Its History and Interpretation-A Commentary by Nehemiah Robinson Institute of Jewish Affairs, World Jewish Congress 1955, para 5, online at <https://www.refworld.org/docid/4785f03d2.html>; See also UNHCR, “Lawfully Staying” – A Note on Interpretation, 1988”, in particular paragraph 23, available at: <http://www.unhcr.org/refworld/docid/42ad93304.html>

<sup>66</sup> See *Celepli v. Sweden*, CCPR/C/51/D/456/1991 at paragraph 9.2 (26.7.1994); See also UNHCR Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level”, UN Doc HCR/GS/12/03, 17 July 2012, online at <https://www.refworld.org/docid/5005520f2.html>, last accessed on 4 June 2022.

<sup>67</sup> See Article 1(a) and 1(b) of the Convention on the Reduction of Statelessness, online at [https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness\\_ENG.pdf](https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf), last accessed on 30 January 2022.

<sup>68</sup> Article 2 of the Convention on the Reduction of Statelessness.

<sup>69</sup> Article 7, 6 of the Convention on Reduction of Statelessness. See also Article 8 of the Convention on Reduction of Statelessness on deprivation of citizenship.

### 3.2. Due process and transparency

The Immigration Act; the National Registration Act;<sup>70</sup> and the Malawi Citizenship Act<sup>71</sup> grant the Minister exclusive discretionary powers to decide on immigration, national identity registration; and registration for citizenship for every person who applies for it. Some of these powers are delegated to officers and the decision of the Minister is final. For example, under the provisions of section 18 of the Malawi Citizenship Act an applicant must satisfy the Minister that he or she is and has been stateless. The same applies to the procedure for appealing against rejections as the above statutes provides that the decision of the said Minister is final. The current statutory provisions on the power of the Minister may lead to abuse even though the Minister's decisions are still amenable to judicial review as a statutory provision cannot oust the jurisdiction of the High Court.<sup>72</sup>

Section 108 of the Constitution grants the High Court of Malawi unlimited original jurisdiction to hear and determine any civil matter including decisions of Ministers made under the Citizenship and Immigration Acts. On the strength of section 5 of the Constitution which provides that any act of Government or any law that is inconsistent with the provisions of the Constitution shall, to the extent of inconsistency be invalid, the above statutory provisions, by purporting to limit or oust the powers of the High Court to adjudicate over citizenship or immigration matters, can be invalidated for being inconsistent with the constitution. In this regard, Government needs to take deliberate steps to ensure that access to legal remedies including the right to appeal against decisions of a Minister is available to stateless persons or those at risk of being stateless since the current provisions of both the Citizenship and Immigration Act are inconsistent with the constitution. One way of doing so is to establish an independent review and appeal mechanism outside the judicial system where this group of people can easily access them. As Malawi has a considerable number of migrants who are in a long-term residence like refugees and asylum seekers, there is also need to establish transparent, easily accessible national identification determination mechanisms including procedures for pursuing appeals where such applications have failed for this category of people. Most of the affected people under this category cannot afford traditional costs associated with legal representation as such deliberate measures should be put in place to ensure their accessing free legal services including those offered by the Legal Aid Bureau.

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<sup>70</sup> National Registration Act no. 13 of 2010.

<sup>71</sup> Citizenship Act no. 28 of 1966.

<sup>72</sup> See section 11(4) of the Constitution of Malawi.; see also *Reserve Bank of Malawi and others vs The A-G*, Constitutional Cause No 5 of 2010, also available online at <https://malawilii.org/mw/judgment/high-court-general-division/2013/451>, last accessed on 22 January 2022.

### 3.3. Acquisition of nationality by naturalisation or registration in Malawi

The Citizenship of Malawi can be acquired in a number of ways including by birth;<sup>73</sup> and descent.<sup>74</sup> For people who on 5<sup>th</sup> July, 1966 were already citizens of Malawi, their citizenship was carried over after that date by operation of law.<sup>75</sup> Dual citizenship is acquired by those who are already citizens of Malawi but being of full age and capacity also hold citizenship of another country.<sup>76</sup> A dual citizen is obliged to notify the Minister in writing of the acquisition of additional citizenship but such persons cannot qualify for public offices including Presidency, office of the Chief Justice; Member of Parliament; and Malawi Defence, among others, if he holds a citizenship of another country in addition citizenship of Malawi.<sup>77</sup>

The Citizenship of Malawi can also be acquired through naturalisation or registration by those who have been ordinarily resident in Malawi for a period of five years;<sup>78</sup> have adequate knowledge of the vernacular language or of the English language;<sup>79</sup> are of good character;<sup>80</sup> and they would be suitable citizens of Malawi.<sup>81</sup> Commonwealth citizens;<sup>82</sup> Citizens of certain African states who are ordinarily resident in Malawi for a period of five years;<sup>83</sup> persons who have close connection with Malawi;<sup>84</sup> and stateless persons<sup>85</sup> may all qualify for citizenship by registration.<sup>86</sup> The same applies to wives;<sup>87</sup> and minor children of Malawi citizens<sup>88</sup> who have been resident in the country for not less than 20 years.<sup>89</sup> The Minister may in his or her discretion also confer citizenship to any person as he or she deems fit.<sup>90</sup> Ordinarily, citizenship by registration is predicated on the applicant meeting conditions already set down in the Act and once fully met, citizenship is automatically issued. Any person's citizenship by registration in Malawi becomes effective from the date of registration.<sup>91</sup>

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<sup>73</sup> Section 4 of the Citizenship Act

<sup>74</sup> Section 5 of the Citizenship Act

<sup>75</sup> See Section 3 of the Citizenship Act. The above date reflects the date that Malawi attained independence from the British Colonial rule to an independent state.

<sup>76</sup> Section 6 of the Malawi Citizenship (Amendment) No. 11 of 2019 Act

<sup>77</sup> Section 6(2) as read with Seventh Schedule of the Malawi Citizenship (Amendment) No. 11 of 2019.

<sup>78</sup> Section 13(1)(a) of the Citizenship Act

<sup>79</sup> Section 13(1)(b) of the Citizenship Act

<sup>80</sup> Section 13(1)(c) of the Citizenship Act

<sup>81</sup> Section 13(1)(d) of the Citizenship Act.

<sup>82</sup> Section 13(1)(a) of the Citizenship Act.

<sup>83</sup> See Section 14 of the Citizenship Act

<sup>84</sup> Section 15 of the Citizenship Act.

<sup>85</sup> See Section 18 of the Citizenship Act.

<sup>86</sup> Section 15 of the Citizenship Act.

<sup>87</sup> Section 16 of the Citizenship Act.

<sup>88</sup> Section 17 of the Citizenship Act.

<sup>89</sup> Section 15(2)(b) of the Citizenship Act.

<sup>90</sup> Section 19 of the Citizenship Act.

<sup>91</sup> See section 20(1) of the Citizenship Act

### 3.4. Citizenship by Registration for Commonwealth citizens and citizens from African States

Citizenship by registration for Commonwealth citizens traces its history to the intention of the Government of Malawi to accommodate British citizens who wanted to permanently reside in the country after independence.<sup>92</sup> The same applies to citizenship of Certain African States provided for under section 14 of the Citizenship Act. There is no justification for the categorisation of citizenship along those lines<sup>93</sup> in the current legal dispensation. The provision that allows commonwealth citizens to apply for citizenship is no longer relevant today as Malawi currently has international relations beyond the commonwealth. It is advisable for government to consider reviewing and, arguably repealing the above two provision.<sup>94</sup> Suffice to observe that developments in other countries including Zimbabwe appear to lean towards the direction of permitting the acquisition of nationality by migrants originating from a SADC country provided the said migrant renounces the citizenship of the said SADC country.<sup>95</sup> To confirm citizenship under this provision, a person must demonstrate that he or she was born in Zimbabwe and-

- “(i) one of his parents was born in a SADC country and entered Zimbabwe on or before 18<sup>th</sup> April, 1980, as a migrant worker, and from the date of such entry until the date of birth of the person referred to in this section such parent has continuously resided in Zimbabwe; and
  - (ii) he has continuously resided in Zimbabwe since the date of his birth except for any temporary absence in any of the circumstances specified in subsection (2) of section *thirteen*; and
  - (iii) he has not at any time after the date of his birth acquired any foreign citizenship or foreign passport, whether voluntarily or otherwise, or enjoyed the protection of any foreign country;
- or
- (b) he was born in a SADC country and-
  - (i) one of his parents was born in Zimbabwe and left Zimbabwe on or before the 18<sup>th</sup> of April, 1980, for a SADC Country as a migrant worker, and such parent was resident in that country as the date of birth of the persons referred to in this section; and
  - (ii) he is permanently resident in Zimbabwe at the time of making an application in terms of subsection (3); and
  - (iii) he has not at any time after the date of his entry into Zimbabwe acquired any other foreign citizenship or other foreign passport, whether voluntarily or otherwise, or enjoyed the protection of any foreign country.”<sup>96</sup>

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<sup>92</sup> See Report of the Special Law Commission on Citizenship, *supra*, fn 18, p 56-57.

<sup>93</sup> *Ibid*, p 59

<sup>94</sup> See Report of the Special Law Commission on Citizenship, *supra*, fn 18 p 59.

<sup>95</sup> See Section 9A(3) of the Citizenship Act of Zimbabwe, No. 12 of 2003.

<sup>96</sup> See Section 9A of the Citizenship Act, cap 4:01 (Amended), available online at <http://citizenshiprightsfrica.org/wp-content/uploads/2003/02/Zimbabwe-Citizenship-Amendment-Act-2003.pdf>, last accessed on 1 June 2022.

Although the Zimbabwe approach may be relevant for Malawi considering that the country also has a large population that migrated to other SADC countries including Zimbabwe and South Africa, the challenge is on the requirement for such people to renounce their SADC citizenship if they already acquired one.

The process for applying citizenship by naturalisation requires an alien to write to the Minister and pay a prescribed fee of USD\$20, 000.00<sup>97</sup> for such purpose before a certificate of naturalisation as a citizen of Malawi is issued.<sup>98</sup> A person qualifies for citizenship by naturalisation if he has been ordinarily resident in Malawi for a period of seven years immediately preceding the application.<sup>99</sup> An application for naturalisation must also be accompanied by evidence based on statements presented to the Minister and a declaration made before a magistrate or commissioner for oaths specifying the reasons for seeking citizenship by naturalisation.<sup>100</sup> Once a certification of naturalisation as a citizen of Malawi has been granted to an alien, the said citizenship is effective from the date of the grant of the certificate.<sup>101</sup>

A woman who intends to marry a Malawian citizen will qualify for citizenship by registration if she declares in writing of her willingness to take an oath of allegiance<sup>102</sup> for that purpose. She must also show willingness to renounce the citizenship that she possesses; and "in the case of a woman who is widowed, divorced or separated from her husband, must show her intention to continue to reside permanently in Malawi."<sup>103</sup> Although section 16 of the Citizenship Act provides the legal basis for wives of Malawian citizens to register for citizenship it does not provide for a similar provision for foreign husbands of Malawian citizens to register for citizenship, as such this provision is discriminatory on the basis of sex.

The foregoing, notwithstanding, the special Law Commission on Citizenship nevertheless recommended the retention of section 16 of the Citizenship Act with amendments arguing that women need to be protected from abusive and fraudulent marriages.<sup>104</sup> They proposed the following amendment for the registration of citizenship by marriage:

"[...] A person who has been married to a citizen of Malawi for a period of at least seven (7) years shall, on application to the Board and in the prescribed manner, be entitled to be registered as a citizen of Malawi, if-

- (a) The marriage was contracted in or outside Malawi under a system of law recognised in Malawi;

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<sup>97</sup> See Fourth Schedule to the Immigration (Amendment) Regulations, 2019 published as Government Notice No. 77 in the Malawi Gazette Supplement, dated 27<sup>th</sup> December, 2019

<sup>98</sup> See Section 21 of the Citizenship Act.

<sup>99</sup> See Section 21(1)(a) of the Citizenship Act.

<sup>100</sup> See section 22 as read with section 28 of the Citizenship Act.

<sup>101</sup> Section 22 of the Citizenship Act.

<sup>102</sup> Section 16(2)(a) of the Citizenship Act

<sup>103</sup> Section 16(2)(c) of the Citizenship Act.

<sup>104</sup> The Special Law Commission, *supra*, fn 18, p 72.



- (b) The marriage was not entered into for the purpose of acquiring a status or privilege in relation to immigration or citizenship; and
- (c) The marriage was subsisting at the time of the application.<sup>105</sup>

The Special Law Commission recognised during their debate that section 16 is controversial as some members supported the proposals for repealing the provision altogether whilst others took a contrary view.<sup>106</sup>

One of the challenges of processing documents for naturalisation in Malawi is the length of time it takes to conclude them. The other challenge is the prohibitive and exorbitant prescribed fees for applying for citizenship by naturalisation. The fees for the registration of citizenship by stateless person are currently pegged at USD\$75, 000.00.<sup>107</sup> The foregoing exorbitant fees for registration of citizenship contradicts article 32 of the 1954 Statelessness Convention which provides for facilitation of naturalisation. With the prescribed fees pegged at such a prohibitive amount it is most likely statelessness in Malawi will not be reduced unless Government takes deliberate steps to accommodate this vulnerable group of people. As the study has established, a majority of people fail to access documents due to the cost and length of time it takes to finalise the process. Exorbitant fees encourage people not to fetch for nationality documents and this has an impact on peoples' naturalisation and statelessness in the long term. High and exorbitant amounts for naturalisation or registration of citizenship should be left to high end migrants who have the financial means to pay for huge amounts like the ones currently prescribed under the Immigration (Amendment) Regulations cited above.

### 3.5. Civil Registration and Identification

Prior to the enactment of the National Registration Act No. 13 of 2010 (hereinafter referred to as "the National Registration Act"), birth registration in Malawi was not mandatory. The preceding and now repealed Births and Deaths Registration Act<sup>108</sup> did not impose a mandatory requirement for nationals to register their birth. Things changed with the entry into force of the National Registration Act making it an offence for every person who fails to register the birth of a child where he has a duty to do so.<sup>109</sup> The old practice of registering birth proceeded as follows: when a child was born,, the hospital would issue a birth report which was converted into a birth certificate at the Registrar General's office. However, since registration was not mandatory some parents were not converting their child's birth reports into birth certificates. Some of the parents

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<sup>105</sup> Report of the Special Law Commission, *supra*, fn 18, p 73.

<sup>106</sup> Report of the Special Law Commission on Citizenship, *supra*, fn 18, p 68-73.

<sup>107</sup> See Immigration (Amendment) regulations, 2019, Government Notice No. 77, dated 27<sup>th</sup> December 2019. The exchange rate between the Malawi Kwacha and USD\$ was 1MK=1011.8053. See Reserve Bank of Malawi official website at <https://www.rbm.mw/>, last accessed on 28 May 2022.

<sup>108</sup> See Section 48 of the National Registration Act No. 13 of 2020.

<sup>109</sup> See Section 42 (1) (g) of the National Registration Act

did not also see the need for registering the birth of their child let alone converting their birth reports into birth certificates. Birth Certificates were issued by the Registrar General's Office and people tended to confuse them with birth Reports (issued then at, and by the Hospital). When the NRB introduced the issuance of birth certificates including the conversion of the old birth certificates to the new ones was taken over by the NRB.

The National Registration Act imposes an obligation on every person who has a duty to register a child born in Malawi. The duty to register the birth of a child lies in,

“the father and mother, and in default of the father and mother, of the occupier of the person in which to his knowledge such child is born, and of each person present at the birth and of the person having charge of such child”.<sup>110</sup>

The following individuals have an obligation to register birth of a child in Malawi: “parents, guardian social welfare officer or foster parents to the district registrar or an authorized person”.<sup>111</sup> The obligation to register a child commences within six weeks of the birth.

It is significant to observe that Malawi aspires to attain universal birth registration.<sup>112</sup> Information sourced from the NRB shows that as of 2 February 2022, Malawi had registered and issued birth certificates countrywide to approximately 2 million children only since the introduction of national identity registration in the country.<sup>113</sup> The low numbers of birth registration are attributed to several factors. Firstly, most people do not appreciate the importance of birth certificates, particularly in their daily lives hence not compelled to register their children. As already observed, the lack of awareness on the importance of birth certificates was common prior to the enactment of the National Registration Act when birth registration was not mandatory. However, apathy appears to continue in the current legal dispensation due to the second reason which is that Malawi has a high rate of deliveries at home.<sup>114</sup> Home deliveries sometimes make birth registration difficult.

In terms of whether there is a requirement for proof of delivery or identification before registering birth, the law does not explicitly stipulate such requirements. The process of obtaining

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<sup>110</sup> See section 24(1) of the National Registration Act.

<sup>111</sup> See Section 20(2) of the Regulations to the National Registration Act.

<sup>112</sup> See National Registration Bureau, Statement by the Chief Director of the Director of the National registration Bureau, “News & Events”, online at <http://www.nrb.gov.mw/index.php/portfolio/73-leberkas-tail-swine-pork>, last accessed on 3 March 2022.

<sup>113</sup> Information confirmed through interview with the Deputy Director of the National Registration Bureau.

<sup>114</sup> See Susan Gennaro, and others “Child bearing in Malawi”, (1998) 27(2) *Clinical Issues*, 191-196; See also Eunsoo Timothy Kima and others “Availability of health facilities and utilization of maternal and newborn postnatal care in rural Malawi, BMC Pregnancy Childbirth 19, 503 (2019), Iso available online at <https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-019-2534-x#citeas>, last accessed on 18 April 2022.

birth certificates usually starts at birth and there is no cost attached to its issuance. The procedure for registering a child entails the duty bearer completing,,

“a birth report in respect of such birth and by certifying its correctness by signing or, if unable to sign, by affixing the mark of the person effecting registration to the birth report and delivering it to the district registrar of the district where the birth occurred.”<sup>115</sup>

There is no similar obligation for registering a child who is born out of wedlock. However, where it is proven in court of law or pursuant to a request and agreement of the mother of the child, a father can be registered as a father of the child.<sup>116</sup> In this instance, the father must acknowledge that he is the father of the child and should sign, or affix his mark to the birth report that he is the father.<sup>117</sup>

For foundlings, the duty to register their birth lies with the person who finds such a child. It is also a duty for any person in whose charge such a child may be placed to give information as informant possesses for the purpose of registering the birth.<sup>118</sup> Any birth that is reported after six weeks from the date of birth of a child is considered and treated as late registration.<sup>119</sup> Late birth registration attracts a prescribed fee of Malawi Kwacha 2, 000.<sup>120</sup> A child will be considered for late registration where a person fails to provide a valid reason for the delay in the application for registration.<sup>121</sup>

Thirdly, the other reason that contributes to the low numbers of registration of birth certificates is the fees that one has to pay to obtain them. For children born from foreign parents, the fee is currently pegged at Malawi Kwacha 30, 000. 00.<sup>122</sup> Some of the people who qualify for registration and for birth certificates face challenges in raising this amount, particularly the minority groups like refugees and Asylum seekers. Finally, the poor record of birth certificates issued to parents is due to inadequate staff that registers births in health facilities as narrated below by on KI:

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<sup>115</sup> Section 24(2) of the National Registration Act

<sup>116</sup> Section 24(3)(a)(b) of the National Registration Act.

<sup>117</sup> Ibid.

<sup>118</sup> Section 26 of the National Registration Act.

<sup>119</sup> See Section 21(2) of the Regulations to the National Registration Act

<sup>120</sup> The prescribed fee for late birth report is contained in the Schedule to the Regulations to the National Registration Act. The same amount is applicable for late registration for National identity cards.

<sup>121</sup> Section 21(2) of the Regulations to the National Registration Act.

<sup>122</sup> See the Schedule to Government Notice No. 8A, National Registration Regulations, 2015, April 2015, available online at <http://citizenshiprightsafrika.org/wp-content/uploads/2019/11/Malawi-National-Registration-Regulations.pdf>, last accessed on 1 February, 2022. The exchange rate between the Malawi Kwacha and USD\$ was 1MK=1011.8053. See Reserve Bank of Malawi official website at <https://www.rbm.mw/>, last accessed on 28 May 2022.

*"Yeah so, but so, probably I will just give like as of now, we are not doing good to be honest in terms of the birth certificates. As much as it is mandatory but in most facilities birth that are occur are not registered. One because we don't have... like in most facilities we don't have NRB staff so in this case, the registration is supposed to be done by the health personnel but they normally say "No we are busy with some other things and the like" So uhm the numbers are really on the lower side, so maybe you may find that for birth maybe in a month maybe they might have about 50 births that have occurred, maybe we only have 10 births that have been registered"* **Government official 2**

The foregoing notwithstanding, it is significant to observe that the NRB does not discriminate against any child on the basis of nationality when issuing birth certificates. Any child born in Malawi is registered no matter their nationality. This is so regardless of the fact that the child was born from an undocumented foreign national or not; the officials are instructed to just write the nationality of the father and mother leaving that of the child blank. According to the Directorate of the National Registration Bureau, this is done to ensure that the institutions sticks to its mandate of registering every birth in the country and not determining the nationality of the child or applicant as this is the responsibility of the Department of Migration and Citizenship. Since the responsibility of determining the nationality of children does not rest with the NRB they deliberately leave the details of the child's nationality on the birth certificate blank, as already indicated.

The two (2) million figure of children registered at birth and issued with birth certificates between 2010 where the exercise was introduced to the time when this study was undertaken is concerning considering that Malawi population is predominantly youthful, and if the Government does not take deliberate steps to register almost all children in the country chances are high that many children will be undocumented and be at risk of statelessness. Given the importance of birth registration for recognition of citizenship in the country, every child in Malawi should be registered at birth, free of charge, in line with the requirements of the Convention on the Rights of the Child and the Africa Charter on the Rights and Welfare of the Child. International human rights standards demand that registration of a child should be done immediately after birth and where this is not possible steps be taken to ensure that the birth of child is registered in the national register. As to what is the definition of "immediately" the African Committee of Experts on the Rights and Welfare of the Child (the Committee) stated that this means that the child must be registered "as soon as possible, with due regard to cultural and local practice related to maternity and infant rearing."<sup>123</sup> In any event every birth must be registered "within a few days or weeks after birth and not months or years later."<sup>124</sup> The Committee further encouraged States to desist from charging for the late registration of children preferring instead that States should allow free

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<sup>123</sup> African committee on experts on the Rights and Welfare of the Child, general Comment No. 2: Article 6 of the African charter on the Rights and Welfare of the Child, 2014, para 79.

<sup>124</sup> Ibid, para 79.

registration as a matter of course and only charge in exceptional circumstances.<sup>125</sup> Since the numbers of birth registration in Malawi is significantly low, the country is taking deliberate steps to enlighten the public on the need for birth registrations. A KI explained this in the following way:

“We are trying to create that demand for birth certificate as well. We are discussing with the ministry of education let’s say maybe to also make it mandatory. If you want to start standard 1, there has to be a birth certificate to register...” **Government official 2**

The registration of adults in the national identity register is progressing rather very slowly as already observed. Unfortunately, the procedure for registration leading to the issuance of national identification cards is still premised on linking an individual to, or with his local or “native” family or community network. When mass registration of people in the country’s national register was introduced, the NRB demanded that every person must confirm his nationality through the village or place of origin. This meant that people who are residing in cities were asked to go to their home villages ie where their parents originated or came from which was difficult for various reasons. The public protested or raised concerns against the practicality of this requirement as result government revised that directive to thereafter allow verifications through chiefs located in townships or places where the applicants were currently residing.

The procedure for issuing national identity cards which is premised on linking an individual with a place of origin or community linkage as above observed may result in certain categories of people who cannot trace their places of origin or community linkage for various reasons being left out. Some people may have been born in cities where there are no village headmen or traditional authorities to identify them. Others may have been born abroad but returned to Malawi without being able to trace and locate their community network. Even where a community network may have been identified, it is possible that such a network may not confirm their identity. Most village headmen or local community leaders do not keep a register of their nationals from where an individual’s identify may be confirmed. Reliance of birth certificates as evidence of nationality is also problematic because very few people applied for, and obtained such certificates prior to the enactment of current Act in 2010. This problem has also continued with the coming into force of the new Act as very few births have been registered in the national register particularly for those that occur outside a medical facility.

### **3.6. Malawi’s efforts to combat statelessness**

Malawi is among the Southern Africa Development Community (SADC) countries that are participating in the UNHCR #IBelong Campaign to End Statelessness by 2024. The campaign was launched in November 2014, and the country joined other SADC countries to adopt an Action Plan for resolving existing major situations of statelessness and prevent new cases from emerging.

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<sup>125</sup> African committee on experts on the Rights and Welfare of the Child, *supra*, fn 123, para 81.

In October 2019, at the 'High-Level Segment on Statelessness' hosted by UNHCR in Geneva, Malawi pledged to reform the law that would grant protections against statelessness including the right to nationality for foundlings and those children who would otherwise be stateless.

Malawi also pledged to accede to the 1961 UN Convention on the Reduction of Statelessness and adopt the Ministerial Declaration following consultations with relevant stakeholders. Malawi also pledged to undertake and publish a qualitative study by June 2020 to better understand the situation of groups and individuals staying on its territory, and which ones are stateless or at risk of statelessness, with a view to finding a solution to their situation. Malawi also pledged to establish a procedure to determine the status of stateless migrants in line with the 1954 Convention. The government of Malawi also committed to review citizenship law and consider within that process to introduce a provision that grants nationality to children of unknown origin found in its territory who would otherwise be stateless. The government also pledged that it will put a safeguard in the law to grant nationality to children born on its territory who would otherwise be stateless by 2022.

Malawi has steadily progressed on some of the above pledges including the outcome of this Consultancy. However, as already observed, the country needs to speed up the accession of the 1961 Statelessness Convention and reform its laws on citizenship so that it can easily adopt protective measures for the reduction of statelessness in the country. The country also needs to remove obstacles associated with obtaining nationality documents including high costs, complicated and lengthy procedures for obtaining documents. As this study recommends the country should undertake a quantitative study to establish the numbers of stateless persons in the country so that minimum protective measures can be adopted in their favour. It will be observed below that the country is also expected to establish SDPs or nationality campaigns to document all stateless persons and those at risk of statelessness in the country.

## 4.0. CHAPTER 4: NATIONALITY LAW IN MALAWI

### 4.1. Historical Aspects relevant to Citizenship in Malawi

#### 4.1.1. Nationality under colonial rule

The citizenship law of Malawi traces its roots to the British colonial times, when the latter governed the country until 1964. Prior to attaining independence in 1964 Malawi was a British colony, and from 1891 to 1906 the country was known as British Central African Protectorate. From 23 October, 1953, Malawi was renamed to Nyasaland after the creation of the Federation of Rhodesia and Nyasaland. The Federation of Rhodesia and Nyasaland amalgamated the Southern Rhodesia, the present Zimbabwe; Northern Rhodesia, the present Zambia; and Nyasaland, now Malawi. The Federation of Rhodesia and Nyasaland came to an end on 29 March 1963.<sup>126</sup> On 6 July 1964 Malawi attained its independence pursuant to the provisions of section 1 of the Malawi Independence Act Chapter 46 of 1964.<sup>127</sup>

Although Malawi gained its independence in 1964, it did not sever ties with the laws of their colonial masters. The adopted British nationality laws<sup>128</sup> and its general legal traditions continued to influence the country's current legal framework.<sup>129</sup> The Malawi Independence Constitution of 1964 granted citizenship to any person born in the Nyasaland Protectorate including citizens of the United Kingdom and Colonies; and British protected persons who were recognised as such immediately prior to 6 July 1964 provided one of their parents were on that day born in Nyasaland.

#### 4.1.2. Nationality Law during the Transition to Independence

Pursuant to section 4 of the 1964 Constitution, Malawi's citizenship took effect from 6<sup>th</sup> July following the above section's carrying over all laws that were still valid as of that date.<sup>130</sup> Section 4 of the 1964 Constitution granted citizenship to any person born in Malawi after the 5<sup>th</sup> of July 1964 except where the father was a diplomat or a citizen of a country at war with Malawi and the birth

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<sup>126</sup> Tabath Masangu, *supra*, fn 99; See also J.J. B. Somerville: "The Central African Federation" (1963) 39(3) *International Affairs*, 388 also available online at [https://cadmus.eui.eu/bitstream/handle/1814/70655/RSCAS\\_GLOBALCIT\\_CR\\_2021\\_8.pdf?sequence=1&isAllowed=y#:~:text=Section%204%20\(1\)%20of%20the,a%20person%20of%20African%20race](https://cadmus.eui.eu/bitstream/handle/1814/70655/RSCAS_GLOBALCIT_CR_2021_8.pdf?sequence=1&isAllowed=y#:~:text=Section%204%20(1)%20of%20the,a%20person%20of%20African%20race), last accessed on 1 February 2022.

<sup>127</sup> The Malawi Independence Act Chapter 64 of 1964 can be accessed online at <https://www.legislation.gov.uk/ukpga/1964/46>, last accessed on 22 February 2022. See also Hansard 1803-2005 of the British House of Commons vide the statement of the Under-Secretary of State for Commonwealth Relations and for the Colonies (Mr. John Tilney), online at <https://api.parliament.uk/historic-hansard/commons/1964/may/11/malawi-independence-bill>, last accessed on 27 March 2022.

<sup>128</sup> See also Simon Roberts, "The Constitution of Malawi, 1964" (1964) 8(3) *J. African Law*, 178-184.

<sup>129</sup> See Chiwemi Chimwete, Susan Cotts Watkins and Msipyaphazi Zulu, "The Evolution of Population Policies in Kenya and Malawi", *Population Research and Policy Review*, (2005) 24(3), p 87; see also UNHCR SADC Statelessness Report, *supra*, fn 1, p 10.

<sup>130</sup> See also Simon Roberts, *supra*, fn 128.

occurred in a place under occupation by that country. Where the mother was a citizen of a country at war with the country, the above exclusionary clause did not apply. However, citizenship was not granted to a person whose parents were neither citizen of Malawi as confirmed by the full text of section 4 of the 1966 Independence Constitution which provided as follows:

“Every person born in Malawi after 5th July 1964 shall become a citizen of Malawi at the date of his birth: Provided that a person shall not become a citizen of Malawi by virtue of this section if at the time of his birth— (a) *neither of his parents is a citizen of Malawi* and his father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Malawi; or (b) his father is a citizen of a country with which Malawi is at war and the birth occurs in a place then under occupation by that country.”(Emphasis added)

Section 5 of the 1966 Malawi Citizenship Act provided for citizenship to a child born outside the country if at the time of birth, the father was a citizen of Malawi and he was also born in Malawi. If the mother was the citizen, she could not transmit citizenship to the child as the child would be deemed to have acquired the citizenship of the father. Attribution of citizenship was limited only to one generation.<sup>131</sup>

The 1966 Constitution and the Citizenship Act continued with the citizenship principles enshrined in the 1964 Constitution and provided for the acquisition of citizenship by birth, descent, or by registration.<sup>132</sup> The Statute also regulated the manner and circumstances in which aliens were to be naturalised as citizens of Malawi.<sup>133</sup> The most crucial amendment under the 1966 statute was the removal of the birth-right citizenship meaning that automatic citizenship to persons born in Malawi was no longer as of right. The amendment to section 4(1) of the Citizenship Act added another requirement which needed one of the parents to be of *African race*. The amendment also allowed persons with commonwealth or Malawian ties to apply for citizenship.<sup>134</sup> Section 5 of the 1966 Citizenship Act also granted equal rights to women and men to pass on citizenship to their children.<sup>135</sup>

The Statute Law (Miscellaneous Amendments) Act 5 of 1971 repealed section 4(2) of the 1966 Citizenship Act to allow for those people with close connection to Malawi to qualify for citizenship. The discriminatory provision in section 2 of the 1971 Citizenship Act which granted citizenship to “persons of African race” was also removed by the 1992 Amendment. The same was the case with the words “and is a person of African race in sections 4 and 5” of the Citizenship Act.

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<sup>131</sup> Tabath Masangu, *supra*, fn 126, p 3.

<sup>132</sup> See the Preamble to the Malawi Citizenship Act No. 28 of 1966. See also Wiseman Chijere Chirwa, Nandin Patel and Fidelis Kanyongolo, *Democracy Report of Malawi* (2000) Stockholm, 9.

<sup>133</sup> See the Preamble to the Malawi Citizenship Act No. 28 of 1966.

<sup>134</sup> See Tabath Masangu, *supra*, fn, 126, p 7.

<sup>135</sup> Tabath Masangu, *supra*, fn 126, p 6.



It appears both the 1964 and 1966 amendments to the Constitution failed to provide for the rights of children to nationality,<sup>136</sup> which omissions were corrected in the Constitution of the Republic of Malawi, 1994 through section 23 which grants them the right to a given name, family name and nationality. Similarly, under this Constitution women are also granted the right to acquire and retain citizenship and nationality without discrimination.<sup>137</sup> The current legislative framework, to the extent that it does not provide for the citizenship of foundlings or children born in the country who would otherwise be stateless, contradicts the constitutional principles enshrined under section 23 above.

The Citizenship Act has recently undergone further amendments by providing for dual nationality.<sup>138</sup> The significance of this amendment lies in the fact that the discriminatory provisions which required women who acquired citizenship of another country by marriage to either renounce the other citizenship or cease to be a citizen of Malawi on the first anniversary of the date of that marriage were removed. Dual citizenship also means that acquisition of another citizenship by a citizen of Malawi does no longer lead to an automatic loss of the Malawian citizenship by voluntarily acquiring another citizenship or retaining a second citizenship after reaching majority. Other significant advantages of the 2019 amendment is that renunciation of citizenship is no longer mandatory where a citizen of Malawi intends to acquire citizenship of another country provided that the Department of Immigration and Citizenship Services is informed of the dual citizenship status.<sup>139</sup>

#### 4.1.3. Nationality law in Malawi today

The evolution of citizenship law in Malawi can, therefore, be traced to the incorporation of the colonial laws at Independence. The 1964 Citizenship Act used the criterion of birth in determining nationality in the sense that the acquisition of the citizenship of Malawi by any person was conditional to a person being born in the country (the *jus soli principle*). The 1966 Amendment to the Citizenship Act, on the other hand, improved this condition by requiring the connection of blood relations for one to obtain citizenship (the *jus sanguinis principle*).<sup>140</sup> Section 4 of the Citizenship Act which grants citizenship by birth adopted the original colonial and 1964 requirements of acquiring citizenship by providing for an automatic attribution of citizenship on the basis of birth if one of the parents is a citizen of Malawi. However, this does not apply to those “who at the time of birth the country where the father comes from is at war with Malawi and the birth occurs at a place then under occupation by the enemy.”<sup>141</sup> Citizenship may also be granted

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<sup>136</sup> Tabath Masangu supra, fn 126, p7.

<sup>137</sup> See Section 24 of the Constitution.

<sup>138</sup> See Section 2 of the Citizenship (Amendment Act) No 11 of 2019.

<sup>139</sup> Tabath Masangu, supra, fn 126, p 8.

<sup>140</sup> Bronwen Manby, *Citizenship Law in Africa: A Comparative Study*, Open Society foundation, New York, 2016; See also Tabath Masangu, supra, fn 126, p 12.

<sup>141</sup> Section 4 of the Citizenship Act

by descent to every person born outside Malawi after 5<sup>th</sup> July 1966 if one of his or her parents were born in Malawi.<sup>142</sup>

The special Law Commission recently considered section 4 of the Act, and resolved to retain some of the requirements subject to the following conditions: the applicant demonstrating a level of commitment which can be objectively measurable including one of the parents being a citizen of Malawi; the person attaining the age of 10 years and being resident in the country for similar number of years or aggregate number of 10 years; and the applicant's parents holding a Permanent Residence Permit.<sup>143</sup>

With respect to the proviso that excludes acquisition of citizenship to children whose father originate from a country at war and the birth occurred in a part of a territory of Malawi that is under occupation, the Commission resolved to amend section 4 of the Citizenship Act,

"to pave way for children born of any Malawian parent but in an enemy territory to acquire Malawian citizenship [...] only after the child undergoes an assessment before the Board whether they could be suitable citizens taking into account the best interests of the child and national security considerations [...]"<sup>144</sup>

The proposed amendment progressively addresses one of the potential causes of statelessness for children born in a part of Malawi that is under occupation by foreign forces by requiring the discretion of the Citizenship Board to assess whether a person qualifies for citizenship even where he or she was born in a territory that was at war with Malawi. The Special Law Commission also recommended for legislation to provide for "citizenship by birth based on lineage, restricted to the third generation"<sup>145</sup> for children born abroad.

The current requirements on acquisition of citizenship by birth, in so far as they are based on descent, still make it difficult for a stateless person to meet, more so when Section 18 of the Citizenship Act is read together with section 5 of the Act. Section 5 of the Act provides for the acquisition of citizenship by descent in the following way:

"A person born outside Malawi after the 5<sup>th</sup> of July, 1966, shall become a citizen of Malawi of Malawi on the date of his birth if his father or mother is a citizen of Malawi by birth."

From a reading of the above provision, it is clear that citizenship is conditional to either the father or mother being citizens of Malawi by birth, If the father or mother is not a citizen by birth then the child may either be stateless or at risk of stateless if such a child does not belong to another country. The requirement for persons born in Malawi from parents who are not citizens of Malawi

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<sup>142</sup> Section 5 of the Citizenship Act.

<sup>143</sup> See Report of the Special Law Commission on Citizenship, supra, fn 18, p 18-23, esp. p 23.

<sup>144</sup> Report of the Special Law Commission on Citizenship, supra, fn 18, p 30.

<sup>145</sup> See Report of the Special Law Commission on Citizenship, supra, fn 18, p 25.

by birth contradicts the entire scheme of obtaining citizenship in Malawi since the Citizenship Act itself permit the granting of citizenship on other grounds other than by birth only. Current provisions of Section 5 of the Citizenship Act may violate provisions of the of section 20 of the Constitution and the Convention on Racial Discrimination to which Malawi is a party to the extent that it treats children born from parents who are Malawi citizens based on other grounds than birth.

#### **4.1.4. Statelessness generating situations from colonial to present day nationality law and individuals not eligible for nationality under the old citizenship law**

As the above discussion has shown, past reforms of the Citizenship Act in the years 1966; 1971; and 1992, among others, did not exhaustively close some of the gaps that existed in the old laws. Discriminatory laws that existed under colonial laws continued and were carried over after independence. The reforms made to the Citizenship Act after independence was neither retroactive nor comprehensive. The evolution of nationality laws from the colonial time to independence and the present day nationality law has, therefore, entrenched laws that risks certain categories of people to be at risk of statelessness. Since the 1964 Constitution carried over all laws having a force of law prior to the 5<sup>th</sup> day of July meant that certain categories of people who were not citizens of Malawi remained non-citizens by operation of law. The gaps that existed under past laws were not closed prior to independence leaving certain groups of people either still stateless or at risk of statelessness. .

The first group of people who were either stateless or at risk of statelessness during the old law and carried over to the current law on citizenship included those who were born in Malawi before independence to either the father or mother who were themselves not born in Malawi. The second groups of people were those born outside Malawi to a Malawian mother and a foreign father. These were unable to transmit their nationality to their children by the operation of the existing discriminatory laws. The third groups of people were foundlings as both the colonial and post-colonial laws did not have a framework for their acquisition or registration of citizenship. The fourth category of people included stateless persons who, although recognised by the legal framework could not attain citizenship due to rigid and complex laws. The laws also failed to recognise dual nationals providing instead the requirement to renounce one's citizenship before attaining a new one.

Unlike the current constitutional and statutory framework which allows for dual nationality; the right of every child to acquire nationality; and non-arbitrary deprivation of citizenship, the Citizenship laws that were adopted at independence in 1964 and, arguably, also the current piece of legislation did not give men and women the equal opportunity to transmit citizenship to their children. Such laws risked people to statelessness. Citizenship legislation enacted in Malawi over the years retained discriminatory provisions including conditioning the acquisition of citizenship by descent to those who had one parent who was a citizen of Malawi by birth;

and, in the past, one of them being of African race as already observed. This means that people including children who did not meet these requirements were either stateless or at risk of statelessness.

The foregoing confirms that the evolution of the Citizenship Act from the colonial times through the era of independence to the current constitutional framework retained provisions which risked certain groups of people to statelessness. No piece of legislation in Malawi explicitly addressed the subject of foundlings, as already observed; the subject of determination of statelessness and its inherent challenges and attendant rights, as it will be observed below. Although the current section 18 of the Citizenship Act has a long history, it only permits the registration of stateless persons as citizens upon fulfilling certain stringent conditions. The conditions set down by the Citizenship Act for registration of stateless persons for citizenship are lengthy and very costly leading to such people not being able to acquire citizenship.

#### **4.2. Registration for citizenship or naturalisation by Refugees or Asylum seekers**

An area that is still controversial relates to the acquisition of citizenship by refugees or asylum seekers, particularly those in long-term residency through registration. As already observed, refugees are one of the groups of people most likely to be at risk of statelessness in the country, and Malawi, being one of the countries with a large influx of this group, presents a fertile ground for risking statelessness if they do not have any other country that recognises their nationality. However, both the Citizenship and the Refugee Acts contain no explicit provision dealing with the naturalisation of refugees or asylum seekers. It appears the omission can be explained from the fact that at the time the Refugee Act was enacted Malawi had already entered reservations on the relevant provisions of the Convention which would have otherwise allowed refugees to apply for citizenship.<sup>146</sup> Malawi still retains the said reservation, particularly, against Article 34 of the 1951 UN Convention on the Status of Refugees and its Protocol of 1967. Article 34 of the Convention on the Status of Refugees provides that,

“The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”

Article 34 guarantees refugees the right to access a facilitated naturalisation process, however, Malawi entered a reservation in the following way:

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<sup>146</sup> Report of the Special Law Commission observed that Malawi acceded to the Refugee Convention in 1987 which was two years before enacting the Refugee Act. See the Report of the Special Law Commission, *supra* fn 18, p 88 .

"In respect of article 34 the Government of the Republic of Malawi is not bound to grant to refugees any more favourable naturalization facilities that are granted, in accordance with the relevant laws and regulations, to aliens generally."<sup>147</sup>

To the extent that Article 34 of the Convention on the Status of Refugees imposes an obligation to contracting states to facilitate the assimilation and naturalisation of refugees, Malawi's reservation led to the provisions of Article 34 of the Refugees Convention not translating into reality with the current nationality laws.

Suffice to observe that the registration for citizenship by refugees under the current legal framework is stringent. The legal framework also imposes high prescribed registration fees<sup>148</sup> which makes it difficult for refugees to register for citizenship in Malawi. The Special Law Commission has recommended for the adoption of a provision under the proposed new legislation that should allow for the naturalisation of refugees on two conditions. The first is where the refugee demonstrates that he has resided in Malawi as a refugee for a period of five years from the date he was granted refugee status in accordance with the Refugee Act.<sup>149</sup>

The second is if the Refugee Committee has certified that he will remain a refugee indefinitely.<sup>150</sup> The oddity behind the latter proposal is that it conditions the registration for citizenship by refugees on unreasonable requirement. This is because no person can predict nor certify with certainty when or whether he or she will remain a refugee indefinitely let alone for a lesser or shorter period. A refugee may cease to be a refugee when circumstances in the country of origin changes substantially. Refugees are vulnerable groups and the Special Law Commission should have recommended for the enactment of a law that allows for speedy, less costly and smooth naturalisation of this group of people. Refugees' naturalisation or registration as citizenship should be easily facilitated by a state by adopting policy measures that exempt them from payment of fees; and considerably reducing the period of residence in comparison with other non-refugee applicants.

It is significant to observe that most refugees have no nationality documents particularly from their countries of origin and they usually face insurmountable obstacles to regularise their situation. For example Angolan refugees born in Angola but whose birth was not registered cannot apply for national identity cards outside Angola and without the identity card they cannot apply for passport. Their birth also needs to be registered in their country of birth but they have

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<sup>147</sup> The reservation entered by Malawi can be accessed online at <https://www.unhcr.org/4d934f5f9.pdf>, last accessed on 10 March 2022.

<sup>148</sup> The Fourth Schedule of Immigration (Amendment) Regulations No. 77 of 2019 made under the Immigration Act on 27 December 2019 sets application fees in the following manner: citizenship by registration- for stateless person is \$75, 000; a minor from Malawi Citizenship is \$20, 000; spouses for Malawi Citizenship is \$ 20, 000.00; and for Malawi Citizenship in general is pegged at \$20, 000.

<sup>149</sup> See Special Law Commission, *supra* fn 18, p 92.

<sup>150</sup> *Ibid.*

no documents to return to their countries of origin and apply for late birth registration.<sup>151</sup> These challenges may equally apply to Malawi as refugees considering that the National Registration Act, as it will be observed below, equally conditions the registration of nationality on ties that would require a person to only register in Malawi. One solution that the Special Law Commission would have considered is to provide for ways that allows for the issuance of residence permits to refugees without insisting on identity documents from their countries of origin. Instead the law should permit the registration and issuance of identity/nationality documentation to their population in Malawi *gratis*.

As Malawi still hosts a large population of refugees in the country, and has done so for decades, continuing to maintain the above reservation against Article 34 of the Refugee Convention is unnecessary. Some of the refugees “have since assimilated in the communities beyond the refugee camps.”<sup>152</sup> Some still consider Malawi their only home including those that were born in the country and know no other country than Malawi. Some have also been granted Business Resident Permits and Temporary Employment Permits over time making the relevance of the reservations questionable.<sup>153</sup> Others have been naturalised already in line with the Citizenship Act.<sup>154</sup>

This suggests that the reservations that Malawi entered into against the Convention on the Status of Refugees are not necessary as circumstances on the ground have changed. To the extent that Malawi continues to host refugees, the risk of statelessness will remain thereby presenting an opportunity for Malawi to reconsider the relevance and effectiveness of the above reservations. Malawi also needs to consider adopting a comprehensive legal framework for naturalisation of refugees and granting of permits to refugees that will lead to their naturalisation in the country.<sup>155</sup>

#### 4.3. Legal Framework on the Right to Nationality for Stateless Persons in Malawi

Malawi law allows for stateless persons to acquire citizenship if they qualify and meet the requirements provided for under section 18 of the Malawi Citizenship Act. Section 18 (1) (a) requires a person to satisfy the Minister that he or she “is and always has been stateless” *and* “that he was born within Malawi or that one of the parents was a citizen of Malawi at the time when he was born” to qualify for citizenship. A person’s recognition as stateless under the Citizenship Act is conditional to one being born in Malawi or one of the parents being a citizen of Malawi at birth; and being resident in Malawi for a period of 3 years. If one fails to meet these requirements or

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<sup>151</sup> Patricia Jeronimo, *Report on Citizenship Law: Angola*, Global Citizenship Observatory (BLOBACIT), April 2019, also available online at [http://repositorium.uminho.pt/bitstream/1822/61263/1/JER%C3%93NIMO%2C%20Patr%C3%ADcia%2C%20Report%20Angola%2C%20RSCAS\\_GLOBALCIT\\_CR\\_2019\\_04.pdf](http://repositorium.uminho.pt/bitstream/1822/61263/1/JER%C3%93NIMO%2C%20Patr%C3%ADcia%2C%20Report%20Angola%2C%20RSCAS_GLOBALCIT_CR_2019_04.pdf), last accessed on 5 June 2022.

<sup>152</sup> Report of the Special Law Commission, *supra*, fn 18, p 89

<sup>153</sup> Report of the Special Law Commission, *Ibid*, p 89.

<sup>154</sup> Report of the Special Law Commission, *supra*, fn 18, p 89.

<sup>155</sup> Report of the Special Law Commission, *Ibid*, p 89.

has a previous conviction for an offence for behaviour, prejudicial to public security and sentenced to imprisonment of five years or more,<sup>156</sup> then he or she does not qualify for registration as a citizen. These requirements are, however, not in line with reality as not every stateless person or those at risk of being stateless could have been born in Malawi and been resident in the country for three years prior to the said application. The section also does not provide for the minimum standards of protection for stateless persons who are resident in the country let alone the procedure for determining statelessness. There is no definition of a stateless person agreed upon by law. A lack of definition creates extreme legal difficulty and uncertainty to determine a person's status. A stateless person does not have any documents from the country of origin including Malawi as there is no statelessness determination procedure (SDP) in Malawi, as it will be argued below. In this regard, it is very difficult for a person to prove residence let alone its length as required by Section 18 of the Citizenship Act.

Suffice to observe, however, that the Special Law Commission on Citizenship recommended the retention of section 18 of the Citizenship Act to allow for the acquisition of citizenship by registration for stateless persons except where the person was convicted for a deportable offence under the Immigration Act; an offence of genocide or human trafficking.<sup>157</sup> A controversial recommendation that the special Law Commission proposes is the exclusion of a person who has not attained the age of eighteen (18) years to make an application for registration as a stateless person. The proposed recommendation is that such a person's application must be made on his behalf by his parent or guardian.<sup>158</sup> The difficulty with this proposal lies in the fact that not all stateless children have a parent or guardian. It appears the special Law Commission only focused on harmonising the age of majority and not necessarily on whether the provision was at all necessary considering that a stateless person may be a minor who may not have a guardian or parent. The foregoing, notwithstanding, however, the special Law Commission on Citizenship's recommendations is a positive step towards management of statelessness in Malawi.

The Special Law Commission should also have tested the provisions of section 18 of the Citizenship Act against its compliance with Article 32 of the 1954 Statelessness Convention. Article 32 of the 1954 Statelessness Convention provides as follows:

"The Contracting States shall as far as possible facilitate the assimilation and naturalisation of stateless persons. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings."

To the extent that section 18 of the Citizenship Act contains provisions that inhibit the possible facilitation of naturalisation of stateless persons, it should be redrafted so that some of the prerequisites for acquiring citizenship including the requirement that one must be born in Malawi

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<sup>156</sup> Section 18(1) (d) of the Citizenship Act.

<sup>157</sup> Report of the Special Law Commission, *supra*, fn 18, p 81.

<sup>158</sup> See Report Special Law Commission, *Ibid*.

or to a Malawian parent should be removed. The provision should, rather, emphasise on facilitation of naturalisation by exempting fees for stateless persons when applying for citizenship and also removing the number of years of residence required for naturalisation.

#### 4.3.1. Protection of “Foundlings”

The Citizenship Act does not provide for protections against the statelessness of foundlings who are defined as unknown or abandoned children<sup>159</sup> found in Malawi. The contentious issue with managing foundlings pertains to the acceptable age for a child to be considered as one as there is no established customary international law principle regarding state practice on the subject.<sup>160</sup> Suffice to observe that where a state intends to provide for a minimum age for granting protections to foundlings, it should be the date the child was found and not when the authorities became aware of the said child.<sup>161</sup>

As the study has shown, Malawi adopted a policy of universal registration of children for purposes of birth certificates, meaning that foundlings are also registered at birth as a legal requirement. Suffice to observe that the proposal by the special Law Commission on Citizenship is for Malawi to amend section 5 of the Citizenship Act with conditions, to allow for citizenship, not only by descent, but also for adopted children;<sup>162</sup> children of parents with dual citizenship;<sup>163</sup> and foundlings.<sup>164</sup> The special Law Commission came to this conclusion after observing that there was a gap in the law for its failure to provide for the rights of foundlings.<sup>165</sup> To cure the defect, it recommended for the inclusion of a provision in the proposed legislation to cover citizenship for foundlings. Only children who are less than eight years of age and found abandoned, deserted or with unknown parents should qualify for citizenship.<sup>166</sup>

The Special Law Commission’s recommendation is reflective of state practices on the subject which appear to show an inconsistent limit of the age range for granting nationality to foundlings. State practices reveals that several “Contracting States to the 1961 Statelessness Convention limit the grant of nationality to foundlings who are very young (12 months or younger) while most Contracting States apply their rules in favour of children up to an older age, including in some cases up to the age of majority”.<sup>167</sup> The UNHCR Guidelines on Statelessness No. 4 also

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<sup>159</sup> See Report of the Special Law Commission on Citizenship, *supra*, fn 18, p 32-34

<sup>160</sup> UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, p 12, para 57-58, UN Doc. HCR/GS/12/04, 21 December 2012

<sup>161</sup> See UNHCR, *Guidelines on Statelessness No. 4, Ibid*, p 12, para 59.

<sup>162</sup> See Report of the Special Law Commission, *supra*, fn 18 p 34.

<sup>163</sup> See Report of the Special Law Commission, *Ibid*, p 32-35.

<sup>164</sup> See Report of the Special Law Commission, *supra*, fn 18, p 32-35.

<sup>165</sup> See Report of the Special Law Commission, *Ibid*, p 33.

<sup>166</sup> See Report of the Special Law Commission on Citizenship, *supra*, fn 18, p 56-57.

<sup>167</sup> UNHCR, *Guidelines on Statelessness No. 4: Ensuring*, *supra*, fn 159, page 12, para 57, also available online at <https://www.refworld.org/pdfid/50d460c72.pdf>, last accessed on 19 April 2022,



recommends the granting of nationality to foundlings when they “are not yet able to communicate accurately information pertaining to their identity of their parents or their place of birth”<sup>168</sup>. Article 2 of the 1961 Convention on Statelessness does not define the age at which a child may be considered as a foundling as such it would be argued that “nothing prevents a State from setting the age of a foundling to be below the age of majority such as under 18 years old.”<sup>169</sup>

As the Special Law Commission has set down an age limit for the acquisition of nationality by foundlings as above observed, the UNHCR Guidelines No. 4 guides States to look at the date when the child was found and not the date when the child came to the attention of the authorities<sup>170</sup> in determining age. Malawi can draw lessons from other African countries including Zimbabwe which have set down the age limit for foundlings at 15 years;<sup>171</sup> Zambia at 8 years of age;<sup>172</sup> and Ghana at not more than seven years of age.<sup>173</sup> Once a foundling’s nationality is granted it may not be lost until “it is proven that the child concerned possesses another State’s nationality”.<sup>174</sup>

It may be observed that the failure by Malawi to grant citizenship to abandoned children found in the territory has been a subject of comment by various international human rights institutions. In 2017, the Committee on the Rights of the Child noted with concern that “despite [Malawi] enacting in its Citizenship Act a provision that guarantees that children born in its territory who would be otherwise stateless, have the right to nationality. As already observed, Malawi has since pledged to reform its laws to ensure that minimum guarantees of protection in favour of stateless children of unknown parents found in the territory, and for children born in the country who would otherwise be stateless to be recognised by statute.<sup>175</sup> The proposal to reform the Citizenship Act to include the registration for citizenship of foundlings is progressive and will mitigate the risk of statelessness in Malawi.

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<sup>168</sup> Ibid, p 12, para 58

<sup>169</sup> Mai Kaneko-Iwase, *Nationality of Foundlings: Avoiding Statelessness among Children of Unknown Parents Under International Nationality Law*, p 245.

<sup>170</sup> UNHCR Guidelines No. 4, supra, fn 159, p 12, para 59

<sup>171</sup> See Global Citizenship Observatory (GLOBACIT), *Report on Citizenship Law: Zimbabwe*, p 1, also available online at [https://cadmus.eui.eu/bitstream/handle/1814/60436/RSCAS\\_GLOBALCIT\\_CR\\_2019\\_01.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/60436/RSCAS_GLOBALCIT_CR_2019_01.pdf?sequence=1), last accessed on 18 April 2022.

<sup>172</sup> See Section 32(2) of the Constitution of Zambia (Amendment) Act No 2 of 2016.

<sup>173</sup> See Section 8 of the Citizenship Act 591 of 2000, also available online at <https://www.refworld.org/pdfid/3eda135a2.pdf>, last accessed on 19 April 2022.

<sup>174</sup> UNHCR Guidelines No. 4, supra, fn 159, p 12 para 60.

<sup>175</sup> See Brownwen Manby, Manby Bonwen, *Citizenship and Statelessness in the Member States of the Southern African Development Community*, (2011), p 32.

#### 4.4. Renunciation, Deprivation and Restoration of Citizenship

The provisions on renunciation, deprivation and restoration of citizenship under the Citizenship Act have a critical bearing on statelessness. Section 23 of the Citizenship Act allows for a Malawian citizen to renounce his or her citizenship if they obtain another country's citizenship provided the citizen satisfies the Minister of his intentions.<sup>176</sup> The impact of this provision is yet to be felt with the coming into force of the 2019 amendment to the Act which now allows dual nationality for Malawian citizens. Suffice to observe that renunciation, being a voluntary act as compared to deprivation,<sup>177</sup> is in line with Section 47(2) of the Constitution which prohibits the deprivation of citizenship by arbitrary means.

The provisions dealing with deprivation of citizenship under the Act are very broad and arbitrary. Citizenship may be deprived if the Minister is satisfied that a citizen "has shown himself by act or speech to be disloyal or disaffected towards the Government of Malawi";<sup>178</sup> during any war, the citizen has "engaged, unlawfully traded or communicated with any enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war";<sup>179</sup> has been sentenced within seven years of becoming naturalised;<sup>180</sup> and has been ordinarily resident outside Malawi without registering with a Malawi diplomatic or consular office abroad or notified the Minister of his intention to retain citizenship.<sup>181</sup> Depriving a person of his citizenship for acting or speaking in a manner perceived to be disloyal or disaffected towards the Government of Malawi is not only a subjective criteria for determining the guilt of an individual, it may also read to abuse by those with the power to make decisions. The above provisions for depriving citizenship are also vague, unclear and may lead to the arbitrary deprivation of citizenship for those who are perceived to be on the wrong side of the political elite. In the absence of a clear definition of what it means to be disloyal or disaffected towards the Government of Malawi, the provisions of section 25 of the Citizenship Act are contrary to the spirit of the constitution which guarantees the freedom of speech for every person in Malawi.

The Special Law Commission on Citizenship considered and resolved to retain the provisions of section 23 of the Citizenship Act governing the process of renunciation.<sup>182</sup> However, with respect to deprivation, and being concerned with cases of executive abuse, it resolved to amend section 24 by subjecting the decision to revoke or deprive a person of his or her citizenship to the Citizenship Board.<sup>183</sup> The Special Law Commission recommended that the law "should be drafted

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<sup>176</sup> See section 23(2) of the Citizenship Act

<sup>177</sup> See R. Baubock and V. Paskalev, "Citizenship Deprivation, A Normative Analysis", (2015) CEPS.

<sup>178</sup> Section 25(2)(a) of the Citizenship Act

<sup>179</sup> Section 25(2)(b) of the Citizenship Act.

<sup>180</sup> Section 25(2)(c) of the Citizenship Act.

<sup>181</sup> Section 25(2)(d) of the Citizenship Act.

<sup>182</sup> Report of the Special Law Commission on Citizenship's Report, supra, fn 18, p 93.

<sup>183</sup> Ibid, p 94

in a manner that requires the Board to make recommendations that do not provide room for discretion to the Minister.”<sup>184</sup>

With respect to the provisions of Section 25(2) (a) of the Citizenship Act which empowers the Minister to deprive a citizen of his citizenship because of actions or speech that are disloyal or disaffected towards Government, the special Law Commission “noted that the provision could be unconstitutional in view of the freedom of speech and other political rights guaranteed in the Constitution”.<sup>185</sup>

As for the provisions of section 25(2)(c) on deprivation due to imprisonment within seven years after being naturalised, and section 25(2)(d) of the Citizenship Act which provides for deprivation for a person’s continuously residing outside Malawi without registering at a Malawi consulate abroad, the Special law Commission observed that since the period of 7 years may be difficult to monitor, any “naturalized or registered citizens must register annually with the nearest embassies and consular offices.”<sup>186</sup> Whilst this recommendation is in itself unclear, the Special Law Commission proposed that this must be done pursuant to a decision of a Board appointed for that purpose.<sup>187</sup> The Special Law Commission should have taken into account the global migratory trends as people are now increasingly traveling for reasons of business, work, and study, among others. As Malawi does not have a Consulate in many countries, the requiring citizens to register with embassies and consular offices make it extremely difficult. The absence of Consular Missions in many countries is a telling indicator of the extreme difficulties that travellers or migrants may face if required to register abroad with embassies or consular offices. It is also unfair to render a person stateless simply because the said person failed to register with a Consulate when the nearest Consulate is in a very far country.

Furthermore, depriving a person of citizenship simply because he has not registered annually and in a prescribed manner with a Malawi diplomatic Mission or consulate abroad,<sup>188</sup> is unreasonable considering that the current legal framework permits dual citizenship. Furthermore, circumstances have now changed as compared to the time the Citizenship Act was first enacted with the increase in international migration. The character of the bond between the individual and the State has now changed considerably as such conditioning the ground for deprivation of citizenship on failure to report annually to diplomatic mission is now otiose. Modern migration has entirely evolved to the extent that people get in sporadic contact with the authorities and visit their countries of nationality. In light of the foregoing, it is argued that as the objective of ensuring strong links between the individual and the State is less relevant now than at the time of drafting

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<sup>184</sup> Report of the Special Law Commission on Citizenship’s Report, supra, fn 18, p 95.

<sup>185</sup> Report of the Special Law Commission on Citizenship, supra, fn 18, p 101 citing section 33 and 40 of the Constitution.

<sup>186</sup> Report of the Special Law Commission on Citizenship, supra, fn 18, p 102.

<sup>187</sup> Report of the Special Law Commission on Citizenship, supra, fn 18, p 102.

<sup>188</sup> Report of the Special Law Commission draft clause 1(e) at p 103 of the Report.

of both the 1961 Convention and the Citizenship Act. The conditions for depriving citizenship enshrined under section 25(2) of the Citizenship Act are outdated.

While the foregoing changes were proposed by the Special Law Commission make sense, they are not necessary. Article 7(3) of the 1961 Statelessness Convention protects stateless persons from losing their nationality merely on grounds that they were abroad; failed to register; depart or on similar grounds. Article 7(3) provides this protection in the following way:

“Subject to the provisions of paragraphs 4 and 5 of this Article, a national of a Contracting State shall not lose his nationality, so as to become stateless, on the ground of departure, residence abroad, failure to register or on any similar ground.”

Provisions on deprivation of nationality like the ones enunciated in section 25(2)(d) of the Citizenship Act are increasingly becoming rare in nationality laws. In most cases, loss of nationality resulting in statelessness cannot meet the proportionality test because the impact on the individual far outweighs the objective sought by the State. States can achieve their policy objective of preserving strong links to their nationals by providing for loss of nationality in such situations only where the individuals concerned would not be left stateless.

International minimum standards on loss and deprivation of nationality by contracting State are provided for under Articles 5 to 9 of the 1961 Convention on Statelessness. Loss of nationality relates to a situation where a person’s nationality status is withdrawn automatically due to the operation of the law.<sup>189</sup> Loss of nationality may arise due a person’s change of circumstances like marrying a foreign national where the nationality law provides for loss of nationality in such circumstances.<sup>190</sup> Deprivation of nationality, on the other hand, occur due to a discretionary conduct or act of state authorities ie “where a State actively takes nationality away from its citizens.”<sup>191</sup>

The general rule is that loss of nationality must not result in statelessness including a change in the personal status of the individual concerned, voluntary renunciation of nationality, or naturalisation in a foreign country. Loss of nationality that would result in statelessness is permitted only in very limited circumstances relating, as a general matter, to residence abroad for substantial

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<sup>189</sup> See UNHCR, “UNHCR releases new guidelines on loss and deprivation of nationality”, 21 May 2020 online at <https://www.unhcr.org/news/press/2020/5/5ec697894/unhcr-releases-new-guidelines-loss-deprivation-nationality.html>, last accessed on 19 April, 2022.

<sup>190</sup> See Jorunn Brandvoll, “Deprivation of nationality: Limitations on rendering persons stateless under international law” in Alice Edwards and Laura van Waas (ed) *Nationality and Statelessness under International Law*, p 194, Cambridge University Press, (2014)

<sup>191</sup> UNHCR, “UNHCR releases new guidelines on loss and deprivation of nationality”, 21 May 2020 online at <https://www.unhcr.org/news/press/2020/5/5ec697894/unhcr-releases-new-guidelines-loss-deprivation-nationality.html>, last accessed on 19 April, 2022.

period of time by naturalized persons or persons born abroad.<sup>192</sup> Even in those cases, loss of nationality resulting in statelessness is permitted only where such persons do not conform to requirements that may be prescribed in law allowing for the retention of nationality in these special circumstances.<sup>193</sup>

Article 8 of the 1961 Convention on Statelessness deals with deprivation of nationality. Deprivation of nationality is permissible only in very limited circumstances including on grounds of misrepresentation or fraud in the acquisition of nationality.<sup>194</sup> In other words, nationality may only be deprived where the person demonstrates “behaviour inconsistent with the duty of loyalty to the Contracting State; formal declaration or oath of allegiance to the Contracting State; or definite evidence of repudiation of allegiance to the Contracting state.”<sup>195</sup> It is also significant to note that article 8(4) of the 1961 Convention imposes procedural safeguards with respect to deprivation of nationality and Article 9 categorically prohibits deprivation of nationality on racial, religious or political grounds, regardless of whether or not it would result in statelessness. Consequently, deprivation that result in statelessness is, as a general rule, not permissible.

Section 25(4) of the Citizenship Act provides for what appears to be a due process mechanisms for persons affected by deprivation. The Section provides as follows:

“(4)before making an order under this section, the Minister shall give the person against whom the order is proposed to be made notice in writing informing him of the ground on which it is proposed to make, and of his right to, an inquiry under this section, and, if that person applies for an inquiry, the Minister shall refer the case to a committee of inquiry consisting of a chairman, being a person possessing judicial experience, appointed by the Minister and of such other member appointed by the Minister as he thinks proper.”

Several issues can be discerned from the above provision. The first is that the law imposes an obligation on the Minister to write the affected person informing the person of the grounds for deprivation and their right to inquiry. By “inquiry” it is assumed that the law gives the affected person an opportunity to challenge the Minister’s decision in a quasi-judicial manner. However, such right is not clearly spelt out in the above provisions of Section 25(4). Although the provision permit the Minister to appoint a panel “as he thinks proper” to hear the said inquiry, such appointment puts the Minister in conflict of interest. The appointed panel is required after hearing the inquiry to recommend to the Minister its decision for implementation which clearly violates one of the cardinal rules of natural justice, the *nemo iudex in causa sua* rule by which no one is required to be a judge in his own cause. The Minister may easily appoint people who may be

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<sup>192</sup> UNHCR Guidelines on statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, Doc. No. HCR/GS/20/05, May 2020, p 5, para 12, available online at <https://www.refworld.org/docid/5ec5640c4.html>, last accessed on 2 February, 2022.

<sup>193</sup> UNHCR, Guidelines on statelessness No. 5, *Ibid*, p 5, para 12.

<sup>194</sup> *Ibid*, para 13.

<sup>195</sup> UNHCR Guidelines on Statelessness No. 5, *supra*, fn 192, p 5, para 13

influenced to decide favourably with the Minister's prior decision to deprive the affected person of citizenship.

Secondly, the provisions of section 25(4) of the Citizenship Act does not explicitly elaborate the process and procedure to be followed by the affected person in challenging the Minister's or the panel's decision to deprive him of citizenship. As it will be argued below procedural guarantees to fair trial include the right of the affected person to appeal against the Minister's or panel's decisions.

Consequently, the current provisions on deprivation of citizenship runs contrary to not only the Constitution of Malawi but also international human rights standards on the point. Section 43 of the Constitution guarantees the right to every person the right to administrative justice including a "lawful and procedurally fair administrative action, which is justifiable in relation to the reasons given where his or her rights, freedoms, legitimate expectation or interest are affected or threatened".<sup>196</sup> The Constitution also guarantees the right to "be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected".<sup>197</sup>

#### 4.5. Oversight mechanisms of citizenship or naturalisation decisions

The Citizenship Act gives powers to the Minister to decide on a number of issues including registration of commonwealth citizens;<sup>198</sup> extension of the period for complying with the provisions of the Act regarding citizenship;<sup>199</sup> and the granting or refusing of any of the application related to citizenship. Further, the Act also provides that the decision of the Minister is not amenable to review in any court.<sup>200</sup> The same applies to vetting procedures that Immigration and National Identity Registration Officers consider when determining immigration matters including applications for visa and permits.<sup>201</sup> The prohibition against challenging decisions of administrators on citizenship and immigration seems to have a colonial background, and although most commonwealth constitutions have now moved on from this position, challenges still remain as the judicial route is costly and lengthy.<sup>202</sup>

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<sup>196</sup> See Section 43(a) of the Constitution.

<sup>197</sup> See Section 43(b) of the Constitution.

<sup>198</sup> Section 13 of the Act

<sup>199</sup> Section 11 of the Citizenship Act.

<sup>200</sup> Section 29 of the Citizenship Act.

<sup>201</sup> See Sections 6, 9, 13, 17 and 22 of the Immigration Act, available online at <https://www.refworld.org/docid/3ae6b4f58.html#:~:text=An%20Act%20to%20regulate%20the,matters%20incidental%20to%20the%20foregoing>, last accessed on 1 February 2022. Also see sections 51(d), 60(3) of the National Registration Act, accessible online at <http://citizenshiprightsafrika.org/wp-content/uploads/2019/11/Malawi-National-Registration-Regulations.pdf>, accessed on 1 February 2022.

<sup>202</sup> See Manby Bonwen, *supra*, fn 161, p 13.

However, the ability for people to challenge decisions of responsible public officers on matters of citizenship or naturalisation is one of the corner stones for the protective regime on statelessness.<sup>203</sup> With respect to oversight mechanisms or the ability for affected people to challenge decisions of adjudicators on nationality, two schools of thought emerge. The first school of thought is that appeals against unsuccessful applications lie with an independent Administrative Body set up specifically for that purpose. The UNHCR Guidelines on Statelessness No. 4 recommends that any decision made by administrative bodies must be justified with reasons, “in writing, including the reasons for the deprivation”.<sup>204</sup> Administrative decisions affecting stateless persons must also be grounded on proper justification and should be amenable to appeal. A person will not have enjoyed his rights under the law nor been guaranteed the due process of the law if the person is unable to appeal against adverse decisions.

The second school of thought is that all appeals against citizenship or naturalisation rejections should lie with a judicial body like a court. Section 29 of the Act provides for exclusionary powers of the Minister however they must be tested against the provisions of the Constitution on access to justice and legal remedies. Section 41 of the Constitution guarantees the right of every person to access any court of law or tribunal with jurisdiction for final settlement of legal issues.<sup>205</sup> Section 41(3) of the Constitution further guarantees to every person the right to an effective remedy by a court or tribunal for acts that violate his or her rights and freedoms guaranteed by the Constitution. For that reason, section 29 of the Act, by excluding the power of the court to adjudicate over cases concerning the decision of the Minister on citizenship, is inconsistent with the provisions of section 41 of the Constitution.

The Special Law Commission has proposed that the unfettered discretionary powers of the Minister under the Citizenship Act should be reviewed by establishing the Citizenship Board which will deal with matters of acquisition of citizenship including that of statelessness.<sup>206</sup> This proposal means that Malawi is now taking the direction of entrusting the Citizenship Board with the responsibility of deciding over nationality issues. Since decisions of the Citizenship Board will be quasi-judicial in nature, they will be amenable to judicial review. In *Chisa v Attorney General*, Mwaungulu J, as he then was, held that judicial review lies against persons or bodies with judicial, quasi-judicial and administrative functions.<sup>207</sup> Equally in *Chawani v Attorney General*, the Malawi Supreme Court of Appeal held that judicial review is available to situations where there is an abuse [by an] Executive arm of government.<sup>208</sup> In such instances, it is advisable for the proposed

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<sup>203</sup> See UNHCR, “Guidelines on Statelessness No. 5”, supra, fn 192.

<sup>204</sup> Ibid, p 23, para 74.

<sup>205</sup> Section 41(2) of the Constitution.

<sup>206</sup> See Report of the Special Law Commission on Citizenship, supra, fn 18, p 80.

<sup>207</sup> *Chisa v Attorney General* [1996] 19 MLR 80

<sup>208</sup> *Chawani v Attorney General*, MSCA Civil Appeal no 18 of 2000. See also *R V Judicial Service Commission & Anor.* (Judicial Review 22 of 2018) [2019] MWHC 34 (04 February 2019), also available online at <https://malawilii.org/mw/judgment/high-court-general-division/2019/34>, last accessed on 3 June 2022.

Citizenship Board to conform to international standards including complying with rules of natural justice when discharging their duties.<sup>209</sup> Compliance with international protective and minimum standards of human rights including the rules of natural justice when dealing with stateless persons is consistent with the provisions of the Constitution on fair administrative justice.<sup>210</sup>

#### 4.5.1. Malawi's Nationality Administration in Practice

A legal framework on nationality is as good as the officials who implement it in practice. As already observed, the Act is implemented by officials from the Department of Immigration and Citizenship Services and, in certain cases, the Minister responsible for those matters. The law empowers the officials to satisfy themselves that the requirements for granting citizenship have been met before issuing nationality documents. The Citizenship Act, just like the Immigration Act, gives the Minister broad discretionary powers to make certain decisions on nationality; granting of residence permits; and passport. Similarly, the National Registration Act empowers the Director to issue national identity cards,<sup>211</sup> which is a *prima facie* evidence of particulars of an individual contained in the National register. The administration and implementation of laws that in one way or the other affect nationality present several challenges starting from birth registration; consular registration; issuance of identity cards; and issuance of passports as discussed below. Accessing these crucial nationality documents is not only costly for a majority of Malawians it is also lengthy and cumbersome for some.

#### 4.5.2 Consular Registration

Section 5 of the National Registration Act allows the Minister to appoint a diplomatic or consular officer or a person attached to any Embassy Office, High commission or Consulate or any other Malawi Government representative abroad to act as a district register for purposes of registering children born from foreign Malawian citizens abroad. Registration of children born to Malawian citizens abroad becomes necessary where the children of Malawians are "born in a country that does not allow foreign parents to acquire nationality of the state in which the child is born."<sup>212</sup> Such children have the potential of being stateless if they are not registered both in the country of birth and Malawi.

Although Consular Registration is encouraged for purposes of national identity registration, it is still dependent on birth being registered in the country of birth first for the child not to be stateless.<sup>213</sup> When the birth is registered in the country where it occurred, chances are very high that statelessness will be prevented. In that regard, Malawi can progressively contribute towards

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<sup>209</sup> UNHCR, "Guidelines on Statelessness No. 5", *supra*, fn 192, p 30.

<sup>210</sup> See Section 43 of the Republic of Malawi Constitution.

<sup>211</sup> Section 12(2) of the National Registration Act.

<sup>212</sup> UNHCR, SADC Statelessness report, *supra*, fn 1, p 67-68.

<sup>213</sup> UNHCR, *Handbook on Protection of Stateless Persons*, *supra*, fn 2, p 68.



the eradication of statelessness if it establishes registries in all consular offices across the globe. This will enable Malawian nationals to register their children globally regardless of whether the country of birth does not register the child or not.

It is significant to observe that although the National registration Act provides for registration of birth in Consular offices abroad, the law has not adequately provide for the procedure for validating or verifying birth registration certificates from a foreign country where Malawi does not have physical Embassies or consular offices. The other issue to consider is whether validation of birth certificates is necessary for the said birth certificate to be considered valid in Malawi. Suffice to observe that consular registration of birth is important and it is advisable for Malawi to provide for thorough and easily accessible registration process so that nationals are able to utilise the said services.

However, when it comes to verification of birth certificates, Malawi can consider other ways of verification including allowing certificates that are authenticated under a cover of an Apostile drawn in line with the provisions of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.<sup>214</sup> The 1961 Apostile Convention facilitates the use of public documents abroad by permitting documents that are issued through a single Apostile Certificate signed by a Competent Authority in the place where the document originates. Such competent Authority may be an Attorney, Notary Public or diplomatic agent from the originating country's Foreign Office. The Apostile convention thus abolishes the traditional requirements for legalisation of documents which is long and costly.<sup>215</sup>

If Malawi decides to introduce consular registration, and since the Consular Office will be a designated district registry for purposes of the National Registration Act, then its register must still comply with the requirements of section 8 of the National Registration Act on contents of national register including recording the full name, principal place of residence in the [country of residence], and the parents permanent home address, among others.<sup>216</sup> A lack of a system for registering citizens at consular offices, as currently obtains, has the potential of giving rise to statelessness as children may not be registered in both Malawi and the country of birth if the latter does not register such birth.<sup>217</sup>

Whilst consular registration of citizens is important to enable the State update the record of its population, it may also be disadvantageous to vulnerable groups including refugees or children born in irregular migration status in the country of birth, as rightly observed by the UNHCR:

"Requirements for consular registration place immediate challenges in the path of those whose parents were refugees at the time of their birth, and who could jeopardise their refugee status by

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<sup>214</sup> See Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, entered into force on 24 January 1961. 122 states are Contracting parties to the Convention

<sup>215</sup> Ibid

<sup>216</sup> See Section 8(2) of the National Registration Act.

<sup>217</sup> See UNHCR, SADC Statelessness, *supra*, fn 1, p 68.

approaching the embassy. Even in case of those who have not formally sought asylum, the embassy may be completely inaccessible for cost or other reasons, especially those who have no regular status in the country of residence (and whose access to a birth certificate from the country of birth may therefore also be difficult)".<sup>218</sup>

Malawi has not yet commenced registration of children at consular offices due to logistical and financial reasons.<sup>219</sup> However, once established, it is envisaged that it will establish procedures that are similar to those used in Malawi under the National Registration Act. Children born from Malawian parents in countries where birth registration is not allowed are encouraged to visit nearest Malawi consulate or embassy for assistance on temporary travel documents for the children to travel to Malawi for registration. For children born in Zimbabwe to Malawian parents who intend to apply for citizenship of that country, the Malawi High Commission based in Harare processes renunciation of citizenship documents to enable them conclude the citizenship of that country.<sup>220</sup> The High Commission does not stand in their way, and with the introduction of dual nationality in Malawi, it is yet to be seen whether the applicants would be required to renounce Malawian citizenship as has been the case in the past. Recently Zimbabwe slightly changed its policy by allowing people born from outside or with foreign backgrounds to confirm nationality without renouncing their foreign citizenship.<sup>221</sup>

As above observed Malawi does not yet have registries at its Diplomatic Mission or Consular Offices abroad. The absence of such registries means that Malawi cannot have records of the population of children born to Malawian nationals abroad. It is expected that once such registries have been opened, the process that will be followed for registering the birth of children will be the ones prescribed under the Act as highlighted in this report. As already observed, one KI stated that in the absence of registries in diplomatic mission and Consular Offices abroad, every parent has a discretion to decide on whether to register their children in Malawi in line with the stipulations of the National Registration Act or not.

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<sup>218</sup> UNHCR, SADC Statelessness, supra, fn 1, p 68 citing The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Concluding Observations on the Initial Report of Lesotho, CMW/C/LSO/CO/1, 23 May 2016, paragraph 37, available online at <https://citizenshiprightsafrika.org/cmw-concluding-observations-on-the-initial-report-of-lesotho-2016/>, last accessed on 1 February 2022.

<sup>219</sup> This information was sourced from the Deputy Director of the National Registration Bureau during KII as part of this study.

<sup>220</sup> Manby, Bronwen "Citizenship and Statelessness in Africa: The Law and Politics of Belonging.". 2015., PhD diss., Maastricht University. <https://cris.maastrichtuniversity.nl/portal/files/1560984/guid-f91d9081-73da-4125-9a7a-887ceb4acca7-ASSET1.0.pdf>, accessed on 7 February 2022; see also ISI (Institute on Statelessness and Inclusion) . 2014. "The World's Stateless." Tilburg, the Netherlands: ISI. <http://www.institutesi.org/worldsstateless.pdf>. last accessed on 7 February 2022; see also Ridderbos, Katinka . 2009. "Stateless Former Farm Workers in Zimbabwe." Forced Migration Review 32:73. <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/statelessness/ridderbos.pdf>, last accessed on 7 February, 2022.

<sup>221</sup>Bronwen Manby, *Citizenship and Statelessness in Africa*: supra, fn 220

### 4.5.3. National Identity Cards

Malawi commenced registration of its citizens in 2010, and shortly thereafter nearly all service providers including financial institutions introduced measures that require every person to produce an identity card to access services. As of 1 February 2022, Malawi had registered and issued biometric identity cards to *ten million five hundred thousand (10.5 Million)* people,<sup>222</sup> out of a population of approximately 19.5 Million people as of 2019.<sup>223</sup>

Every person who has attained the age of 16 qualifies for the National Registration Card which is important for identification and citizenship. Section 5 of the Regulations to the National Registration Act provides for the requirements needed for the verification of particulars of nationality applications, which are divided into six categories. The first are Malawian citizens whose particulars must be witnessed and verified by “the village headman and one senior member of the village where the applicant hails from”.<sup>224</sup> The second category is for abandoned children who have not attained the age of 16. Their particulars must be witnessed and verified by “the social welfare officer of the District in which the child is found and a letter from that social welfare officer supporting the application”.<sup>225</sup> Although recorded in the National Register, the exercise does not culminate in the granting, or recognition of nationality as the latter follows a different legal framework.

The third category is adopted children where one or both adopting parents are Malawian Citizens. For this category, their particulars are verified by an adoption order issued by a court of competent jurisdiction and the court order must also accompany such application.<sup>226</sup> The fourth category is adopted children whose parents are non-Malawian Citizens. Their particulars must be verified by certified copies of the adoption order issued by a court of competent jurisdiction and the relevant immigration permit of the adopting parents authorizing their stay in Malawi.<sup>227</sup> The fifth category is non-Malawian citizens whose particulars must be verified by certified copies of the relevant Permanent Residence, Business Residence Permit or Temporary Employment Permit. Dependents of permit holders under this category can verify their identities by producing certified copies as proof of their dependency to the holder of permits including marriage certificate, birth certificates, adoption order and copies of passports.<sup>228</sup>

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<sup>222</sup> Information provided by the Deputy Director of National Registration Bureau during oral interviews conducted on 31 January 2022 as part of this study.

<sup>223</sup> See The World Bank, “Population, total-Malawi”, available online at <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=MW>, last accessed on 1 February, 2022.

<sup>224</sup> Section 5(b) of the National Registration Regulations no 8A of 2015 made under the National Registration Act.

<sup>225</sup> Ibid.

<sup>226</sup> Section 5(c) of the National Registration Regulations, no 8A of 2015 made under National Registration Act.

<sup>227</sup> Section 5(d) of the National Registration Regulations, 2015 made under the National Registration Act.

<sup>228</sup> Section 5(e) of the National Registration Regulations, no 8A of 2015 made under the National Registration Act.

The sixth category is naturalised Malawian citizens or citizens by registration, their identities must be verified by certified copies of their passports and Malawi Citizenship Registration Certificate. Their dependants must also verify by showing certified copies of the passport; certificates of registration of citizenship, marriage certificate; birth certificate or adoption order and certified copies of passports where relevant.<sup>229</sup> Conspicuously missing is a provision for verifying particulars of stateless persons who have resided in Malawi for a long time.

However, requiring the verification or confirmation of particulars of applicants by village headmen and senior traditional leaders from the area that one hails from has its own problems. Most areas, particularly in urban locations, have temporary village headmen or traditional leaders that are just selected by their peers depending on how active they are, or how long they have resided in the community. Most village headmen do not even know their subjects and this has the disadvantage of encouraging applicants for citizenship to find village headman of “convenience” so that their nationality or passport applications succeed. In light of the foregoing, it is safe to say that verification of particulars through village headmen particularly in urban areas may propagate fraud as such there is need for Government to find a better way of managing verification of particulars for applicants. The above observations equally apply to applications for passports.

Despite launching a mass registration campaign in 2011, the uptake of national identity cards has been very poor due to apathy by the public in coming forward to register as this is a voluntary process. One KI stated that although there is slow uptake of national identity cards, they are confident that the numbers will rise as the demand for nationality cards rises, particularly from service providers and also when more people become aware of the requirement to register for one. The introduction of mandatory production of identity cards when people access certain services, whilst important, also affects a large sector of the Malawi population that has not yet accessed them. The issued identity cards have an expiry period of 5 years which has affected those who cannot afford renewal fees. In terms of the prescribed renewal fees, the same differs between national and non-nationals with the latter required to pay the sum of Malawi Kwacha 50, 000.00 and the former required to pay the sum of Malawi Kwacha 2, 000 as late registration fees respectively.<sup>230</sup> National Identity cards are important for social-economic reasons in the country, however, the speed at which their mandatory production was introduced in certain sectors may violate rights of citizens especially those who cannot access identity cards like refugees.

#### 4.5.4. Passports

Proof of nationality may sometimes be shown through a passport. Malawi does not have a legal framework that stipulates how passports should be issued.<sup>231</sup> In practice, however, an application

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<sup>229</sup> Section 5(f) of the National Registration Regulations, no 8A of 2015 made under the National Registration Act.

<sup>230</sup> When mass registration was launched in Malawi after the coming into force of the National Registration Act, birth certificates were issued free of charge.

<sup>231</sup> Report of the Special Law Commission, *supra*, fn 18, p 116.

for a passport commences with an applicant filling a passport application form and submitting them to the Department of Immigration. Application forms are readily available at the Department of Immigration offices, and they can also be downloaded online.<sup>232</sup> An applicant must prove that he or she is a Malawian citizen, and this may be done by producing some form of identification including the national identity card. An applicant is also required to take an oath by signing the completed application forms before a Commissioner for Oaths.

Before the introduction of the National Identity Cards, the most acceptable form of identification required for processing passports was a birth certificate or the passport application form. The back of every application form had an already prescribed affidavit of birth (where no birth certificate was produced) which an applicant was required to complete before a Commissioner for Oaths who may be a Legal Practitioner, a Magistrate or other public officers currently holding the grades of Professional Officer or Administrative Officer; a District Commissioner and other officials prescribed by Section 4 of the Oaths, Affirmations and Declarations Act Cap 4:07 of the Laws of Malawi. The application form also had sections that were supposed to be filled by the Village Headman and Traditional Authority of the District where an applicant hailed from. The Application Form also had a part where the District Commissioner of the District where the applicant hailed from was required to sign as confirmation that the applicant hailed from that District.

It is interesting to note that current Passport application forms still requires an applicant to follow the above requirements on top of producing a national identity card. Although retained, the content of the Passport Application form was not prescribed under the Immigration Act. In other words, the schedule to the Act has no format of the application form and it appears the format was developed administratively by the Department of Immigration. A criticism of the passport verification process is that it prone to abuse. Applicants sometimes forge stamps of the authorised institutions including the District Commissioner's Office; the Chiefs and Traditional Authorities.

The decision to issue passports lies at the discretion of the passport officer upon being satisfied that the applicant has complied with the requirements. The decision of the Passport Officer is made pursuant to provisions of the Immigration Act and since it is an administrative act, it is amenable to, and subject to judicial review. However, it is a delegated authority of the Director General of Immigration as such any aggrieved person must challenge any adverse decision through the office of the Director General.

The special Law Commission on Citizenship considered this issue and observed that since the Act is silent on the procedure for issuing passports, the amendment to the Citizenship Act must include regulations which should prescribe the said procedure.<sup>233</sup> The Special Law

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<sup>232</sup>Department of Immigration, Apply for passport, online at <https://www.immigration.gov.mw/passports/apply-for-passport/>, last accessed on 4 February 2022.

<sup>233</sup> Report of the Special Law Commission, *supra*, fn 18, p 116-127.

Commission on Citizenship also recommended that the categories of passports; and the requirements needed for their issuance to citizens should not be complicated or costly. The proposed new law on issuance of passports state that a passport must be issued to citizens upon application, and appearing in person before an immigration officer.<sup>234</sup> The proposed amendments are positive and it is hoped that the drafting regulations will also tackle the loopholes that currently exist with the completion of the Application forms as above observed.

As the National Registration Act recognises a birth certificate and, most importantly, the national registration card as a form of identification, the recommendations of the Special Law Commission are that any application for a passport must be accompanied by a birth certificate or an adoption order; a national identity card; a certificate of registration or naturalisation; a passport size photograph; a prescribed fee; and in case of a child or a person with a disability that renders him dependent, a written consent of a parent or legal guardian.<sup>235</sup> The prescribed fees for issuance of passports differ depending on the type of Passport that one is applying for. According to the Fourth Schedule of the Immigration (Amendment) Regulations, a thirty-two paged ordinary passport attracts a fee of Malawi kwacha 90, 000; a forty-eight paged passport attracts a fee of Malawi Kwacha 130, 000; a thirty-two paged passport for children attracts a fee of Malawi Kwacha 80, 000; and forty-eight paged passport attracts a fee of Malawi kwacha 130, 000. The fees for express passports which takes a period of between one day to five days to be issued attracts a fee of Malawi Kwacha 180, 000 for both thirty-two and forty-eight paged passports.<sup>236</sup> Otherwise the standard turn-around time for the issuance of ordinary passports is between fourteen to thirty days from the date of application.

The foregoing notwithstanding, it is observed that the proposed requirements, just like those currently obtaining for the issuance of passports remain restrictive, and premised on the traditional forms of identification. Although stateless persons are by nature not entitled to a national passport, by Malawi domesticating the 1954 Statelessness Convention would mean that a stateless person will qualify for a special passport or travel document which if Malawi does not currently have, must be modelled in the format of the one annexed to the 1954 Statelessness Convention. In the absence of such travel document, the current requirements for acquiring passports under the Immigration Act are predicated on conditions that disqualify stateless persons; are lengthy, and cumbersome, and should be reviewed.

#### **4.6. Assessment of domestic institutional framework on statelessness in Malawi**

Section 47 of the Constitution provides for the legal basis for granting citizenship in Malawi. The above provision has been further elaborated by several domestic legislations, including the

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<sup>234</sup> Report of the Special Law Commission, *supra*, fn 18, p 121, 123.

<sup>235</sup> See Report of the Special Law Commission Report, *Ibid*, p 123.

<sup>236</sup> For prescribed fees see the Immigrations (Amendment) Regulations to the Immigration Act, cap 15:03,, 2019, fourth schedule of 27 December 2019

Citizenship (Amendment) Act No. 11 of 2019 which amended the Malawi Citizenship Act; the Immigration Act; and the National Registration Act. All these pieces of legislation dealing with the acquisition, identification, and loss of citizenship, establish institutions that are located within the Ministry of Homeland Security. When it comes to migration and citizenship, the Department of Immigration and Citizenship Services is responsible for the processing and issuance of Malawi citizenship, residence and work permits and passports in line with the Constitution, its principle legislation and governing policies.<sup>237</sup> The National Registration Bureau is an institution established under, the National Registration Act with a specific mandate of managing, coordinating, implementing and maintaining the national registration and identification of Malawi nationality for applicants.<sup>238</sup> It is responsible for the registration of births, marriages and deaths including details of place of birth and parental affiliation which is important for the determination of nationality.<sup>239</sup> The management of migration, refugee status, nationality or citizenship, and identification are localised or decentralised, and the question worth considering is whether this is ideal particularly when it comes to the management of statelessness in the country.

Issues of migration are currently localised within the Departments of Immigration; Refugees and NRB where they deal with matters of entry and exit of people; refugees and asylum seekers and registrations of birth, deaths, marriages and national identity cards independent of each other in that order. The biggest weakness with this arrangement is that it creates a lack of synergy or coordination among the respective offices. Considering that each of these Departments deal with important issues that implicates on nationality, there is need for government to reconsider whether centralisation of the above subject areas would be ideal for Malawi.

This study has established that the phenomenon of statelessness exists in Malawi, hence Malawi should assess whether an independent institution should be established to deal with the above issue or not. Whatever direction Government takes, it needs to make an informed decision on how the fragmented systems that deals with nationality issues should be harmonised.

The localised mode of managing migration; citizenship; and refugee status has served Malawi for decades. However, statelessness being a subject that is now attracting attention in the country would, however, benefit from a compromised solution. The special Law Commission in its proposals for reform of the Citizenship Act recommended for the establishment of a Citizenship Board, an independent body to deal with all issues related to citizenship including acquisition; loss or deprivation of citizenship; undertaking inquiries on citizenship; collecting information that it considers relevant to its functions; and undertaking consultations with stakeholders.<sup>240</sup> This means

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<sup>237</sup> See Department of Immigration and Constitutional Services, "Main Functions", online at <https://www.immigration.gov.mw/about-us/main-functions/>, last accessed on 1 March 2022.

<sup>238</sup> National Registration Bureau, "Purpose of NRIS?" online at <http://www.nrb.gov.mw/index.php>, last accessed on 2 March 2022.

<sup>239</sup> See the Preamble to the National Registration Act, also available online at <http://www.nrb.gov.mw/images/documents/NATIONAL-REGISTRATION-ACT.pdf>, last accessed on 2 March, 2022.

<sup>240</sup> Report of the Special Law Commission, *supra*, fn 18, p 95-98.

that Malawi may be leaning towards a centralised mode of administering nationality issues including statelessness.

According to the above recommendations, members of the proposed Citizenship Board will be drawn from the Ministry of homeland security; department of Immigration and Citizenship Services; National Registration Bureau; the Malawi Police Service; Human Rights Commission; and Ministry of Justice.<sup>241</sup> The proposed composition of the Board shows that it will pull together expertise from migration, national registration, police and Ministry of Justice to work under one roof which can only be in the best interest of stateless persons. Interestingly, the Department of Immigration is earmarked to be the secretariat to the Board under the proposed framework, which will be chaired by the Ministry responsible for homeland security.<sup>242</sup>

From the recommendation of the Special Law Commission it is expected that the Citizenship Board will “create a subcommittee that considers issues of statelessness.”<sup>243</sup> The subcommittee will have the power, arguably, to determine its own rules, terms and conditions of operation. In the interest of conforming to international standards, the sub-committee should ensure that a legal framework that guarantees minimum standards of protection to stateless persons is established speedily. In the interest of resource management and pooling of critical personnel together, centralising the issue of statelessness in the proposed Citizenship Board would be an ideal approach. Considering that Malawi has a large population of people in long-term non-migratory context, the proposed institutional framework should also consider issues of SDPs and how to manage nationality campaigns. There is currently no legal framework for determining statelessness in Malawi and that is an area worth considering by Government as hereinafter discussed.

#### *4.6.1. Solutions to Statelessness: case for Establishing Status Determination Procedures (SDPs) or Nationality Campaigns on statelessness*

Since the phenomenon of statelessness arises in different contexts the manner in which a state establishes the extent of the scourge in its territory may also vary. Whilst the phenomena of statelessness calls for equal treatment of stateless persons, the manner in which a state accords protective measures to this group of people must be reflective of the different contexts in which affected persons find themselves in. The UNHCR Guidelines on Statelessness No. 3 confirms this observation in the following way:

“Statelessness arises in a variety of contexts. It occurs in migratory situations, for example among expatriates and/or their children who might lose their nationality without having acquired the nationality of a country of habitual residence. Most stateless persons, however, have never crossed borders and find themselves in their “own country”. Their predicament exists *in situ*, that is in the

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<sup>241</sup> Report of the Special Law Commission, *supra*, fn 18, p 95-96.

<sup>242</sup> Report of the Special Law Commission, *supra*, fn 18, p 97.

<sup>243</sup> Report of the Special Law Commission, *supra*, fn 18, p 80.



country of their long-term residence, in many cases the country of their birth. For these individuals, statelessness is often a result of discrimination on the part of authorities in framing and implementing nationality laws."<sup>244</sup>

The above exposition attests to the fact that statelessness is dynamic; some stateless persons exist *in situ*, where they find themselves in the country of their long-term residence and in many cases it is the country of their birth and there are others who are in a migratory context<sup>245</sup> like expatriates and their children "who might have lost their nationality without having acquired the nationality of a country of habitual residence."<sup>246</sup> The nature in which stateless persons find themselves, thus, calls for different approaches to ascertaining the extent of this scourge.

International law standards for the protection of stateless persons demand that every state must establish in its territory a strong and deliberate institutional framework for managing statelessness. Such institution may assist in determining the extent and scope of statelessness which forms the basis for ascertaining the scope of minimum protective standards to accord to this group of people. Statelessness determination also assists a state to ascertain which groups of people exist *in situ* and which ones are in a migratory context. As already observed, Malawi has a large undocumented population due to various reasons and in order to ascertain the extent of this scourge, it may, therefore, adopt one of the two approaches, namely, either undertake a statelessness determination process or a national wide nationality campaign.

#### 4.6.1.1. Nationality Campaigns

Nationality campaigns assist in identifying groups of people that are undocumented so that they may be granted nationality documents.<sup>247</sup> Nationality campaigns usually target long-term residents who are often in such status due to discriminatory laws on the part of the authorities. They are, thus, tools to eradicate statelessness by regularising the nationality status of people at risk of statelessness; and those stateless persons with strong links to Malawi. The latter stem from a person's fundamental right to a nationality and the concomitant state obligation to end statelessness. Nationality campaigns require an acknowledgement of the *in situ* groups at risk of statelessness. The government then designs legislation or policy to regularise their situation along with a sensitization campaign and legal aid support for those affected. Nationality campaigns are at the heart of nationality as compared to SDP's which are at the heart of migration.

#### 4.6.1.2. Status Determination Procedures

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<sup>244</sup> UNHCR, Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level", UN Doc. HCR/GS/12/03, 17 July 2012, also available online at <https://www.refworld.org/docid/5005520f2.html>, last accessed on 3 June 2022.

<sup>245</sup> Ibid, p 2, para 4.

<sup>246</sup> UNHCR Guidelines No. 3, supra, fn 244, p 2, para 4.

<sup>247</sup> See UNHCR Guideline on Statelessness No. 3, supra, fn 244, paras 59-60, p 26.

The SDP, on the other hand, is a tool where the state identifies and protects stateless migrants. It is a tool to manage migration and owes its genesis from the 1954 statelessness convention. In undertaking SDPs, a state may establish an independent institution or combine an already existing institution to conduct SDPs with that of, either migration or refugee management. Sometimes the issue of refugee status determination and statelessness determination go hand in hand. As a result, applicants whose refugee status' determination failed may apply for recognition as stateless persons or the vice-versa. It may also happen that some applicants for statelessness may have failed in their refugee status application; the refugee status cancelled; may have acquired additional information which may assist their applications; or may have had their refugee status no longer recognised for various reasons.<sup>248</sup> In such situations, establishing SDP together with refugee determination procedures under one institution not only saves costs and time, it also assists the authorities to deal with the two crucial issues on migration with greater coordination.

With respect to statelessness, a state is recommended to establish strong and deliberate statelessness determination procedures for the protection of stateless persons. Establishing SDPs not only assists states in complying with their 1954 Statelessness Convention's obligations, it also enables states to identify stateless persons so that necessary treatment and protection measures that are in line with international standards can be adopted and accorded to this group of people.

#### 4.7. Developments in other jurisdictions

Malawi's legal framework on nationality must be analysed from the benchmark of comparable international standards. In December, 2020, the UNHCR released a Report on *Citizenship and Statelessness in the Members States of the Southern African Development Community*<sup>249</sup> which, among others, comprehensively studied citizenship and statelessness laws in the SADC region. The findings of that study reported about gaps in the legal framework of some SADC Member states which cause statelessness in the region.<sup>250</sup> The study also identified groups of people that may be stateless or at risk of statelessness; and the reasons for the prevalence of statelessness in the region.<sup>251</sup> The study made a number of recommendations pertaining to statelessness which have a bearing on Malawi including the removal of "administrative procedures that discriminate on the grounds of sex or birth in or out of wedlock"<sup>252</sup> when people apply for citizenship; creation of an independent oversight mechanism, both administratively and through judicial means on nationality issues;<sup>253</sup> accession to African Conventions on Nationality;<sup>254</sup> incorporation of measures

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<sup>248</sup> UNHCR Guideline on Statelessness, supra, fn 244, p 31-32

<sup>249</sup> UNHCR SADC Statelessness Report, supra, fn 1, Ibid, p 7.

<sup>250</sup> UNHCR SADC Statelessness Report, supra, fn 1, p 7.

<sup>251</sup> Ibid, p 7.

<sup>252</sup> UNHCR SADC Statelessness Report, supra, fn 1, p 8.

<sup>253</sup> Ibid, p 8

<sup>254</sup> UNHCR SADC Statelessness Report, supra, fn 1, Ibid.

for the prevention and reduction of statelessness required by treaties in national laws<sup>255</sup>; and reform of naturalization procedures to allow refugees and former refugees to obtain citizenship.<sup>256</sup> A similar study was undertaken for Member States of the East African Community with similar recommendations for improving the nationality regime of the region to avert statelessness and rising numbers of people at risk of statelessness.<sup>257</sup>

The theme running throughout the UNHCR's study is that the laws on nationality in selected African countries follow two legal traditions, namely, common law and civil law traditions depending on their colonial history.<sup>258</sup> Malawi applies the birth right citizenship (*jus soli rule*) with limitations attributing citizenship automatically to children born in the territory, in line with its common law background that was adopted from the British colonialism. Section 23(2) of the Constitution guarantees the right to nationality to all children born in Malawi. Section 4 of the Citizenship Act, however, conditions the acquisition of nationality to descent. As above observed the position of this law has the potential of putting newly born children from parents of other who were themselves born by descent at risk of statelessness if the father is from a citizen of a country which is at war with Malawi and the child is born at a place under enemy occupation.

The *Jus soli rule* is also applicable in other countries with slight modifications like Lesotho;<sup>259</sup> Tanzania;<sup>260</sup> Zimbabwe;<sup>261</sup> Zambia<sup>262</sup>. On the application of the *Jus soli* rule the position in South Africa may have influenced the special Law Commission in its proposals to recommend that children born in the country to parents who are holders of the Permanent Residence Permit can also apply for citizenship once they attain the age of majority if their recommendations are adopted and become law.<sup>263</sup> Several countries adopt a similar approach with respect to foundlings including Zambia<sup>264</sup> where there is a presumption of citizenship for foundlings. Although this issue was considered by the special Law Commission, section 26 of the National Registration Act already provided for registration of exposed new-born children who are found in the territory. Section 26 of the National Registration Act is in the following way:

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<sup>255</sup> UNHCR SADC Statelessness report, supra, fn 1, p 8.

<sup>256</sup> Ibid, p 8.

<sup>257</sup> UNHCR, *Statelessness and Citizenship in the East African Community*, September 2018, p 2 and p 5, available at: <https://www.refworld.org/docid/5bee966d4.html>, accessed 23 January 2022.

<sup>258</sup> UNHCR SADC Statelessness Report, supra, fn 1, p 7 and p 19.

<sup>259</sup> Ibid, p 19. See article 38 of the 1993 Constitution, and the principle is also applicable to stateless children.

<sup>260</sup> UNHCR SADC Statelessness Report, supra, fn 1, p 18; see also Section 5(1) of the Citizenship Act of Tanzania no. 6 of 1995).

<sup>261</sup> See Article 43(2) of the 2013 Republic of Zimbabwe Constitution; available online at [https://www.constituteproject.org/constitution/Zimbabwe\\_2013.pdf](https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf), last accessed on 12 January 2022

<sup>262</sup> See Article 37 of the Constitution of Zambia (Amendment) Act No. 2 of 2016).

<sup>263</sup> UNHCR, SADC Statelessness, supra, fn 1, p 20; see also Section 4 of the Principal Act to the South African Citizenship Amendment Act No. 17 of 2010.

<sup>264</sup> Section 16 of the Citizenship Act of Zambia, No. 23 of 2016, also available online at <https://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Citizenship%20of%20Zambia%20Act%20No.%2033,%202016.pdf>, last accessed on 23 January 2022

"If any living new-born child is found exposed, it shall be the duty of any person finding such child, and of any person in whose charge such a child may be placed, to give such information as informant possesses for the purpose of registering such birth."

The same is the case for adopted Children where the law obliges the Director to register them once adopted. Section 28 of the National Registration Act obliges the Director to "keep the Adopted Children Register and enter therein such entries as may be directed to be made therein by the adoption of a child order, but no other entries." The foregoing is in line with laws of Botswana (for children under three years old only), Eswatini, Mozambique, Namibia, South Africa, and Zambia who are automatically granted citizenship once the adoption order is finalised.<sup>265</sup>

In West Africa, the Cote d'Ivoire's nationality laws grants citizenship to individuals born in or outside the country when at least one parent is a national.<sup>266</sup> Not only does the law provide for the attribution of nationality to an Ivorian by origin, it has also extended the same to a "second group, namely, those born outside of Cote d'Ivoire to an Ivorian parent."<sup>267</sup>

With respect to SDPs, most African countries with the exception of Cote d'Ivoire (who adopted them in 2020); and Senegal (who adopted them in 2022) respectively, have not yet adopted the legal framework for the management of statelessness. However, Ivory Coast seems to have led African countries on this path when, on 2 September 2020 two regulations were signed into law to formally establish the SDPs.<sup>268</sup> Cote d'Ivoire developed a national action plan to end statelessness in 2016 based on the global action plan of the UNHCR's *#Ibelong* Campaign. This plan had several components: information campaign, reform of the nationality law, and development of SDP.<sup>269</sup> The aim of the joint qualitative and quantitative data collection exercise was to identify key administrative, legal causes of statelessness and the profile of stateless persons in the country.<sup>270</sup> Ultimately, a nation-wide household survey was undertaken which tremendously improved raw data collection and understanding the phenomenon of statelessness.<sup>271</sup> In undertaking the above quantitative study, Cote d'Ivoire was thus implementing its action plan.

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<sup>265</sup> UNHCR SADC Statelessness Report, supra, fn 1, p 32.

<sup>266</sup> Article 6 of the 1961 Nationality code.

<sup>267</sup> Mirna, Adjami,, "Statelessness and Nationality in Cote D'Ivoire, UNHCR, December 2016, p 15, available online at <https://www.refworld.org/pdfid/58594d114.pdf>, last accessed on 28 February 2022.

<sup>268</sup> See UNHCR, "Cote d'Ivoire adopts Africa's first legal process to identify and protect stateless people", 4 September 2020, online at <https://www.unhcr.org/news/press/2020/9/5f51f33b4/cote-divoire-adopts-africas-first-legal-process-identify-protect-stateless.html>, last accessed on 28 February 2022.

<sup>269</sup> See Layse Farias and Charlotte Arnaud, "UNHCR launch mapping of statelessness in Cote d'Ivoire", 3 September 2018, online at <https://www.unhcr.org/blogs/mapping-statelessness-cote-divoire/>, last accessed on 28 February, 2022.

<sup>270</sup> Ibid.

<sup>271</sup> See Layse Farias and Charlotte Arnaud, "UNHCR launch mapping of statelessness in Cote d'Ivoire", Ibid.

The approach adopted by Ivory Coast is recommended for Malawi so that after this qualitative study, a national wide quantitative household survey on statelessness should be conducted. For the sake of managing resources, the quantitative survey can be done with or when the National Statistics Office of Malawi undertakes a national census. Lessons to be drawn from Ivory Coast are that any SDP must be based on comprehensive qualitative and quantitative study on the extent of statelessness. Once this is established, a legal framework must be put in place from where any SDPs or nationality campaigns will be based. Stateless persons who are identified under that framework can be protected in accordance with international standards including access basic amenities like healthcare, education and own property.<sup>272</sup>

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<sup>272</sup> See Bobi Koigi, "The Cote d'Ivoires Commendable Plan to protect stateless people" 7 September 2020, online at <https://www.fairplanet.org/editors-pick/the-cote-d%E2%80%99ivoire%E2%80%99s-commendable-plan-to-protect-stateless-people/>, last accessed on 7 March 2022.

## 5.0. CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS

In order to strengthen Malawi's nationality law and its systems to combat of statelessness, the country needs to consider the following:

### 5.1. Quantitative study on Statelessness

5.1.1. Malawi should first undertake a quantitative study on statelessness. The qualitative study subject of this report focused on identifying groups that are stateless or most likely at risk of statelessness; whether or not they have a country of origin; their human rights challenges; causes of their statelessness and facilities that they fail to access in the country. Whilst this study confirms the existence of the phenomena of statelessness in Malawi, it has not established the numbers of people who are stateless or at the risk of statelessness. The National Statistic Office of Malawi never included the issue of statelessness in its data collection exercise for purposes of national census<sup>273</sup> hence this recommendation. On the basis of the groups identified in this report as being at risk of statelessness, it is strongly recommended that the National Statistics Office should consider extrapolating the numbers of individuals within each group on the basis of already existing data at NSO.

5.1.2. The quantitative study will provide a definitive estimate of stateless persons or those at risk of statelessness in Malawi. The Government should, therefore, authorise a quantitative study at the level of, or during national census or any national survey regularly conducted by the NSO so that the numbers of stateless persons in the country can be thoroughly established.

### 5.2. Data Sources and Prioritisation

5.2.1. A quantitative study may consider the following data sources: The Department of Immigration's records describing the number of stateless persons that have been encountered through its immigration admissions and enforcement processes; and the National Registration Bureau's records for people who may have approached their office but were not registered for their failure to meet the requirements of National Registration Act.

5.2.2. Screening of data on information of persons in refugee camps; orphanages; of persons who self-identify as undocumented; border areas, for example, will lead to identification of persons with circumstances that confirm statelessness or risk of statelessness including their numbers.

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<sup>273</sup> Following comments received from the client, the Consultant contacted a KI from the National Statistics Office who confirmed that the office has never included the issue of statelessness in its data collection for purposes of census. For more on Malawi's records on the census visit the publications of the National Statistical Office's official website at [http://www.nsomalawi.mw/index.php?option=com\\_content&view=article&id=2&Itemid=2](http://www.nsomalawi.mw/index.php?option=com_content&view=article&id=2&Itemid=2), last visited on 21 April 2022.

5.2.3. The quantitative study may also collect information from detention centres for persons who have been ordered to be removed from the country; were released or are challenging decisions of their removal from the country through courts or other means, if any.

5.2.4. Data may also be sourced from lawful immigrants residing in the country on temporary or permanent residence permits, refugees and asylum seekers. The Department of Refugees may also obtain data from refugees and asylum seekers who sought their assistance during their first registration processes.

5.2.5. Several hotspots where migrants may be found include Lilongwe, Chitipa, Karonga, Mchinji, Mangochi, Blantyre and Mwanza Districts because these are the places most frequented by migrants, both lawful or unlawful.

5.2.6. Finally, information may be sourced from the national Statistics' official data sources on nationality.

### **5.3. Reforming the legal and institutional framework on citizenship, naturalisation and management of statelessness in the country**

5.3.1. The country should review its laws on citizenship, naturalisation and statelessness to align them with the minimum standards of protection guaranteed under the 1954 Convention on Statelessness; the 1961 Statelessness Convention; UNHCR guidelines on Statelessness No. 4 on Prevention of Childhood Statelessness, and UNHCR Guidelines on Statelessness No. 5 on Loss and Deprivation of Nationality.

5.3.2. The review of citizenship and immigration laws should focus on removing all discriminatory provisions and procedures; allow the granting of nationality to minority groups including stateless persons; foundlings; and refugees in long-term residence. The reform of the laws must create the necessary minimum requirements for attaining nationality including for all children of migrants in long-term residence who have integrated into the communities.

5.3.3. Malawi should also consider removing laws that grant strong discretionary powers to Ministers in favour of an independent oversight mechanism. Access to the proposed oversight mechanism should be less costly and the Body must also resolve matters speedily, guaranteeing applicants' rights to judicial remedies; free legal aid services; and paralegal support.

5.3.4. As discussed in this report, statelessness is connected to nationality as a result the procedures and processes for registering birth, collecting birth certificates must be less stressful

and less costly. The filling of gaps in the issuance of identity and national documents like ID cards and passports must be based on a legal framework that conforms with international standards.

5.3.5. The same applies to the institutional framework that should be set up to deal with the subject of statelessness; it must be responsive to the dynamic nature of the subject including issues of location; language of those applying for recognition as stateless persons. Emphasis of English language as mode of communication in applications or during interviews should not be encouraged.

5.3.6. The legal reform must also provide for a framework for conducting SDPs. Government may also consider launching nationality campaigns as discussed in this report.

## **6. Statelessness determination mechanisms and due process**

6.1. The quantitative study will also assist in confirming the numbers of stateless persons so that migrants are protected through SDPs. Identified migrants should be protected as legal migrants with special rights. The rest should be regularised as nationals after undertaking nationality campaigns. Once regularised such groups of people should be treated and protected as nationals.

6.2. For *in situ* populations, the legal framework should also provide mechanisms for undertaking nationality campaigns that will enable the granting of nationality documents to those people who have been in long-term non-migratory context. Malawi can achieve this objective if it enhances the public awareness on nationality procedures so that those who are not aware of the law and procedure for applying for identification documents, naturalisation, the level of assistance available to applicants for naturalisation and identity documentation.

## **7. Mandatory birth registration across the country including refugee camps**

7.1. Although the National Registration Bureau already adopted a policy on universal birth registration, it is significant to also note that the country has not yet achieved its target in this area. As already pointed out, not everyone registers the birth of their children in the country. Malawi should, therefore, consider registering stateless or persons in forced migration like refugees. Deliberate registration of birth including for descendants of those perceived to be stateless is critical as it will assist Government in its policy formulation and direction including deciding on whether it should establish identity management documentation or SDPs.

7.2. Malawi should continue its policy of registering all birth in the country including at refugee camps. Malawi should also grant children born from refugee or asylum seeker parents with identification documents until such time that the nationality of their parents has been



determined. This proposal ensures that children born from asylum seekers or refugees are not deprived of their nationality.

7.3. The current policy and legal framework on nationality registration aims at achieving universal birth registration only. As birth certificates do not grant nationality, children who do not qualify for nationality despite being born in Malawi are still at risk of statelessness despite their birth being registered. The country must, therefore, introduce a deliberate policy that strives at not only achieving universal birth registration but also ensuring that all children born in Malawi have some form of identity documents. Children born to asylum seekers or refugees should be issued special identification documents.

7.5. As the report has established that the population does not seem to consider birth registration as important, it is recommended that government should deliberately conduct a robust sensitization campaign on the importance of birth registration. The most critical target group are people who reside in rural areas especially where birth occurs outside medical facilities.

## **8. Revision of prescribed fees for Nationality Documents**

8.1. Malawi should immediately and urgently revise prescribed fees for naturalisation and, where possible, allow the registration of stateless persons for citizenship *gratis*. For stateless persons, the law must be responsive to the fact that this group of people may not be financially secure as costs related to nationality applications should be set up in such a way that they do not cause their hardship. The current prescribed fee of USD\$75, 000 for a stateless person to apply for citizenship is unreasonably high considering that most people in this group have little or no means. Government should, therefore, scrap the above prescribed and grant citizenship to stateless persons *gratis*.

## **9. Consular Registration of children born to foreign Malawi nationals**

9.1. Malawi does not currently conduct consular registration of children born to Malawian abroad. Malawi should, therefore, take steps to introduce consular registration of children born outside the country at all of its foreign missions. National identity cards may also be issued to Malawians abroad at the country's embassies. This helps nationals residing outside the country to renew their identity documents with ease. Although, some missions have introduced the renewal of passports for Malawi nationals, not all missions are able to provide this service. For the missions that have introduced the processes, delay in production of documents is of serious concern.

## 10. Accession to the Convention on the Reduction of Statelessness

10.1. In order for Malawi to meaningfully fulfil its pledge, and join the international community in fighting statelessness and its reduction globally, it must accede to the 1961 Statelessness Convention. Although the country has already made progress in the area of birth registration with the introduction of universal birth registration under the auspices of the National Registration Bureau acceding to the 1961 Statelessness Convention will go a long way in cementing the country's position at the international level in the fight against statelessness.

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## ANNEX 1 Findings Report

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### STATELESSNESS AND RISKS OF STATELESS IN MALAWI REPORT

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By Nozgechi Phiri

#### Background

The study aimed to explore statelessness, the causes of statelessness and the risk of being stateless in Malawi. The study took a qualitative research approach talking with people that work with potentially people that are stateless or are potentially stateless themselves. The study was done in Lilongwe and Dowa.

#### Methods

The study used a qualitative research design to explore statelessness and we used this design because it qualitative research aims to understand a phenomenon rather than measuring. It answers the questions why, what and how.<sup>1</sup>

Using a convenient sample we conducted 7 key informant interviews (KII) and 2 Focus Group Discussions (FGD). We used 2 methods as a way of triangulating our data. In total we had 24 participants, both men and women. We used a snowballing technique to help us identify the participants. We identified through fellow participants people that could add more depth to the study topic. The participants were identified in Lilongwe and Dowa. We identified participants with different perspectives on the topic of statelessness, from the Immigration department, Department of Refugees, Civil society, Legal Aid, National Registration bureau, refugees and chiefs. Originally the study had intended to include the police, orphanages and refugees outside the camp. We did not include the police because our snowballing technique did not identify them as key informant. We did include the orphanages and refugees outside of Dzaleka camp because our snowballing technique through the Department of Refugees could not identify these people. Our sample size was driven by saturation point, a point whereby the interviews or FGDs were not producing any new information about the study topic. We stopped when we reached saturation point. Since the study was exploratory with the intention to understand the



phenomena, the groups of people who are stateless and what causes statelessness, the data collected was enough to answer the aims of the study.

The study was done through the Department of Refugee who facilitated in getting us the authorization and credentials for the team to talk to different people. Data collection was conducted by a social scientist with the support of a research assistant. Data collection was done from 2<sup>nd</sup> of February 11<sup>th</sup> of February 2022.

The interviews were conducted in private spaces with just the social scientist and the participant. The FGD were conducted in a hall with just the participants and the research assistant. The participants were given the information about the study and were given an opportunity to ask questions before commencing the KII or FGD. The participants were asked to consent to take part in the study either through written or verbal consent. They were informed that consent was voluntary and that they could withdraw at any without affecting any of their rights. The interviews were conducted in English while the FGDs were conducted in Chichewa as preferred language. Interviews and FGDs were conducted with confidentiality. Names were not included in the interviews and the data was stored using random numbers.

The KII or FGD used a semi structured guide which started with general questions to get to know the participants. This was designed this way as a way to break the ice and get the participants to be comfortable. Then the guide asked how the participants would define statelessness, whether they have encountered people who are stateless and the risks of being stateless. We also discussed solutions to being stateless.

Interviews were recorded using a Sony recorder and a Samsung Galaxy S2 tablet as a backup. The media files were transcribed verbatim and this is what represents the data to support this study. Data was stored in a password protected laptop. We developed a coding framework based on the guide that we used to collect the data. The transcripts were coded manually. Using thematic analysis, we came up with themes from the codes that were generated. We came up with 5 themes. Then we produced a descriptive summary of the codes while highlighting codes to explain specific points.

Strength of our study comes from the snowballing method because it identified different types of people and made our data rich.

## **Results**

In this section we are going to present the results from the data collected from the key informant interviews and the FGDs. The analysis resulted in 5 themes; definition of statelessness causes of

statelessness, impact of statelessness, importance of statelessness in Malawi and solutions to statelessness.

### Definition of stateless

Statelessness has been defined as a state where a person has no documentation that proves that s/he is from any country which essentially means that s/he has no protection of any country.

*"A situation where a person is not a citizen of any country or does not have legal protection of any country."* **Civil society**

*"From my understanding, the person has got no documentation that they belong to a particular state. So they have no formal documentation that vouch that they belong or they are a citizen of a particular country."* **Government Official 2**

### Causes of statelessness

According to the participants, a person can become stateless in a number of ways;

#### 1. Renouncing citizenship

A person that renounces their nationality to become a citizen of another country can become stateless if that other country revokes that citizenship due to certain reasons such as criminal offence as this participant narrates;

*"Typically people from Rwanda, after the genocide and after the new government came in... I think there was a deliberate policy to clean up, so a good number of them trekked this side. And typically for most of them, they had Rwandese and French passports. And then they came here, they got Malawi passports which by that time by the operation of the law, they were no longer Rwandese or French because Malawi at that time did not allow dual citizenship. It so happens that Malawi government realized that a good number of them had obtained their passports here in Malawi fraudulently. So if you look at those facts and you try to interpret them, you realize that once Malawi government revoked their passports, they would be essentially be stateless."* **Lawyer**

NRB attest that foreigners are somehow able to beat the system by getting the national ID fraudulently and locally integrate into the community.

*"And the other thing from our angle as well which we feel might really help is that we have realized that there are some refugees who are trying to beat our system. Of course some may have done that. They have registered as Malawian to have that national ID so that they can be able to access when they were not supposed to have that identity."* **Government Official 2**

According to NRB, Malawi has so far registered 10.5 Million people for the national IDs.

*"It's a moving target anyway because we are supposed to register everyone that has just turned 16. So almost each and every day we have people that are turning 16 and above but what we have realized is that we anticipate we will be registering I think up to about 40,000 in a month, those that have just turned 16... but the figures are on the lower side. Maybe about 5000 only so we still have newly turned 16 that have no valid IDs."*

**Government Official 2**

## 2. Asylum seekers or refugees that lose their status

Some refugees here in Malawi perceive that they are stateless although legally they have been given refugee status. These refugees feel that they are stateless because they do not have any ties or feel they would not be able to go back to the country they fled from while at the same time Malawi cannot give them citizenship according to the refugee act. And also because they have been refugees for over 20 years.

*"I cannot go back to my country of origin, at the same time the country that has received me will not give me citizenship. We are indeed stateless! Things are hard, things are hard indeed!"* **Refugee**

*"Legally yes [that is their country] but using other [social] parameters, No. Because if we use social context, we can say 'if I can't go back, how can it be my country'."* **Lawyer 1**

There is also another group of refugees that is perceived to be stateless because they are third or fourth generation of their tribe but have been in exile for a very long time that they cannot trace their roots. As highlighted in the quote below

*"For example, the Banyamulenge group here at Dzaleka. They register that they are from DRC but the other groups of people from DRC deny them and say they are from Rwanda. But Rwandans also do not recognize Banyamulenge's. They are born from the Tutsi's. They fled more than 50 years ago to DRC. Either of the 2 countries, do not accept 100% that they are from their countries."* **Government official**

Malawi government gave them refugee status based on where they say they are from but if they are grandchildren or great grandchildren of people that have moved countries. They cannot trace where they are coming from, they cannot tell you their village in this country. Essentially

even though they say they are coming from this country, they do not have a nationality. They just end up adopting a country to help the process.

Then there other refugees who came to Malawi seeking asylum and were given refugee status which was later revoked after the Geneva Convention. When this happened, Malawi ideally should have repatriated them back to their country however they have not been repatriated and years have gone by and they have resettled. This participant explains;

*"They run away from their country, they have given birth to children here who are Malawians. So this person is not a refugee and is not an asylum seeker, he is just in limbo. So the question that you are asking about belonging to a state.... We do not have a state but those [with no refugee or asylum status] are even worse for at least those who have a status are called refugees but those are like thieves. Maybe we can call them that."* **Refugee**

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And there are others who came to Malawi seeking asylum but years have gone by but have not received the decision whether their application was granted or not. They feel depressed and do not know if they have a future anywhere or how their children will grow. Some of people like these have been in this state for more than 14 years.

*"Now a person has been here for over six years or maybe 10 years, but they still have not received their decision on their status. So this is just like what she is saying because she has been here for over 6 years but she has not received her decision. Is she a refugee or she's in asylum seeker? What is her status?"* **Refugee 1**

*"There are people who have no status and have been living for years. I am an example. I have been here years but I do not see my future, the future of the children that I have given birth to. So someone is going crazy because she cannot see where she is going. So you just end up seeing that this person has lost her mind. Why has she lost her mind? It's what is happening to her because she cannot see a future... I have not been assigned a status. They just tell me that they will give me... what wrong have I done? Maybe I am a sinner"* **Refugee 5**

*"So where do you place this one [child]? Is he a refugee or asylum seeker?"* **Refugee 2**

*"If he passes or qualifies, he is given refugee status. If he fails or he's denied then he remains an asylum seeker. [I: Then what do you do with him?] He has a second chance to apply. If he fails the second chance, the rules are for him to leave the country within 14 days but they do not usually live. They stay on. Just because of humanitarian management or what, he continues to receive food.. [Repatriation] is supposed to be by Malawi government but do we have the money? It's an expense. To buy them plane tickets."*

**Government official**

Another example of people that were granted asylum but remained in Malawi are a certain group of Mozambicans who run away from the clashes in their country a few years back and never went back. One participant explains here;

*"Some of those people never returned. They will never go back. They are no longer refugees, because...firstly because of issues of politics, the government never recognized them as refugees. They were here as asylum seekers. Because of politics they didn't want to do that because the government of Mozambique did not acknowledge that there was war or clashes. So if the government of Malawi recognized them as refugees, it would mean they were saying that there was a war. So in protecting the diplomatic relations, those people were here as asylum seekers. They never got to the point of refugee status... the majority left on their own. But some still stayed behind."* **Civil society**

*"I also heard of Mozambicans who came here a long time ago and settled in Malawi. I think during the Mozambican civil war. And settled in Malawi. They are not Malawians and they never applied for the Malawian citizenship. They have been here and they are recognized by the chiefs...That Mozambican that settled in Dedza or Ntcheu or Mwanza can get a Malawi passport because they can say that they are Malawians..."* **Civil society.**

There are some people from Mozambique that came to Malawi so many years ago during the first civil war and never went back. These are not refugees as that status was revoked and so essentially they are stateless. According to the participants, these are able to obtain Malawi national ID through the chiefs since they are known by the chiefs and have been in Malawi for some time. According to the NRB, the application for a national ID requires that one produces a birth certificate that attests that one is Malawian but in case that is not available one can apply through their Malawian parents or through a letter from the chief accompanied by two Malawian witnesses with a national ID. A participant explains;

*"So like according to NRB, the way we prove that the person is indeed a Malawian, we require that the person must have let's say, a birth certificate. That will indicate that the person is indeed a Malawian Born of Malawian parents. And in other circumstances if that documentation is not available, we require that that person must have like a letter from the chief vouching that that person is indeed a Malawian. And maybe resides in my village. On top of that the parents of the person might also attest to the fact that yes indeed this is a Malawian. If the parents are not available, for those that have just turned 16, we require that... we normally insist that it should be the parents that accompany them but if a person is a grown-up and they don't have parents then we require at least two witnesses who already have a national ID to vouch for them. So on top of the letter from the chief, we're also supposed to have two witnesses who already have a national ID who can vouch that this is a Malawian."* **Government Official 2**

Even though birth certificate is a requirement for the application of a Malawi national ID, the demand for the certificate is low. People can get the birth notification from the health facilities but do not go to NRB to get the actual certificate. All births are supposed to be registered regardless of nationality.

*I will give you as of now, we are not doing well in terms of the births. Much as it is mandatory but in most of the facilities the births that are occurring are not being registered. 1) because we don't have... most facilities we do not have [NRB] staff so registration is supposed to be done by the health personnel but normally they say no, we are busy with some other things so ah the numbers are really on the lower side. So you might find that in a month 50 births that have occurred but you may have only births that have been registered... one other reason why the numbers are on the lower side is that we have not intensified the demand for that. For the national ID, yes... we trying to create that demand for birth certificates... we are in discussion with MOH to have policy in schools..."* **Government Official 2**

NRB has given out just over 2 million birth certificates since they started.

### 3. Children statelessness

There are children that are stateless in Malawi because they are born to foreign nationals whose countries do not/ would not recognize these children as their citizens and according to the immigration laws of Malawi, children cannot get citizenship by being born in Malawi. This participant explained such a scenario;

*"Children born to foreign nationals who were raised in Malawi, but the countries where their parents come from, do not recognize them as their citizens and also in Malawi we do not give citizenship by birth to foreigners who are born here. They also do not have anywhere to be put."* **Government Official 3**

*"On the certificates, we do not indicate the nationality of the child. We just indicate the nationality of the parents. So the certificate looks like this. The nationality of the father, the nationality of the mother, it does not say the nationality of the child. That is not determined by us. [I: Okay] of course people say that if both the nationality of the mother and the father is Malawian then automatically the child becomes Malawi."* **Government Official 2**

Child statelessness also exists in people that came here seeking asylum and were given refugee status. This participants explains;

*"Some refugees came to Malawi, and their children were born here but are not Malawian. I think the laws of the country of origin do not recognize them as their citizens and even here the refugee status of their parents was revoked and so they cannot claim to be refugees and so end up with protection of no state. Those children are stateless. Malawi government cannot recognize them. The country of origin of their parents cannot recognize them. Who are they? They are stateless!"* **Civil Society**

*"When we leave the hospital, after the child is born, we are given that receipt from Government and they give us a certificate after paying 30,000. Then from there, we come to UNHCR registration office and this child is added to your ID. If you as a parent has status, the child will also be a refugee. If you as a parent has rejection, the child is also given rejection. If you are asylum seeker, the child also is an asylum seeker."* **Refugee 4**

One participants shared that Malawi has a challenge repatriating people that have been rejected as asylum seekers or who's refugee status has been revoked.

*"Another challenge is when they asylum application is rejected, for us to send them back to their countries of origin, it's a challenge because we do not have resources as government, as immigration. We have a big number of rejected asylum seekers living in different communities yet to be taken back to their countries."* **Government Official 3**

#### 4. Third or fourth generation Malawians

There are people who moved from Malawi a long time ago to go to other countries like South Africa, Zimbabwe and these people while there have had children and grandchildren and so forth. When citizenship issues arises in those countries, they sometimes come back to Malawi with no idea where to start looking for their relatives. For example this case that one of the chiefs explained even though this ended well.

*"It happened here in Dowa, there was a person that was originally from here but was living in South Africa. He had children while he was there. The children came back here but found it difficult to trace where they were from. There in South Africa, they were told to go back to their home. Life was difficult for them here until a senior chief got involved but also another chief, until they found their clan. And then they were received but it took a lot of work. So there are indeed people that are stateless here in Malawi."* **Chief 3**

In other cases, these third or fourth generation Malawians come back to live with their relatives and just locally integrated into the community though without documentation to prove their Malawian nationality.

*"I have an example of Malawians that live in Zimbabwe, but left [Malawi] a long time ago. They lost their nationality at some point, I think for purposes of election the Zimbabwean government revoked their citizenship of such people. But they ended up somehow not being Malawian citizens. I think because of third or fourth generation, they ended up not being citizens of either Zimbabwe or Malawi. After all this time, they are not citizens of either country by operation of the laws of both countries."* **Civil society**

*"Legally they could be others that are stateless but because they are integrated into society... they have been there all along but you may not be considered as stateless after all Malawian social services can be accessed by almost anyone Malawian or not so it is not really an issue... I have heard of the same Malawians that come from Zimbabwe whereby by operational of law lost the citizenship of Malawi but returned. Who are they? Because by law they have to apply to get it back but currently they were just received by family. It's possible they renounced their citizenship. But because our laws are not serious, they have settled. If you had to apply the citizenship law seriously, they are not Malawians... Legally they are stateless but socially they are accepted as Malawians by the community."*  
**Lawyer 2**



## 5. People who live in no man's land along the borders

Another way that people can become stateless is when people who live along the borders of countries, when they shift and live on the land between the two countries' border, land that is called 'no man's land'. Here in Malawi, we can give an example of people that live along the borders areas along Dedza, Ntcheu, Mwanza and Mangochi etc. People end up living in this areas for so many generation that they lose the nationality, they cannot say that they belong to this or that country.

*"I will give an example where we had an operation in the southern part where we were dealing with an influx of Mozambicans but when you asked them do you consider yourself as a Mozambican? Some of them would say yes and others would say no because "my parents were from Malawi and I was born in Mozambique. I do not have any identification but my parents were from Malawi and they have Mozambican identification so I am not sure what to consider myself but I have lived most of my life in Mozambique" but they do not have any identification either from Malawi or Mozambique. So you say what do you consider them to be?"* **Government official 4**

### Risks of being stateless

There are several challenges of being stateless. The most important one is that in this new era some social services are not available to those that are legally not recognized as Malawians, those that do not have a Malawi national ID. For example, these days one cannot register for a cellphone sim card without a national ID. Now banks require a national ID for one to open an account. Below participants explains this point;

*"For example in terms of treatment, if the government want to send that person to India for treatment. Would they be able to? No they can't because they are not Malawian"* **Civil society**

*"If I am not a Malawian, then I can't get an ID, I can't get a license, I can't get fertilizer and a whole lot of things... You can't have any travel document because you belong to no government."* **Lawyer**

*"Your legal status determines your legal rights and privileges. If you don't fit it then you can't benefit from those."* **Lawyer**

*"Being stateless matters if you go in a place that requires documentation" NGO*

Being stateless makes one economically deprived. For example;

*"They are not eligible to get employment from government." Lawyer*

*"Most of these people who have no papers, the best job they can find is to go to those industries where minimum skills are required. Most of these people you find in sugar industries, tea industries, tobacco industries, farming industries, they can get jobs where they cannot even demand higher pay or they do not even have rights to demand higher pay because they have no papers. That is why we believe there could be people working in these places that have no papers" NGO*

People that are socially seen as stateless can face discrimination, segregation, and are vulnerable to human trafficking as highlighted by these participants here;

*"That statement is not a palatable statement. No one would want to say that they are stateless... The Banyamulenge's do not say that they are stateless. They say they are Banyamulenge's, they are from Congo, they are from DRC and yet the DRC people do not stay comfortably with them. Even marriages are very, very difficult... but they will not accept that they are stateless because acceptance of that makes them more vulnerable"*  
**Government Official**

*"They are vulnerable to traffickers if they want to seek greener pastures. They can end up being exploited sexually or in any other form." Government Official 3*

If a person is declared stateless, they can end up losing property or assets.

*"If one is declared stateless, it means everything you own or acquired before then is no longer yours. If you are stateless, it means all the paperwork you submitted as a Malawian falls off. It means those transaction by operation of the law are void." Lawyer*

### **Is statelessness a big problem in Malawi?**

According to some participants, statelessness is not a big problem in Malawi. One reason is that declaring a person stateless is a burden to the government and so should be avoided at all costs. This participant explains;

*"International law says declaring someone stateless should be avoided at all costs."* **Civil society**

*"They knew that they could not use the French or Rwandese passport because they were on the red alert of the Interpol. So for them to still visit their businesses in Paris, they were using the Malawi passport like they were Malawians with all these funny names. When it became clear that they were cut off, their thinking was that they will revert back to the Rwandese or French. I told them that it's not that automatic because by operation of the law here, it means you will be stateless. Like I said, the Malawi government... in good wisdom, there was no profit in declaring them stateless. In any case they will be the burden of the government so the better option was just to facilitate that they should be sent back to Rwanda... Imagine if you yourself declare him stateless, then what are you going to do with him? Where are you going to deport him to? Because you are saying he is stateless. That is a burden because you have to take care of that person"* **Lawyer**

It is not in the best interest of Malawi government to declare anyone stateless because that person will become the responsibility of the country.

The second reason why statelessness is not a problem is that people are not concerned with that. Whether one is stateless or Malawian is not a big problem yet because people have access to most things. This participant explains;

*"For the simple reason that nobody cares. [Or nobody is declared stateless?] Yes"* **Lawyer**

*"Malawi has no social security services like in other countries."* **Civil society**

And then there are others who are stateless while others are at risk of being stateless in Malawi but are not aware. Even the general populace just takes them as Malawians because they have been in their communities for many years.

Statelessness will start to matter when the national ID program is scaled up because the plan to introduce the requirement that people should produce a national Id if they want to receive medical treatment at the hospital. Although there is always the issue that treatment should be given to everyone there the idea is that if that is introduced then foreigners or anyone without documentation would have to pay out of pocket. This would create demand for national IDs.

*"There are talks with Ministry of Health to introduce the use of national Id in hospitals. Even though medical treatment is supposed to be universal. Statelessness does have an impact on the medical treatment one receives."* **Government Official 2**

*"If you are not Malawian, then you do not benefit from the 10% discount [for example]. You go to the hospital, you [should] pay the full amount."* **Lawyer**

## Solutions to statelessness

There were several solutions that participants offered would help people that are stateless.

### 1. *People need to be aware.*

There are people in the communities that are accepted as Malawian but legally they are not and they themselves are not aware that they are not Malawian as with the case of the Malawian that lost their nationality in Zimbabwe.

*"They might think they are Malawian but they are not. It might sound unfair. They might think they have been unfairly treated by their own country but the law is the law. Ignorance is not an excuse in law but these are people that must be aware. The government isn't doing its part if it's not making people aware".* **Civil society**

### 2. **People need to be aware that every child that is born needs to register for the birth certificate.**

Government needs to create demand for birth certificates by for example the suggestion that Ministry of Education should introduce the requirement for a parents to include a birth certificate as part of the application process for their child to be admitted into standard one in public primary school. Some private primary school already require it. Participant also talked about making the birth certificate affordable to foreigners because at present foreigners need to pay 30,000 to process a birth certificate.

*"We would want to intensify on civic education because most people do not know the importance of having the birth certificates. Yes they registered [the birth] but they do not see the need to have that particular document."* **Government Official 2**

### 3. **Government needs to simplify the citizenship process and procedures.**

*"The law is not clear on immigration law."* **Lawyer**

*"The law is discriminatory against male foreigners. But they are working on amending the immigration act."* **NGO**

4. **Government should find durable solutions for refugees because a person cannot remain a refugee forever.** According to some participants, the average number of years a camp has been in existence is 17 years but Dzaleka has been in existence since 1994, almost 28 years.

*"Similarly with the refugee, if he tells you that I do not have a state but he has come here seeking you protection so you have to think that what is the most durable solution for this individual? You have to locally integrate them or find a way. Can you find another state to recognize him because that would not be easy? You cannot send him back to any state because you cannot prove that he is a member of that state, that state cannot protect him so that leaves the responsibility to the government to protect that person so how do you do that? You just have to look at how you integrate that person locally. So that would be the responsibility of the department of immigration to consider."* **Government official 4**

## Conclusion

The study aimed to explore statelessness and the risks of being stateless. This study has shown that we may have people that are stateless in Malawi. They are stateless mostly as defined by social parameters but not necessarily declared by government. According to law, declaring someone stateless is a burden to the country and so in most cases countries will avoid this route.

From the results, people that are stateless can be found among the refugee population in Dzaleka, grandchildren and great grandchildren of people that have been in exile for decades, and children born to asylum seekers with no official status or those born to foreigners and in border areas like Dedza, Ntcheu, Mwanza etc. According to participants, being stateless is not a problem because we do not have systems in place that brings the issue into the limelight. People are able to access most social services in the country whether you are foreigner or Malawian. However things are starting to change with the introduction of national IDs.

## Recommendations

Evidence from this study has helped us understand statelessness in Malawi. The study has identified where people that are stateless may be found. Data from this study will help come up with a more comprehensive mixed study to identify people that are stateless and their numbers through District offices and chiefs.

### References

1. Green J. Qualitative methods for health research: SAGE PUBLICATIONS 2013.

## ANNEX 2: DATA GUIDE

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### Key Informant interviews Guide

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- Name Consultant:
  - Name of Instructing Client: Department of Refugees
  - Introduction and Explanation of right of consent anonymity
  - Consent forms signed (optional)
  - Introduction of Consultant
- 

Key Informant: Government officials eg. Department of Refugees/Homeland and Security/refugee campsite manager

- In what way does your department work on issues to do statelessness/refugees
  - What is the legal basis for your role?
  - Does the law/policies/institutions support your work and how
  - In your opinion, what kind of impact does the law/policies have on your work
  - What would you change for your work dealing with statelessness to improve
  - What support do you require?
  - What challenges do you face?
- 

### KEY INFORMANT TARGET GROUP: GOVT OFFICIALS ETC

#### About Statelessness

- Since when did your office start dealing/handling migration/stateless issues and what has changed in terms of numbers of migrants, refugees etc
- Have you encountered people claiming to be stateless? If so, what are the numbers todate? Since when did you start encountering this issue? If so, are the numbers of people claiming to be stateless?
- Non-identifying details about stateless individuals and those potentially at the risk of statelessness:

What are the causes of their statelessness or migration status?

- Their migration history;
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- contacts with village headmen and other authorities;
- immigration benefits they sought;
- possession of national identity documents,;
- conditions before and after entering Malawi; and
- Basic demographic information like age, place of birth, ethnicity, race, religion, and languages spoken.

## ABOUT STATELESS DETERMINATION PROCEDURES

- Whether the domestic framework provides for a legal basis for determining statelessness;
- Whether the law provides for access to stateless determination procedures for affected individuals
- Whether the law allows for procedure for submission of stateless determinations in writing or orally
- Whether the law provides for a centralised institution responsible for determining statelessness in the country.
- Whether sanctions for irregular entry or stay provides for the right to stay whilst appealing against rejections or their exceptions.
- whether there are exceptions that conforms with international standards including reasons of national security or public order
- Whether the law provides for the provision of temporary documents whilst stateless determinations are taking place
- Whether the law allows for the right to legal representation at the State's expense including legal aid.
- Whether the law provides for the standard regarding burden of proof to prove statelessness
- Whether the law provides for the right to appeal.
- Whether the law provides for the right to naturalisation for stateless persons
- Whether the law allows for registration at birth for stateless persons
- Whether nationality laws are not discriminatory on the any basis including gender
- Whether policies exist that deliberately removes cases of statelessness.

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### Proposed detailed questions:

- Can you tell me about role?
- How long have you been doing this role?



- What do you do?
- What is expected of you?
- What are some of the positive things about your role?
- What are the challenges that you face executing this role?
- Have you met people claiming to be stateless?
- What does statelessness mean to you?
- Do you think that it exists in Malawi?
- What causes one to become stateless?
- What are the risks of being stateless? How can you mitigate these risks?
- Is there any way that you can change the status of those who are stateless?
- Do you think that being stateless is a big problem here in Malawi? Why?
- What do you think should be done to remedy some of the challenges/ problems that you have mentioned?
- Do you work/ deal with people that are stateless? Please explain to me how you work with them?
- What are some of the issues/ problems that people that are stateless face?
- What are the issues your office face in supporting people that are stateless? Please give examples of your experiences
- How do you solve these issues?
- Do you think there would have been an easier way to solve these or avoid these?
- What other organizations do you work with when dealing with people that are stateless?
- How do you work with these organisations?

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**TARGET INFORMANT DZALEKA CAMP SITE MANAGER**

- Can you tell me about the role?
- How long have you been doing this role?
- What do you do?
- What is expected of you?
- What are some of the positive things about your role?
- What are the challenges that you face executing this role?

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**TARGET INFORMANT: REFUGEE/ASYLUM SEEKER/POTENTIALLY STATELESS OR POTENTIALLY AT RISK OF STATELESSNESS**

- Where were you born?
- Which country do you consider your home?
- Where did you come from?
- How long have you been at Dzaleka
- How long have you been in Malawi?
- How did you end up here in Malawi?
- What did that mean for your life? What changed?
- What does it mean to be a refugee here in Malawi? (Good or bad things? Give examples of experiences, any solutions to challenges faced?)
- Do you feel that you belong here? If not where do you think you belong?
- (Assuming he/she earlier answered that he does not consider his original country home, right?) Do you consider yourself to be stateless? Why do you think so?
- What causes you to become stateless?
- What are the risks of being stateless? How can you mitigate these risks?
- How does statelessness affect your children? (Birth certificate, school, health care?)
- How does statelessness affect your wives/ husbands? (Stateless spouses or Malawian?)
- What are the things that you are entitled to?
- What are the things that you are prohibited?
- How does this affect your life?
- Is there any way that you can change your status of being stateless?
- Who are the people or groupings that look after your interests? (What do they do?)
- What have they done to help? In your view, have they helped?
- Apart from people in your community, do you know of other people who are stateless that are outside of your community? How can I reach them so I hear their views too?

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#### KEY INFORMANT TARGET: NATIONAL REGISTRATION BUREAU OFFICIALS

- Take us through identity card registration process
- What law do you use to issue national identity cards
- What factors do you consider
- How do you deal with Children born from one parent
- Have you ever faced with a case of abandoned children? How did you handle it with respect to identify document's issuance?
- How many identity cards have you issued to date?
- When did you start issuing them?

- Do you issue identity cards at Malawi's foreign missions? If yes, what is the process like? If not, have you ever received any requests from Malawi foreign mission about Identity cards for children of Malawian nationals abroad? If so, how do you handle them?
- Have you encountered a request for identity cards from a person claiming to be stateless?
- Has your office ever recorded cases of card rejections? If so, how do you handle cases of appeals against such rejections?
- Do you have an office at refugee camps? If so, how do you deal with children born from parents based at the camp? Which nationality do you record for the children?
- Have you encountered a case of a child born from stateless parents at the camp? If so, how did you deal with such cases?
- Do you have records Village Headmen/Religious leaders/Traditional Authority?
- How do you verify confirmation of nationality?
- What happens if a person fails to prove nationality?
- Do you have a process for appeals?

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#### KEY INFORMANT TARGET: IMMIGRATION OFFICIALS

- Have you handled a request for citizenship from a stateless person, if so, how did you handle it?
- What are the fees for naturalisation:
- Do naturalisation fees apply across the board ie does it matter that the one applying is a stateless person or not.

#### REPEAT QUESTIONS FOR GOVERNMENT OFFICIALS ABOVE

- Whether sanctions for irregular entry or stay for stateless persons provides for the right to stay whilst appealing against rejections or their exceptions?
- Whether there are exceptions that conform with international standards including reasons of national security or public order?
- Whether the law provides for the provision of temporary documents whilst stateless determinations are taking place?
- Whether the law allows for the right to legal representation at the State's expense including legal aid?
- Whether the law provides for the standard regarding burden of proof to prove statelessness?
- Whether the law provides for the right to appeal?
- Whether the law provides for the right to naturalisation for stateless persons?

- Whether the law allows for registration at birth for stateless persons?
  - Whether nationality laws are not discriminatory on the any basis including gender?
  - Whether policies exists that deliberately removes cases of statelessness
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#### Non-identifying details about stateless individuals:

- The causes of their statelessness or immigration status;
  - Their migration history;
  - contacts with village headmen;
  - immigration benefits they sought;
  - possession of national identity documents
  - conditions before and after entering Malawi; and
  - Basic demographic information like age, place of birth, ethnicity, race, religion, and languages spoken.
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#### KEY INFORMANT TARGET: VILLAGE HEADMEN

- What is your role in national registration identity documents
  - What factors do you consider to confirm that a person is your subject
  - Have you ever encountered cases of people who claim that they come from your village but you cannot recognise them? If so, how do you deal with such cases?
  - How is your relationship with the national registration bureau?
  - Have you ever heard of refuges or asylum seekers?
  - What about stateless persons?
- 

#### FGD

- Which countries do you come from?
  - Do you consider those countries your home?
  - What does it mean to be a refugee here in Malawi? (Good or bad things? Give examples of experiences, any solutions to challenges faced?)
  - Do you feel that you belong here? If not where do you think you belong?
  - Do you consider yourself to be stateless? Why do you this so?
  - What causes one to become stateless?
  - What are the risks of being stateless? How can you mitigate these risks?
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- Is there any way that you can change your status of being stateless?
  - Who are the people or groupings that look after your interests? (What do they do? What have they done to help? In your view, have they helped?)
  - Apart from people in your community, do you know of other people who are stateless that are outside of your community? How can I reach them so I hear their views too?
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