

The protection of stateless persons in the African human rights System

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DECLARATION

I, SAMUEL BIZEN ABRAHA, do hereby declare that this research is my original work and that, to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

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DEDICATION

To the Stateless Nubian children in Kenya and the Stateless people of Rohingya in Myanmar

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LIST OF ABBREVIATIONS

AU	African Union
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of Child
OAU	Organization for African Unity
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights
UN	United Nations

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Chapter 1

Introduction

1.1 Background to the problem

The vast majority of the world's population takes for granted the rights and obligations that nationality confers on them. Nationality provides a tangible, durable and unshakable legal link with a state and infuses a sense of belonging and worth greater than the individual.¹ Most importantly, nationality provides citizens with access to employment, ownership of property, the right to enrol their children in schools, to seek medical attention, to freely go out and re-enter their country, to elect and be elected for government positions etc...² Unfortunately, the majority of the world's population is unaware of statelessness and the problems related to it.

'Stateless persons'³ are individuals or groups who due to lack of nationality, cannot exercise their rights under the operation of the law. Currently, according to United Nations Higher Commissioner for Refugees (UNHCR) an estimated 15 million people are stateless worldwide.⁴ Stateless persons often face legal challenges related to access to birth registration, identity documentation, education, health care, legal employment, property ownership, political participation, and freedom of movement.⁵

Until now, the exact number of stateless persons in Africa is not known. Although it is difficult to estimate the number of stateless persons in Africa, it has been opined that Africa is home to hundreds of thousands of stateless persons.⁶ To mention a few, Kenya is home to a stateless population of 100,000⁷ while Ethiopia hosts around 15,000 stateless Ethiopians of

¹ M Achiron, 'Nationality and statelessness: A handbook for Parliamentarians,' (2005) 11 *Inter-Parliamentary Union* 6. See also Indira Goris, Julai Harrington & Sebastian Köhn, 'Statelessness: What it is and why it matters,' (2009) *Forced Migration Review* 4.

² n 1 above, 6.

³ The 1954 Convention related to the Status of Stateless Persons, Article 1(1) describes a "stateless person as a person who is not considered a national by any state under the operation of its law." In addition to defining statelessness in the 1954 Convention, this definition is presumed to define statelessness in the 1961 Convention on the Reduction of Statelessness.

⁴ United Nations High Commissioner for Refugees (UNHCR), 'Addressing situations of statelessness,' (2009) *UNHCR Global Appeal* 45-48.

⁵ Lawyers for Human Rights, 'Towards ratification of the Statelessness Treaties,' (2011) *Lawyers for Human Rights* 3. See also Achiron (n 1 above) 6.

⁶ B Manby, *Struggles for citizenship in Africa*, (2010) 18. She says that the number of stateless persons in Africa is difficult to estimate, but they are certainly in the millions and possibly in the tens of millions.

⁷ A Sing'oei 'Promoting citizenship in Kenya: The Nubian case,' in B Blitz & M Lynch (eds) *Statelessness and Benefits of Citizenship* (2009) 40.

Eritrean descent.⁸ Other states such as the Democratic Republic of Congo are also known to host tenth thousands of stateless groups.⁹ In Zimbabwe, Zimbabweans of European or Malawian, Mozambican and other African descent in their hundreds thousands are rendered stateless.¹⁰ The view has been expressed that the civil war in the Democratic Republic of Congo which destabilised the Great Lake Region and resulted in a tragic human and refugee crisis is caused, among other things, by the denial of citizenship to the Banyarwandas.¹¹ Similarly, the civil war in Cote d'Ivoire that ended in 2011 was also the result of the non-recognition of the long-time agricultural migrants from neighbouring countries, Burkina Faso and Mali, for political reasons.¹²

The above cases show that the issue of statelessness in the continent is not only peculiar to the plight of individuals, but also of groups that suffer from a collective denial of citizenship. On the one hand, these cases have revealed that the statelessness is a human tragedy which spread gross human rights violation of both individuals and societies.¹³ On the other hand, they showed that statelessness is also a source of many ethnic conflicts that destabilised different countries and regions in Africa.¹⁴ Therefore, the severity of the statelessness problem in Africa calls for attention for two reasons: first, to understand the intensity of the crisis; and second, to find a formula that would help to alleviate the hardships encountered by stateless persons.

⁸ John R. Campbell, 'the enduring problem of statelessness in the Horn of Africa: how nation-states and western courts (re)define nationality,' (2011) 23(4) *International Journal of Refugee Law* 656. Maureen Lynch and Katherine Southwick, 'Ethiopian - Eritrean Stalemate takes a toll on Eritreans and Ethiopians of Eritrean origin,' (2008) *Refugees International*: <http://www.refugeesinternational.org/policy/field-report/ethiopia-eritrea-stalemate-takes-toll-eritreans-and-ethiopians-eritrea-origin> (accessed 1 October 2012). See also Immigration and Refugee Board of Canada, 'Ethiopia: The treatment of Eritreans by the Ethiopian government authorities (2008-2009),' 14 January 2010, ETH103319.FE, <http://www.unhcr.org/refworld/docid/4b7cee7b18.html> (accessed 1 October 2012).

⁹ Open society Justice Initiative, 'De jure Statelessness in the Real World: Applying the Prato Summary Conclusions' (2011) *Open Society Foundation* 13. See also Manby (n 6 above) 18.

¹⁰ Manby (n 6 above) 18.

¹¹ Open society Justice Initiative (n 9 above) 14. See also F Deng, 'Ethnic Marginalization as Statelessness: Lessons from the Great Lakes Region of Africa,' in *Citizenship Today: Global Perspectives and Practices*, 8-9. The term Banyarwanda refers collectively to a number of different ethnic minorities living in the eastern provinces of North and South Kivu, all of whom speak Kinyarwanda, the Rwandan language.

¹² Open society Justice Initiative (n 9 above) 16. B Blitz, 'Statelessness, protection and equality,' (2009) 3 *Refugee Studies Centre*.11. See also as above 10-11.

¹³ Manby (n 6 above) 3-8.

¹⁴ As above.

1.2 Definitions of terms

Nationality/citizenship: the synonyms, nationality and citizenship, denotes the legal link between an individual and a particular state.¹⁵ As the US-Mexico General Claims Commission clearly underlined in *Re Lynch*, “an individual owes allegiance to the state and in return may avail him or herself of the state’s protection.”¹⁶ Nationality normally confers some protection on the individual by the state, and some obligations on the individual towards the state. The most common feature of citizenship is that citizens have the right to permanent residence within the state, the right to freedom of movement within the state, the right to vote and to be elected or appointed to public office, the right of access to public services, the right to diplomatic protection when outside the country, and other rights.¹⁷

Statelessness: the term “statelessness” describes the situation of a person who is without a state to call his own. According to international law, a stateless person is any person who is not considered as a national by any state through its nationality legislation or constitution.¹⁸ Thus, the word was coined to describe the status of a person who cannot enjoy the protection of any state.

1.3 Statement of the problem

The number of cases on stateless persons in Africa is not something that can be ignored easily. Statelessness is a tragic human rights problem that has not received the attention it deserves.¹⁹ Researches show that laws and practices governing citizenship in many Africa countries effectively leave hundreds of thousands of people without nationality.²⁰ Moreover, the citizenship laws of many African countries have been manipulated and restricted to deny rights to those whom a state wishes to marginalise or exclude.²¹ As is the case in other continents, stateless persons are among the most vulnerable category of persons in the

¹⁵ International Court of Justice, *Liechtenstien v. Guatamala “Nottebohm case”*, 1955 I.C.J. 4 (Apr. 6) 23.

¹⁶ *Re Lynch* (1929-30), 5 Ann. Dig. 221 (US-Mexico Claims Commission), 222.

¹⁷ Achiron (n 1 above) 6.

¹⁸ Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons.

¹⁹ Lawyer for Human Rights (n 5 above) 3.

²⁰ Campbell (n 8 above) 656. See also Manby (n 6 above) 1-3.

²¹ n 8 above, 656. See also Manby (n 6 above) 15.

African society.²² They cannot vote, stand for governmental office, enrol their children in schools, travel freely, or own property.²³

The 1954 Convention relating to the Status of Stateless Persons²⁴ and the 1961 Convention on the Reduction of Statelessness²⁵ are specifically designed as legal regime that deals with statelessness at the international level. Additionally, they both also are designed to address the two dimensions of the statelessness question together. Alarming, only twenty two African countries have ratified the 1954 Convention relating to the Status of Stateless Persons,²⁶ while only eleven countries have ratified the 1961 Convention on the Reduction of Statelessness.²⁷ This reluctance by African states to ratify the two conventions can be attributed to either due to lack awareness of the existence of the two conventions or the lack of political will to acknowledge and address the issue of stateless persons in their respective countries.

Furthermore, the African Charter on Human and Peoples' Rights (the African Charter)²⁸ does make an explicit reference to nationality which raises the question whether this hinders the effective protection of stateless persons in the continent. The jurisprudence of the African Human Rights Commission (the African Commission)²⁹ is very scanty and still at its lowest level when it comes to the issue of statelessness. To date, the African Commission has handled very few cases related to stateless persons which address the issue indirectly. However, the African Committee of Experts on the Rights and Welfare of the Child

²² B Manby, *Citizenship Law in Africa: A Comparative Study*. (2010) 1.

²³ As above.

²⁴ The 1954 Convention on the Status of Stateless Persons (hereafter the 1954 Statelessness Convention) was adopted 28 September 1954 and entered into force on 6 June 1960. See also UNHCR, 'the 1954 Convention relating to the Status of Stateless Persons. Its history and interpretation', 1997, available at: <http://www.unhcr.org/refworld/docid/4785f03d2.html> (accessed 16 September 2012).

²⁵ The 1961 Convention on the Reduction of Statelessness (hereafter the 1961 Statelessness Convention) was adopted on 30 August 1961 it entered into force on 13 December 1975.

²⁶ United Nations Treaty Collection, 'Ratifications on the 1954 Convention relating to the Status of Stateless Persons, http://treaties.un.org/pages/ViewDetailsII.aspx?src=UNTSO&mtdsg_no=V~3&chapter=5&mtdsg2&lang=en (accessed 16 September 2012).

²⁷ United Nations Treaty Collection, 'Ratification on the 1961 Convention on the Reduction of Statelessness,' http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=V-4&chapter=5&lang=en (accessed 16 September 2012).

²⁸ The African Charter was adopted by the OAU in Nairobi, Kenya on June 27 1981 and entered into force on 21 October 1986. African Charter is also sometimes called the 'Banjul Charter'.

²⁹ The African Commission on Human and Peoples' Rights (hereafter the African Commission) was established under the African for Human and Peoples' Rights is a body in charge of handling communication based on the African Charter and its Protocols. For more analysis see chapter four.

(Committee of Experts)³⁰ in the case of *Children of Nubian descent in Kenya v Kenya*³¹ directly addressed the plight of the Nubian children in the acquisition of birth certificates which resulted in the statelessness of Nubian children in Kenya. In this ground breaking decision the Committee of Experts employed the provisions of the African Charter on the Rights and Welfare of the Child (Children's Charter)³² which provided a glimpse of hope in the prevention, reduction and protection of stateless child in particular and statelessness in general in the whole continent.³³

1.4 Research questions

The general research question this paper seeks to address is whether the African human rights system (i.e. instruments and its organs) adequately address the issue of statelessness in the continent. Hence, the research question that is intended to be addressed in this paper is: *how can the African human rights system be improved to adequately deal with the issue of statelessness and ensure adequate protection of stateless persons in the continent?*

To address this research question, the following sub-questions will be raised: what are the main causes of statelessness in Africa; what protections and prevention mechanisms are provided by the two statelessness conventions; what is the position of the African human rights system in protection and prevention of statelessness in the continent; and what should be done to improve the system?

1.5 Research Objectives

The study seeks to accomplish the following objectives:

- (i) To assess the status of stateless persons in Africa.

³⁰ The African Committee of Experts on the Human and Peoples' Rights on the Right of the Child (hereafter Committee of Experts) was established under the African Charter for Human and Peoples' Rights on the Rights and Welfare of the Child.

³¹ Communication: No. Com/002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*. (ACHPRCR 2011). (hereafter *Nubian case*).

³² The African Charter on the Rights and Welfare of the Child was adopted in 1990 and entered into force on 29 November 1999. (hereafter *Children's Charter*).

³³ See Chapter four for more analysis of the case.

- (ii) To analyse the international legal framework governing statelessness, in particular, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.
- (iii) To analyse the international human rights and regional systems in relation to the protection they provide to stateless persons.
- (iv) To assess whether the African human rights system is adequately addressed the issue of statelessness in the continent.
- (v) To assess the feasibility of having a Protocol on the right to nationality.

1.6 Preliminary literature Review

Most of the literature on statelessness and related issues, during the 1960-80s were limited to human security issues rather than human rights. However, with several publications such as, the United Nations High Commissioner for Refugees,³⁴ the Open Society Justice Institutions³⁵ and the United Nations Treaty Bodies,³⁶ the literature has shown a shift in approach from statelessness as a human security issue to statelessness as a human rights issue.

To date, the most comprehensive study on statelessness is called: *Nationality Matters: Statelessness under International Law*, by Laura Van Waas.³⁷ The book provides a comprehensive analysis of the causes, prevention, and protection of statelessness. It also evaluates the technical and practical causes of statelessness such as conflict of laws, state succession, arbitrary deprivation of nationality in light of the two Statelessness Conventions and international human rights law. It also shows how international human rights law can close the gaps left by the two conventions.

Another scholar, Goldston, pointed out that states have increasingly exploited their traditional discretion over matters of citizenship to carve out significant exceptions to the universality of

³⁴ See UNHCR, 'Protecting the Rights of Stateless Persons: The 1954 Convention relating to the Status of Stateless Persons' (2010) *UNHCR*. see also UNHCR, 'Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness,' (2010) *UNHCR*.

³⁵ Open Society Justice Initiative (n 9 above).

³⁶ UN Human Rights Council Resolutions 7/10 of 27 March 2008, 10/13 of 26 March 2009 and 13/2 of 24 March 2010, and 20/5 of 16 July 2012.

³⁷ Waas (n 23 above).

human rights protection.³⁸ He also emphasised that racial discrimination is a major cause of denationalization and restrictive access to citizenship. Besides, he expounded on how human rights norms on non-discrimination on grounds of racial or ethnic origin can be utilised to combat the worst effects of citizenship denial and ill-treatment of non-citizens. Similarly, David Weissbordt and Clay Collins also reiterated that the rights of stateless persons must be seen from the eyes of different international human rights instruments.³⁹

In relation to Africa, the literature on stateless is scanty and inadequate. Most scholarly writings are largely focused on the identification of the narrow problems of specified groups or countries. However, recently the Open Society Justice Initiative is playing a positive role by publishing comprehensive reports and news items on stateless persons such as in Mauritania⁴⁰ and Southern-Sudan⁴¹. Manby is one of the leading scholars in this area who has contributed to literature related to stateless in Africa.⁴² In her first book *the Struggles for citizenship in Africa* she traced back the cause of statelessness in the continent to colonial period discriminatory rules and migrations. In the book called *Citizenship law in Africa: A comparative study*, she expounded that nationality laws of many African still discriminate based on ethnicity, race and gender and are the main cause of statelessness in the continent. However, the scholarly writings on Africa and statelessness, including Manby's, still fall short of addressing adequately the statelessness issue in Africa. More specifically, it is weak when it is seen from the perspective of the two statelessness conventions and international human rights law.

1.7 Significance of the study

Research indicates that there are gaps and shortcomings in the Africa human rights system concerning the protection of the human rights of stateless persons. Additionally, the scholarly writing on Africa and statelessness to date is scanty and limited to specific issues. One of the aims of this paper is to assess the causes of statelessness in Africa and analyse them in

³⁸ James A Goldston 'Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens' (2006) 321-347.

³⁹ David Weissbrodt and Clay Collins, 'The human rights of stateless persons,' (2006) 28 *Human Rights Quarterly* 245-276.

⁴⁰ Sebastian Kohn, 'Fear and Statelessness in Mauritania,' 3 October 2011 *Open Society Justice Initiative*, <http://www.soros.org/voices/fear-and-statelessns-mauritaniaes> (accessed 16 September 2012).

⁴¹ B Manby, 'The right to a nationality and the secession of South Sudan: A commentary on the impact of the new laws,' (2012) *Open Society Justice Initiative* <http://www.unhcr.org/refworld/docid/4ff158d527.html> (accessed 16 September 2012).

⁴² Manby (n 6 above) and (n 22 above).

comparison with the protections provided under the 1954 and 1961 Statelessness Conventions. The paper also aims at exploring the African human rights system in light of its adequacy not only in the prevention and reduction of statelessness but also the protection of stateless persons in Africa. Furthermore, the paper will also look for ways and formulas to fill the gaps and remedy the inadequacy in the African human rights system by looking at the ways international and regional human rights systems address those gaps. Finally, the paper will explore whether adopting a Protocol on the right to nationality is a viable and feasible option. In doing so, this paper will advance solutions that can lead to improvement in the protection of stateless persons under the African human rights system.

1.8 Limitations of the Study

This study does have some limitations. Firstly, it should be noted that the research is based on second hand information and is reliant on the statistics produced by other researchers and organizations. Therefore, the figures and statistics that are utilised in the research might overestimate the reality on the ground. Secondly, as mentioned above the study relies on secondary information and the internet. Therefore no physical interviews have been conducted. Lastly, but not the least, the study cannot claim that the discussion engaged in here are exhaustive enough.

1.9 Research Methodology

The research methodology that is utilised in this research paper is qualitative, analytical and comparative. This study will deploy library based qualitative research methodology. This will be supplemented by recourse to internet based qualitative research where appropriate. It is primarily based on a review of scholarly contributions (secondary sources) on statelessness. The methodology also includes an examination of primary sources such as the two statelessness conventions, and international and regional human rights instruments. Emphasis will also be given to the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. General Comments of the different UN treaty bodies and cases of different regional human rights bodies will be considered for a comparative study. The survey of primary and secondary literature sources will be done mainly by desk top research.

1.10 Organisation of Dissertation

Besides this opening chapter, the remainder of the dissertation is organized into the following chapters. Chapter Two provides a discussion the causes of statelessness in Africa in light of the 1961 Statelessness Convention and international human rights law. Chapter Three focuses on the protection provided to stateless persons under the 1954 Statelessness Convention and international human rights law.

The main focus of Chapter Four is the discussion of statelessness under the African Human Rights system. The chapter deals with three important instruments the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. Organs and mechanisms of enforcement under the African human rights system are also discussed in the same chapter. Finally, Chapter Five presents the overall conclusion and recommendations.

Chapter 2

Preventing Statelessness under international law

2.1 Introduction

Nationality is the link that relates an individual to a particular state. Thus, the factors that cause statelessness are either nationality laws or the guiding principles behind the nationality laws. The main source of statelessness in Africa can be traced back to the colonial history and heritage of each country. The Artificial boundaries in Africa, which were forced by the European colonial powers at the Berlin Conference (1884-85), are also the other factor exacerbating statelessness in the continent.⁴³ These boundaries which were imposed without due consideration given to ethnic, social, and cultural bond between the African people, were transferred into post-colonial Africa by the African Union through the adoption of these colonial boundaries as the legitimate boundaries between African countries.

It should also be noted that colonialism was established on racial and ethnic discrimination. These discriminatory policies did not only create distinction of treatment between the Europeans and Africans, but also between slaves from Asian origin and blacks Africans.⁴⁴ The colonial era internal migration also created a preferential treatment between the indigenous African people and other African migrants.⁴⁵ Hence, these discriminatory colonial policies have played a great role in shaping the national identity and nationality laws of African countries.

In this chapter we are going to deal with possible causes of statelessness in Africa and its prevention under international law. In dealing with the prevention of statelessness we are going to employ the 1961 Convention on the Reduction of Statelessness and other international and regional human rights instruments. This chapter will be divided into the following three sections: technical causes of statelessness; arbitrary deprivation of nationality; and statelessness and state-succession.

⁴³ Manby (n 6 above) 3.

⁴⁴ n above, 4.

⁴⁵ As above.

2.2 Technical causes of statelessness

Nationality has been attributed in three ways: by descent (*jus sanguinis*), by birth within a territory (*jus soli*), by naturalisation (*jus domicilli*).⁴⁶ As mentioned above the *jus sanguinis* nationality principle requires conferment of citizenship by descent. The principle of *jus soli* nationality also implies that citizenship is based on place of birth.

Research indicated that nationality laws in most African countries reflect a compromise of the *jus soli* and *jus sanguinis*.⁴⁷ Unfortunately, applied separately and collectively both the *jus sanguinis* and *jus soli* principles fail to solve all issues that revolve around citizenship.⁴⁸ For instance, *jus sanguinis* may fail to grant nationality to a child where the child's parents are not the citizens of any country.⁴⁹ Similarly, *jus soli* may fail to confer nationality to child when the child's birth is not registered and the parents cannot prove upon what soil the child is born. Further, a child born from parents, which their country of origin only confers nationality *jus soli*, is born in a territory of foreign country that confers *jus sanguinis* nationality will be rendered stateless.⁵⁰ He does not qualify a citizen in the country that he is born because the laws only allow nationality by descent and he also does not qualify for his parents' nationality because he is born in a foreign country. Such cases are what are collectively called by Waas as 'technical causes' of statelessness.⁵¹ These causes are related to a conflict of nationality laws or a unilateral act by a state.⁵² In the sub-section we are going to address children (in general), abandoned or orphaned children; marriage, divorce and adoption; loss, deprivation and renunciation of nationality.

2.2.1 Protection of children from statelessness

The 1961 Statelessness Convention reflects both the *jus sanguinis* and the *jus soli* in its provisions. On the one hand, Article 1 which adopted the *jus soli* principle obliges states parties to grant nationality to a child born in their territory if otherwise would be stateless.⁵³ On the other hand, Article 4 which reflects the *jus sanguinis* doctrine obliges states parties to

⁴⁶ J Milbrandt, 'Stateless' *Cardozo Journal of International & Comparative Law*. (2011) 90. See also D Walker, 'Statelessness: violation or conduit for the violation of human rights' (1981) 3 *Human Rights Quarterly* 110.

⁴⁷ Manby (n above 22) 32. The statistics that is provided about the citizenship law of African countries in this paper is dependent on the study conducted by the Open Society Justice Institutions.

⁴⁸ Walker (n 46 above) 110 -111. See also Goris et al, (n 1 above) 4.

⁴⁹ Weissbrodt (n 38 above) 255.

⁵⁰ As above.

⁵¹ Waas (n 23 above) 49.

⁵² As above.

⁵³ Article 1 of the 1961 Statelessness Convention "A Contracting State shall grant its nationality to a person born on its territory who would otherwise would be stateless".

grant nationality to a child born outside of their territory of state if one of his parents is a national and if he would otherwise be stateless.⁵⁴ However, under this provision the *jus soli* attribution of nationality is provided precedence over the *jus sanguinis*.

The 1966 International Covenant on Civil and Political Rights (ICCPR) specifically provides to a child's right to nationality at birth.⁵⁵ However, the ICCPR does not provide concrete procedures by which states are obliged to adhere to its application. Cognisant of such a weakness the Human Rights Committee, the body responsible for monitoring the application of the ICCPR, in its General Comment 17,⁵⁶ addressed the conflict of laws resulting from *jus sanguinis* and *jus soli* doctrines by explicitly obliging states to adopt measures to prevent statelessness of children at birth.⁵⁷ Similarly, Article 7 of the UN Convention on the Rights of the Child (CRC)⁵⁸ provides that a child has the right to acquire nationality after birth.⁵⁹ Further, paragraph 2 of Article 7 of the CRC obliges states to make sure that a child shall not be rendered stateless. In cases of the transferral of *jus sanguinis* nationality one's the parents are abroad, Article 1 and 4 the 1961 Convention might be applicable if a child is risking statelessness.⁶⁰

We may now return to the issue of legitimate and illegitimate children and gender-sensitive nationality laws. More than half of the African countries grant citizenship through paternal descent alone.⁶¹ Hence, women in these countries are unable to pass on their citizenship to their foreign spouses.⁶² In such cases, children born out of wedlock and children born to stateless father will remain stateless. Article 1 (3) of the 1961 Convention imposes an absolute obligation that a child born out of wedlock be granted nationality if he risks

⁵⁴ Article 4 the 1961 Statelessness Convention "A Contracting State shall grant nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that state".

⁵⁵ Article 24 of the ICCPR: "Every child has a right to nationality." See also Article 15 of the Universal Declaration of Human Rights (UDHR).

⁵⁶ Human Rights Committee General Comment 17 "While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with others States, to ensure that every child has nationality when he is born."

⁵⁷ Waas (n 23 above) 59,

⁵⁸ Except Somalia and USA who have signed but not ratified it, all other UN member states have ratified it.

⁵⁹ See Article 7 of the CRC. See J Doek, 'The CRC and the right to acquire and preserve nationality' (2006) 3 *Refugee Survey Quarterly* 26-32. See also Article 4 of the European Nationality Convention and Article 4 of the American Convention on Human Rights.

⁶⁰ Waas (n 23 above) 56.

⁶¹ Manby (n 22 above) 37.

⁶² As above, Benin, Burundi, Guinea, Liberia, Libya, Madagascar, Mali, Mauritius, Senegal, Somalia, Swaziland, Togo, and Tunisia still discriminate on the grounds of gender in granting citizenship from birth to children either born in their territory or abroad.

statelessness, when the mother of a child possess nationality of the state.⁶³ Waas suggested that if Article 7 of the CRC read in conjunction with the non-discrimination clause of Article 2, it provides for equal treatment of a child born in and out of wedlock.⁶⁴ It should be pointed out that the American Convention clearly recognises the equal treatment of children born out of wedlock, while the European Convention on Nationality reserves the right such right on states to determination through their municipal law.⁶⁵ Furthermore, Article 9 of the 1979 Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁶⁶ is devoted for the eradication of discrimination against in nationality matters.⁶⁷

In relation to abandoned and orphaned children, Article 2 the 1961 Convention clearly states that the state where a foundling child found in its territory is obliged to assume the child as *jus sanguinis* and *jus soli* national.

2.2.2 Marriage, divorce and adoption

With the advent of globalisation, migration and mobilisation of people across international borders have resulted in the multiplication of cross-cultural and cross-national marriages and adoptions in an unprecedented way. Family links are among the factors that determines an individual's genuine link to a state in the acquisition of nationality through naturalisation. Hence, change of status related to marriage, divorce and adoption has increasingly become a relevant factor that renders individuals (particularly women) susceptible to statelessness.⁶⁸

The 1961 Statelessness Convention contains an unequivocal provision concerning the change of status related to marriage, divorce, and adoption. According to Article 5 of the Convention loss of nationality resulting from 'any change in the personal status of a person' related, to marriage, divorce and adoption, shall be effectuated by states after ensuring that the person

⁶³ Article 1(3) the 1961 Statelessness Convention "Notwithstanding the provisions of paragraphs 1 (b) and 2 of this article, a child born in wedlock the territory of a Contracting state, whose mother has the nationality of that state, shall acquire at birth the nationality if otherwise would be stateless".

⁶⁴ Waas (n 23 above) 65.

⁶⁵ See Article 17 paragraph 5 of the American Convention and Article 6 1(b) of the European Convention on Nationality.

⁶⁶ Adopted on the 18th of December 1979, entered into force on the 3rd of September 1981.

⁶⁷ Article 9, paragraph 2 of CEDAW: "States Parties shall grant women equal rights with men with respect to the nationality of their children." See also The Committee on the Elimination of Discrimination Against Women, Concluding Observations, Morocco, A/52/38/Rev. 1 part I. New York: 1997, paragraph 63. Algeria, A/54/38/Rev. 1 part I. New York: 1999, paragraph 83. See Human Rights Committee, Concluding Observations, Egypt A/58/40 vol. I, Geneva: 2001, paragraph 84. Morocco, A/60/40 vol. I, Geneva: 2005, paragraph 32. See also Committee on the Rights of Child, Concluding Observations, Egypt, CRC/C/103, Geneva: 2001, paragraph 224-225. Togo, CRC/C/146, Geneva: 2005, paragraph 547.

⁶⁸ Walker (n 46 above) 115.

has acquired another nationality.⁶⁹ The wording can apply both to a female and male spouses and it also addresses the inter-country adoption cases. Careful compliance to Article 5 of the 1961 Statelessness Convention by states parties can go long way to prevent statelessness.

When it comes to the protection of women, Article 9 of the CEDAW prohibits woman's automatic change of nationality in case of marriage to an alien if it otherwise renders her stateless.⁷⁰ Equally, Article 1 of the 1957 Convention on the Nationality of Married Women provides that the change of a woman's status related to marriage and divorce shall not amount to automatic loss of nationality. On similar issue, the European Convention on Nationality provides equal treatment to both male and female and prohibits automatic change of nationality by marriage or divorce.⁷¹ Article 6 paragraph 4(a) further obliges states parties to the Convention to facilitate the acquisition of nationality for the non-national spouse.⁷²

Nationality matters concerning the inter-country adoption of a child is not well addressed by international human right instruments. The Convention on the Rights of the Child Article 8 mentions that obligation of states to respect the preservation of a child's right.⁷³ This Article seems to suggest that in case of inter-country adoption the retention of the original nationality is the preferred method to avoid statelessness. On the other hand, the Committee on the Rights of the Child seems to suggest that the preferred approach in inter-country adoption of a child is the attribution of the nationality of the adoptive parents.⁷⁴ Strangely enough, both the CRC Article 21 which is devoted to the protection of adopted child and the Convention on Protection of Child and Co-operation in Respect of Inter-country Adoption⁷⁵ are silent about the choice of nationality of an adopted child. In contrast, Article 11 of the 1967 European Convention on the Adoption of Children provided for a facilitated acquisition of nationality of the adoptive parent. Further, the Article makes the loss of nationality in such a case conditional upon the possession of another nationality by the adopted child.

⁶⁹ Article 5 of paragraph 1 of the 1961 Statelessness Convention "If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality."

⁷⁰ Article 9 paragraph 1 CEDAW.

⁷¹ Article 4 section d) of the European Convention on Nationality.

⁷² Article 6 paragraph 4(a) of the European Convention on Nationality.

⁷³ See article 8 of CRC: "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality."

⁷⁴ Waas (n 23 above) 77.

⁷⁵ The Convention on Protection of Child and Co-operation in Respect of Inter-country Adoption entered into force the 1st May of 2005.

2.2.3 Loss, deprivation and renunciation of nationality

The other major technical causes of statelessness are loss, deprivation and renunciation of nationality.⁷⁶ Some countries in Africa provide that a long term residence on a foreign country can result on the loss of nationality.⁷⁷ Such legislations allow states to revoke the nationality of those emigrants for different reasons prescribed under their laws. Besides, some nationality laws allow their citizens the freedom to renounce their citizenship, to give the individual the benefit of acquiring citizenship through naturalisation and avoid dual nationality.

The 1961 Statelessness Convention addresses loss of nationality, deprivation and nationality. Article 7 paragraph 1(a) of the Convention clearly provides that an individual cannot lose his original nationality for the mere reason that he has resided in a foreign country unless he possesses or acquires another nationality. The Statelessness Convention in Article 7 paragraph 3 makes a clear distinction between a naturalised person and a person who resides abroad and prohibits loss of nationality in the latter case. However, states parties are allowed to revoke the nationality of an individual. First, if he has acquired nationality through naturalisation. Second, if he lived abroad more than seven years without registering his intention to retain his original nationality.⁷⁸ It can general be said that that the human rights instruments are almost silent about the consequence such factors on statelessness.

Article 8 of the 1961 Statelessness Convention provided some exceptions cases whereby states are allowed to revoke or deprive and individual of his nationality. The first exception relates to cases when an individual acquiring nationality through marriage or birth by misrepresentation or fraud.⁷⁹ The other exception relates to cases when he has rendered services or receives payments or acted against the vital interest of the state. He can also be deprived of his nationality when he has declared his allegiance to another state.⁸⁰ Similarly, Article 7 of the European Convention on Nationality is provides similar list of circumstances which allow states parties to withdraw their nationality.⁸¹

⁷⁶ See also walker (n 46 above) 112-115.

⁷⁷ Malawi, under article 25 of the Citizenship Act of 1966, and Sudan under article 13 of the Citizenship Act of 1957.

⁷⁸ The exception to naturalised persons is provided under article 7 paragraph 4 1961 Convention.

⁷⁹ Article 8 paragraph 2(b) The 1961 Statelessness Convention “Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State: (b) where the nationality has been obtained by misrepresentation or fraud.”

⁸⁰ Article 8 paragraph 3 of the 1961 Statelessness Convention.

⁸¹ Article 7 of the European Convention on Nationality for the exhaustive list.

Another important provision worth noting is Article 6 of the 1961 Convention which prohibits states parties from revoking/withdrawing nationality of spouses or children of a person whose nationality being revoke, unless they possess or acquire another nationality.⁸² This article explicitly prevents statelessness in cases of dependants of a stateless person.

The third type of the withdrawal of nationality, involves the individual's right to renounce his nationality. Article 7 of the 1961 Statelessness Convention without any exception provides that renunciation of one's nationality shall be effective only when the individual possesses or acquires another nationality.⁸³ This Article, in paragraph 2 also makes it a requirement that either the person must first acquire the nationality or should be given assurance that his application will be honoured.⁸⁴ Article 8 The European Convention on Nationality prohibits an individual from renouncing his nationality without applying for naturalisation.

2.3 Arbitrary deprivation of Nationality

The majority of the cases of statelessness in the in Africa to date fall under category of arbitrary deprivation of nationality. In most African countries there is a widespread lack of due process of protections. The laws in too many African countries give almost unlimited discretion to the executive to revoke nationality.⁸⁵ Deprivation in this context is not limited "to denationalisation or withdrawal of nationality on certain ground prescribed by law but includes the procedure followed by states during conferral of nationality at birth or during naturalisation".⁸⁶ Then arbitrary deprivation of nationality incorporates denationalisation, refusal of access to nationality at birth or naturalisation.⁸⁷ Accordingly, there are three different circumstances that are addressed under arbitrary deprivation of nationality: unlawful or illegal deprivation, discriminatory deprivation and deprivation without due process of law.⁸⁸

⁸² Article 6 of the 1961 Statelessness Convention.

⁸³ Article 7 of the 1961 Statelessness Convention.

⁸⁴ Article 7 paragraph 2 of the 1961 Statelessness Convention.

⁸⁵ Manby (n 22 above) 16.

⁸⁶ Waas (n 23 above) 94.

⁸⁷ As above 93-95.

⁸⁸ As above.

2.3.1 Discriminatory deprivation

Many African countries which follow the *jus sanguinis* rule of nationality explicitly restrict citizenship rights on racial or ethnic bases.⁸⁹ Some African countries have also different citizenship requirements based on the concept of “indigenous origin” rather than race, ethnicity and religion.⁹⁰ In these countries there is a widespread practice of discrimination based on ethnic or racial or indigenous grounds which render hundreds of thousands stateless failing to acquire citizenship from their country of origin or through other mechanism. Discriminatory deprivation in most cases takes two forms. On the one hand, it can be the result of a state action of denationalisation that targets a specific ethnic group or racial group like that of Banyarwandas of DRC, black Mauritians, Asians in Uganda, Ethiopians of Eritrean origin in Ethiopia. On the other hand, it can be state’s action against an individual believed to be a threat to the political power of the incumbent government such as Kenneth Kaunda of Zambia, Allassen Ouetara of Cote d’Ivoire and Madiso of Botswana. Therefore, in such circumstances we are not looking at the denial of access to nationality, but at the violation of equal treatment and non-discrimination as prescribed under international law.

Waas indicated that one of the noticeable weaknesses of the 1961 Statelessness Convention is its lack of a general non-discrimination clause unlike in other international conventions.⁹¹ Instead, Article 9 of the Convention only provides a limited non-discrimination clause, which prohibits states parties from depriving an individual or a group of their nationality on racial, ethnic, religious or political grounds.⁹² It should be noted that excluding gender from its non-discrimination clause decreases the effectiveness of the Convention in reducing statelessness. This is true because there is no possible room by which courts or tribunals can read gender into these grounds. Waas suggested that without a monitoring body that would interpret

⁸⁹ As above. Sierra Leon and Liberia both found by freed slaves, take the position that only those “of Negro descent” can be citizens from birth.

⁹⁰ The constitution of Democratic Republic of Congo (DRC) explicitly states that nationality of origin belongs to those persons who are members of an “indigenous community” present in the country at the date of independence. Similarly the Ugandan constitution also restricts citizenship from birth to those persons with ancestors of “indigenous origin”. Eritrea Nationality Proclamation No. 21 of 1992 Articles 2 and 3 provides that nationality from birth is given to person born to the father or mother of “Eritrean origin”. Law No. 28 of 22 December 1962 Somali Citizenship, section 2 provides for any person “who by origin, language and tradition belongs to the Somali Nation” and is living in Somalia to obtain citizenship.

⁹¹ Waas (n 23 above) 102.

⁹² Article 9 of the 1961 Statelessness Convention: “a Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political group.”

possible developments through general comments, concluding observations and recommendations its protection will be limited on such grounds.⁹³

The general principle of non-discrimination is a well-recognised norm of international customary law. The UDHR and the ICCPR prohibit discrimination based on “race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status”.⁹⁴ The general non-discrimination clauses provided in international human rights instruments provide wider scope of prohibition to discriminatory deprivation of nationality than the 1961 Stateless Convention. This can easily conclude by looking at the additional elements such as sex, language, and property. Most importantly, the term “or other status” provides a wider scope of interpretation which can be applicable to new future developments. In addition to the above human rights instruments the UN Human Rights Councils also expressed concerns on the arbitrary deprivation of nationality by states on similar grounds enumerated above.⁹⁵ Moreover, international human rights have a wider application on cases mass denationalisation.

The application of non-discrimination clauses in naturalisation is limited as compared to that of denationalisation and access to nationality at birth. Unfortunately, nationality laws of some African countries prescribe race and speaking the right language as a requirement for naturalisation.⁹⁶ Many African states also fail to place effective naturalisation procedures for refugees.⁹⁷ For example, several North African countries, such as Egypt, Libya and Morocco, discriminate against non-Muslim on grounds of religion and language. This is taken as a reasonable ground for deprivation of nationality in case of naturalisation while it is considered discriminatory in cases of both denationalisation and access to nationality at birth.

⁹³ Waas (n 23 above) 102.

⁹⁴ See also Article 5, paragraph (d) (iii), of the ICERD; Article 24, paragraph 3, of the ICCPR; Articles 7 and 8 of the CRC; Articles 1 to 3 of the Convention on the Nationality of Married Women, article 9 of the CEDAW; Article 18 of the Convention on the Rights of Persons with Disabilities.

⁹⁵ UN Human Rights Council, resolution on human rights and arbitrary deprivation nationality, 16 July 2012 A/HRC/RES/20/5 paragraph 21.

⁹⁶ Manby (n 22 above) 32. In Malawi, citizenship from birth is restricted to those who have at least one parent who is not only a citizen of Malawi but is also “a person of African race”. Those persons who do not have the “right” skin colour or speak the “right” language at home can never obtain nationality from birth, and neither can their children nor their grandchildren.

⁹⁷ n 22 above, 4 and 6. Chad, Nigeria, Sierra Leone, and Uganda require 15 to 20 years, and the Central African Republic requires 35 years. Egypt requires an applicant for naturalisation to “be knowledgeable in Arabic”. Botswana requires knowledge of Setswana or another language spoken by a “tribal community” in Botswana. Egypt Morocco and Libya the rules on naturalisation and recognition or deprivation of nationality discriminate against non-Muslims as well as non-Arabs

2.3.2 Illegal deprivation of nationality and lack of due proceed of law

In this section we are going to examine two different forms of arbitrary deprivation of nationality, illegal deprivation of nationality and lack of due process of law. The first part is concerned with the reasonableness or otherwise of the criteria that are prescribed by nationality law during conferral, withdrawal and loss of nationality. The other important element that will be examined is the procedural requirement followed in decision taken by authorities in matters of nationality.

Article 8 the 1961 Statelessness Convention provides for the protection against arbitrariness in the nationality cases. Paragraph 4 of this article provides that a decision relating to nationality must be taken in accordance with the law and an individual's right to a fair hearing must be respected and a mechanism for review must be in place.⁹⁸ Nevertheless, one of the criticisms forwarded against this protection provided by the convention is that it only deals with cases of denationalisation. Therefore, whether states are obliged to honour the same procedural requirements afforded by this article in cases related to naturalisation and access to nationality at birth is still questionable.⁹⁹

It also provides for a protection against illegality and infringement of due process of law. Article 2 paragraph 3 of the International Convention on Civil and Political Rights provided an individual with an effective remedy when his rights and freedoms are violated.¹⁰⁰ Similarly, Human Rights Committee General Comment 31 obliges "states to establish appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law".¹⁰¹ Thus this can be interpreted as enabling individuals to exercise their right to fair hearing and appeal in matters of nationality.

According to Article 14 individuals have the right to a fair and public hearing by a competent and impartial tribunal in matters related to both criminal and civil cases.¹⁰² If we look the decision on admissibility by the European Court of Human Rights of on case against Austria

⁹⁸ Article 8 paragraph 4 of the 1961 Statelessness Convention: "A Contracting State shall not exercise a power of deprivation permitted by paragraph 2 or 3 of this article except in accordance with the law, which shall provide the person concerned the right to a fair hearing by a court or other independent body."

⁹⁹ Waas (n 23 above) 114.

¹⁰⁰ Article 2, paragraph 3 of the ICCPR: "everyone has the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted him by the constitution or the law".

¹⁰¹ Human Rights Committee General Comment No.31: Nature of the General Obligations imposed on States Parties to the covenant. CCPR/C/21/Rev. 1/Add. 13 Geneva: 26 May 2004, paragraph 15.

¹⁰² Article 14 of the ICCPR. Similar provisions are found in the Article 6 of European Convention on Human Rights and Article 8 of the American Convention on Human Rights.

shows that article 6(1) which demands due process of law during criminal and civil cases is not applicable to nationality matter.¹⁰³ The European Convention on Nationality obliges states to follow strict guidelines that guarantee due process of law in their decision related to attribution of nationality.¹⁰⁴ Similarly, the European Convention also requires states to follow similar guidelines of due process during the acquisition, retention, loss, recovery or certification of citizenship.¹⁰⁵

2.4 State-succession and statelessness

State succession happens when there is a transfer of territory or sovereignty in a state or between states. Weissbrodt states that “statelessness also occurs when states are dissolved, succeeded, or broken up or when territory is transferred. Indeed, these incidents are the most well-known and common causes of statelessness.”¹⁰⁶ He also underlined that when the successor state introduced a strict *jus sanguinis* nationality laws which only confers nationality to the territory’s ethnic majority, then this would result in the statelessness of other ethnic minorities.¹⁰⁷

There is an assumption under state succession states would normally harmonise their respective nationality laws through a treaty.¹⁰⁸ If they fail to do so statelessness arises from the conflict of policies adopted by the states that have been created in the process of transfer of territory or sovereignty and the concurrent adoption of new nationality regulation. Similarly, state-succession between the Republic of Sudan and the Republic of South Sudan is going to affect the nationality of many Southerners living in Sudan and abroad.¹⁰⁹ This is so because without trying to harmonise their nationality laws by a treaty South Sudan already adopted a new Nationality Act while Sudan amended its Nationality Act.¹¹⁰ Those who can be rendered stateless are southern Sudanese population who origin living for many years in the Republic of Sudan who lost their Sudanese nationality; individuals with mixed parents,

¹⁰³European Court of Human Rights, *case of x v. Austria*, Application No. 5212/71. Decision of Admissibility, 5 October 1972.

¹⁰⁴ European Convention on Nationality articles 10, 11, 13 paragraph 1, 12 and 13 paragraph 2 provide the guidelines that need to be followed by states parties while processing the attribution of nationality.

¹⁰⁵ See also European Convention on Nationality articles 10 – 13.

¹⁰⁶ Weissbrodt (n 13 above) 261. See also J Blackman, ‘State succession and statelessness: The emerging right to and effective nationality under international law,’ (1998) 19 *Michigan Journal of International law* 1142-1145.

¹⁰⁷ As above 261.

¹⁰⁸ Waas (n 23 above) 131.

¹⁰⁹ Manby (n 40 above).

¹¹⁰ As above.

members of cross-border ethnic groups; and people separated from their families by war, including unaccompanied children.¹¹¹

Under the 1961 Statelessness Convention there is only one provision that addresses the issue state succession. Article 10 of the Convention states that treaties shall ensure stateless does not happen during transfer of territory. When a treaty is not signed then the successor state must confer nationality to person who would otherwise be stateless.¹¹² Nevertheless, this article failed to provide what the treaty needs to include in ensuring that statelessness is avoided.¹¹³ In a way, the second paragraph of Article 10 provides the best solution in dealing with statelessness than what is expected to be achieved by a treaty especially when the treaty is ineffective in dealing with the issue of avoiding statelessness. Therefore, it can be safely argued that the protection provided in the second paragraph is much more concert than what can be achieved by a treaty.

It is very clear that in cases of state succession, the successor state is under the obligation to confer nationality to a person who would otherwise be rendered stateless. The application of this paragraph is not limited only to those persons who were residents at the time of succession. It also assures the attribution of nationality of when a person resident abroad and who has been rendered stateless as consequence of deprivation or withdrawal of his or her nationality of the predecessor state. This Article obviously offers a concrete solution to the problem of stateless such as the situation in Sudan. If properly applied the 1961 Convention will protect Southerners who might be victims of deprivation or withdrawal of Sudanese nationality. It should however be noted, under this Convention the predecessor state is not under obligation to withhold or not withdraw nationality to protect statelessness. Accordingly, the government of Sudan is free to withdraw its nationality form a Southerner whether he or she be rendered stateless temporarily or permanently. Unless South Sudan is ready to provide nationality graciously without evidentiary and procedural hurdles, many Southerners living in the Republic of Sudan and abroad will be stateless.

Most importantly, the ILC Draft Articles on Nationality of Natural Persons in relation to Succession of States¹¹⁴ addresses nationality matters in cases of state succession. Article 4 of

¹¹¹ N 40 above,

¹¹² Article 10 of 1961 Statelessness Convention.

¹¹³ Waas (n 23 above) 131.

¹¹⁴ The Draft Articles on Nationality of Natural Persons in relation to Succession of States was prepared by the International Law Committee at the request of the General Assembly. The Draft Articles are annexed to the text

the Draft Articles also deals with the avoidance of cases of statelessness prior to state succession.¹¹⁵ In cases of persons who are not habitual residents of successor states who are at risk of statelessness, Article 8 paragraph 2 of the Draft Articles oblige state to which the person has appropriate connection to confer nationality.¹¹⁶ Moreover, if the person is afforded more than one nationality at a time, Articles 23 and 26 of the Draft Articles protect the right of choice of the individual. Unlike the 1961 Convention which exonerates the predecessor state from any responsibility of attribution of nationality when an individual is at risk of statelessness, Articles 20 and 25 of the Draft Article prohibit a predecessor state from withdrawing its nationality until the individual acquires the nationality of the successor state. In such cases, the Draft Articles seeks to prevent both temporary and permanent stateless.

Further, the ILC Draft Articles prohibits discrimination “on any ground”,¹¹⁷ which goes beyond what is afforded in the general non-discrimination clauses. In addition to that the Draft Articles also provide a clear procedural requirement that guarantee person’s right to due process of law related to conferral, withdrawal and loss of nationality during state succession.¹¹⁸ Further, according to article 18 paragraphs 1 and 2 of the Draft Articles the entering into a treaty, exchanging of information and engaging in consultation on matters of nationality is a one of the compulsory obligation of states. It should also be noted that the Council of Europe Convention on the avoidance of statelessness related to state succession also makes almost identical provisions which address the issue in a similarly.¹¹⁹

2.5 Conclusion

In this chapter we have seen how statelessness can be caused by different factors. If we start with the technical causes of statelessness, most provisions of the 1961 Statelessness Convention are formulated in a way to adequately address these situations. However, being a result of a lot of compromise between states, there are still gaps that open up avenues to creation statelessness. Among the achievements of the 1961 Statelessness Convention is its ability to prevent children from being rendered stateless, by obligating states to grant children *jus soli* nationality in case of risking statelessness. The Convention also ensures better protection to abandon and adopted children than international human rights law does. The

of the UN General Assembly, Resolution on Nationality of natural persons in relation to the succession of States, A/RES/55/153, 30 January 2001. Hereafter ILC Draft Articles.

¹¹⁵ Article 4 of the ILC Draft Articles.

¹¹⁶ Article 8 paragraph 2 of the ILC Draft Articles

¹¹⁷ Article 15 of the ILC Draft Articles.

¹¹⁸ Articles 6 and 17 of the ILC Draft Articles

¹¹⁹ Waas (n 23 above) 134-145.

convention obliges states to confer nationality upon a foundling child whether they follow *jus sanguinis* or *jus soli* nationality rules. Further, the Convention also prohibits the loss of nationality as the result of change of status such as marriage, divorce and adoption. Nevertheless, when it comes to the loss or deprivation of nationality, the 1961 Stateless Convention by providing some exceptions allowed states to revoke their nationality in cases that might result in the stateless. In contrast, international human rights law prohibits any discriminatory treatment regarding the conferral of nationality. Gender sensitive nationality laws are rendered discriminatory and are prohibited under such instruments.

If we look to the arbitrary deprivation of nationality, the 1961 Convention have exhibited several weak points. First and foremost, it lacks a general provision that deals with non-discrimination or arbitrary deprivation of nationality. Moreover, the Convention only prohibits discrimination on four grounds only. This makes it difficult to read words into to include gender into the provisions. In the contrary, international human rights law offers a broader protection when it comes to arbitrary deprivation of nationality.

In the case of statelessness in context of state succession, the 1961 Stateless Convention is way ahead as compared to international human rights law which seems to be silent. It attempts to address the issue of statelessness by obligating the successor state to confer nationality to those persons otherwise be rendered stateless. One of the shortcomings of the convention is that it failed to put any kind of obligation to the predecessor state, even withholding the right to withdraw its nationality until the person acquires the nationality of the successor state. In contrast, the Draft Articles obligate the predecessor state to withhold the withdrawal of nationality from any person affected by state succession. Though the 1961 Statelessness Convention have some shortcomings, with the complementarity provided under the human rights regime and the Draft Articles, the Convention can play a pivotal role in the reduction of stateless.

Chapter 3

3 Protecting Stateless Persons under international law

In this chapter we are going to look at the two categories of fundamental rights of stateless persons. These are the civil and political rights and the socio-economic rights. The two categories of human rights play a significant role in ensuring every right. Civil and political rights are those rights closely related to individual rights such the right to life, religion, opinion, expression, assembly association, vote etc... In such cases states are obliged to respect and protect these rights at any time unless the law otherwise say so. Whereas Socio-economic rights are those rights closely related to the economic wellbeing of an individual such as the right to health, the right to work, the right to education, the right to housing etc... Concerning such rights states are obliges to fulfil these rights until their resource permit them. The economic development of one country plays a great role in the realisation of socio-economic rights. In this chapter we are going to address the rights of stateless persons protected as founded under varicose international documents particularly under the 1954 Convention relating to the Status of Stateless Persons.

3.1 Protection of the civil and political rights of the stateless

The civil and political rights that are provided under the 1954 Convention relating to the Status of Stateless Persons are: the right to movement (Articles 26 and 31), access to courts (Article 16), freedom of religion (Article 4), and the right to property (Article 13). Although the list provided in the 1954 Statelessness Convention is restricted, this does not mean that the rights of stateless persons are limited. Human rights law provides much wider protection than what is provided in the Convention. That is why the focus of this section is to the comparison between the two regimes. In the following subsection each right will be analysed separately.

3.1.1 Freedom of Movement

The first fundamental right to be addressed is the freedom of movement. The right to movement entails the right of a person to move from one to place to another and incorporates the opportunity of a person to move from one place to another where he enjoys to establish his or her life and families.¹²⁰ On the one hand, it is the freedom to move around within the

¹²⁰Waas (n 23 above) 240.

borders of a state and to choose ones place of residence. On the other hand, it also entails the right of a person to move across borders and in and out of the territory of a state. In its international context the right to movement encompasses the right to re-enter and reside in a state.¹²¹

The freedom of movement is guaranteed under Article 26 of the 1954 Statelessness Convention. It provides that a stateless person who lawful resides in the territory of a state is entitled to the freedom of movement. However, this Article does not granted absolute right to movement and freedom to choose residence. Since stateless persons are assimilated with non-nationals whenever restriction on the right of movement is imposed on foreigners it will automatically affect them.¹²² Moreover, according to this Convention a stateless person who is not granted a lawful residence or an irregular immigrant is excluded form benefit the rights accorded by this article.

Waas points out that unlike the 1951 Refugee Convention which provides for *non-refoulement*,¹²³ there is nothing in the 1954 Statelessness Convention that protects non-refugee stateless person's right to re-enter and remain in the state. The states are free to impose any kind of penalty from deportation to unlimited imprisonment. Thus, one of the biggest weaknesses of the 1954 Statelessness Convention is its failure to impose an obligation on states to allow stateless person to re-enter and settle in their territory. This glaring omission places stateless persons in the legal limbo.¹²⁴

The 1954 Statelessness Convention provides relatively better protection when the stateless person is legally recognised by the state. Article 31 of the Convention provides that states shall not expel and individual unless on the grounds of national security. Further, according to this article states are obliged not only to enact an expulsion order but also provide a review of the expulsion decision.¹²⁵ Moreover, pursuant to article 28 paragraph 13 of the Convention once the stateless person is lawfully residing, the state is compelled to issue a travel document which enables him to re-enter the country and reside.

¹²¹ n 23 above, 246

¹²² J Hathaway, the Rights of Refugees under international law, (2005) *Cambridge University Press* 712 as quoted by Waas (n 23 above) 243.

¹²³ Article 33 of the 1951 Convention on the Status of Refugee.

¹²⁴ Waas (n 23 above) 249.

¹²⁵ Article 31 paragraph 2 of the 1954 Convention relation to Status of Stateless Persons.

Article 13 of the UDHR provides for the right of movement or residence of everyone irrespective of his nationality.¹²⁶ Similarly, the ICCPR also provides the right to movement and choose of residence where the person is lawfully in the territory.¹²⁷ Accordingly, a stateless person who is lawfully in the state is entitled to the right to movement and to choose his residence. The ICCPR provisions require for a highest degree of justification on the part of the state related to the restriction of the right to movement and choice of residence as compared to the 1954 Statelessness Convention which left the degree of restriction at the discretion of the state. Further, Human Rights Committee General Comment No. 15 prohibits states from applying discriminatory standards in refusing entry or residence of stateless.¹²⁸

3.1.2 Access to Justice

In general terms access to justice is regarded “as one element of a broader set of rights and principles that include the right to an effective remedy, the right to a fair trial and the principle of due process of law”.¹²⁹ In the context of statelessness access to justice plays a pivotal role in ensuring their rights for the following reasons.¹³⁰ Firstly, it means empowering them to find remedies against violations of these rights. Second, it means opening an avenue to challenging states decision on their attribution of nationality. Finally, it means that a stateless person can legally demand their rights that are conferred by Stateless Conventions and human rights instruments.

Under the 1954 Statelessness Convention, access to justice is addressed in Article 16.¹³¹ Accordingly, states are obligated to unconditionally provide stateless persons with equal access to courts to that of nationals. Further, paragraph 2 of Article 16 states that the status of a stateless person whether lawful or not is not a condition for accessing the court as it is a necessary contrary to the freedom of movement.¹³² Thus, a stateless person with an unlawful

¹²⁶ Article 13 paragraph 1 of the Universal Declaration: “everyone has the right to freedom of movement and residence within the borders of each state.”

¹²⁷ Article 12 of the 1966 ICCPR.

¹²⁸ Human Rights Committee, *General Comment No 15, The position of Aliens under the Covenant*, Geneva: 11 April 1986, para. 5. “It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstance an alien may enjoy the protection of the Covenant even in relation to the entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect of family life arise.”

¹²⁹ Waas (n 23 above) 265

¹³⁰ n 23 above, 266.

¹³¹ Article 16 paragraph 1 of the 1954 Statelessness Convention: “a stateless person shall have free access to the courts of law on the territory of all Contracting states”.

¹³² Article 16 paragraph 2 of the 1954 Statelessness Convention “ a stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national matters pertaining to access to courts...”

status can approach the court to assert his rights starting from rights related to status and any other rights. Moreover, paragraph 2 also provides stateless persons the same right of access to legal assistance and exemption from *caution judicatum solvi* (a security deposit to access a court).¹³³

The ICCPR Article 2 paragraph 3(a) and (b) requires for competent judicial, administrative or legislative to bodies to be set up to provide effective remedies in cases of violation of those rights enunciated in the Covenant. This provides a stateless person an advantage of claiming remedies against any violations including against his right to nationality. Though the above provisions does not seem to directly provide for access to courts, the Human Rights Committee in its General Comment 32 states that Article 14 shall read as access to a fair hearing which amounts to access to courts applies equally to all including stateless persons.¹³⁴

3.1.3 Freedom of Religion

Freedom of religion which encompasses the right to choose and practice ones religion is among the fundamental rights of human beings. Thus, non-discrimination on the basis of religious belief is among protected human rights.

Article 4 of the 1954 Statelessness Convention provides that states are an under obligation to allow stateless persons to exercise their religion freely and teach their beliefs to their children.¹³⁵ This right is deeply protected, in that no reservation from such right is allowed pursuant to article 38 of the 1954 Convention. Unlike the provision on the freedom of movement, freedom of religion is applicable regardless of the lawful presence or residence of stateless persons.

Similarly, international human rights law provides freedom of religion to everyone without any precondition, including stateless persons.¹³⁶ For example, article 18 paragraph 1 of the ICCPR states that a stateless person has the freedom to “have or to adopt a religion or belief of his choice [...] manifest his religion or belief in worship, observance, practice or

¹³³ Article 16 paragraph 2 of the 1954 Statelessness Convention “[...] similar treatment as a national matters pertaining to access to courts, including legal assistance and exemption from *caution judicatum solvi*”.

¹³⁴ As above para 9.

¹³⁵ Article 4 of the 1954 Convention relating to the Status of Stateless Persons: “the Contracting States shall accord to stateless persons within their territories treatments at least as favourable as that to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.”

¹³⁶ Article 18 of the ICCPR, Article 14 of the CRC, Article 5 of paragraph (d)(vii) of the CERD; Article 12 of the Migration Workers Convention; Article 9 of the European Convention on Human Rights; Article 12 of the American Convention on Human Rights.

teaching”. Besides, pursuant to article 4 paragraph 2 of the religious freedom of stateless person cannot be derogated from even in times of emergency. Paragraph 2 of article 18 of the ICCPR goes further and provides a stateless person with the right to change his or her religion which the 1954 Stateless Convention failed to recognise.¹³⁷

3.1.4 Right to property

The right to property is among those rights which are left at the discretion of states. The 1954 Convention article 13 provides stateless persons with the right to acquire, lease, and enter into other contracts related to movable and immovable property and other rights pertaining thereto. However, the terms “as favourable as possible” and “not less favourable than that accorded to aliens generally” qualified the right to property and accordingly stateless persons are provided weak rights which are equal to non-nationals.

International human rights law is silent about the right to property apart from the general formulation provided by the UDHR under article 17. However, regional human rights instruments have provided the right to property but no mention is made of the right to acquire property.¹³⁸ Thus, these human rights documents have only provided protection once the property is acquired. Nevertheless, despite these shortcomings, human rights law prohibits any interference with the peaceful enjoyment of property or deprivation unless it can be justified under the permissible exceptions for example when the interference or confiscations serves, the public need or the general interest, and is provided by law and is proportional to the interest.

3.2 Protection of the economic, social, and cultural rights of the stateless

The other category of rights that are protected by the by the 1954 Statelessness Convention are the socio-economic rights. The economic, social and cultural rights of stateless persons that are enumerated under this Convention are: the right to work and labour related rights (Articles 17, 18, 19 and 24 paragraph 1(a)), freedom of association (Article 15), right to social security and assistance (Articles 23 and 24), right to adequate standard of living (Articles 20 and 21) right to education (Article 22) and intellectual property rights (Article 14). Similar to what we have discovered while investigating on the protection of the civil political rights, the catalogue of socio-economic rights provided to stateless persons under the

¹³⁷ Article 18 paragraph 2 of the ICCPR.

¹³⁸ Article 1 of the Protocol No. 1 to the European Convention on Human Rights; Article 21 of the American Convention on Human Rights.

convention. In this section for convenience sake the right to work and labour related rights, right to education and freedom of association are treated separately due to their separate treatment by the convention. The right to social security and assistance, right to an adequate standards of living, and intellectual property rights are treated together due to the similarity of treatment by the Convention.

3.2.1 The right to work and labour related rights

The right to work is among the components of rights that provide the means by which an individual is able to fulfil the subsequent needs of his or her families.¹³⁹ The right to work is also closely related to individual's right to dignity and self-realisation.¹⁴⁰

Article 17 of the 1954 Statelessness Convention indicates that a stateless person is entitled to a wage-earning employment equal to that of other non-nationals.¹⁴¹ However, this provision requires that the stateless person must be lawfully staying in the territory of a state. But paragraph 2 of the same article asks states for a sympathetic treatment of stateless person equal to that of nationals. Thus, stateless persons are given a lee way to claim the same rights as nationals for wage-earning employment.

It is noteworthy that Articles 18, 19 and 24 provide for the minimum standards whereby stateless persons can access employment and conditions of work. Accordingly, Article 18 enumerates a list of employment in which stateless persons can independently engage,¹⁴² while article 19 provides the list of professions stateless persons are allowed to be involved in.¹⁴³ Further, paragraph 1(a) of Article 24 provides that stateless person same treatment as nationals in relation to conditions of work or labour related rights.¹⁴⁴

If we shift our attention to human rights law, we see that the right to work and labour related rights we see that the issues are addressed very well.¹⁴⁵ The ICESCR provides the right to

¹³⁹ Waas (n 23 above) 307

¹⁴⁰ As above.

¹⁴¹ Article 17 of the 1954 Statelessness Convention states.

¹⁴² Article 18 the 1954 Statelessness Convention "the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies."

¹⁴³ Article 19 of the 1954 Convention "who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession"

¹⁴⁴ Article 24 paragraph 1 (a) the 1954 Statelessness Convention: "remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on homework, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining"

¹⁴⁵ See Article 23 and 24 the Universal Declaration provides for the right to work and favourable working conditions.

work and labour related rights in articles 6 and 7. Under the Covenant, the right to work is for everyone including stateless persons. Nevertheless, the General Comment No. 18 Committee on Economic, Social and Cultural Rights indicates that this right is not absolute and is subject to a progressive realisation.¹⁴⁶ Thus, stateless persons shall have non-discriminatory access to the minimum core obligations of states.¹⁴⁷ Though in accordance to this the right to favourable work condition follow suit once a stateless person has access to employment, it is required that he or she must be lawfully in the state.¹⁴⁸ Accordingly, article 7 of the ICESCR provides that states are obliged to provide stateless persons a guarantee to just and favourable conditions such as fair remuneration, safe and healthy working environment.

3.2.2 The right to education

Article 22 of the 1954 Statelessness Convention guarantees the right to elementary education to stateless persons equal to those of nationals in public schools.¹⁴⁹ However, in relation to non-elementary education a stateless person has a right to claim treatment equal to non-nationals to education, as far as they are legally in the country.

Under the ICESCR the right to education is accorded to all persons irrespective of nationality and status. According to article 11 states are under the obligation to provide a stateless person with equal opportunity to attend the free and compulsory primary education, which is the core obligation to the right to education.¹⁵⁰ The right to education that is guaranteed in human rights law is much higher than what is provided under the Statelessness Convention.

3.2.3 Freedom of Association

The 1954 Statelessness Convention addresses the right to association of stateless persons in article 15. This provision provides similar requirements of lawfully stay. Apart from trade

¹⁴⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 18, the right to work*, E/C.12/G/C/18, 16 February 2006 para 6.

¹⁴⁷ n 146 above, para 19 and 31.

¹⁴⁸ n 146 above, para 18 and 23.

¹⁴⁹ Article 22 paragraph 1 of the 1954 Statelessness Convention .Unlike e requirements of lawful stay and equal treatment to that of non-nationals, this provision provides no such requirement.

¹⁵⁰ Article 13 paragraph 2(a) of the ICESCR. See also Committee ESC, General Comment No. 13: The right to education, 8 December 1999 para 34.

unions which are closely related with the right to work, this Article gives a right to stateless persons to establish non-political and non-profits associations.¹⁵¹

In terms of Article 28 of the ICCPR the right to association include right to trade unions which are active in politics, social and cultural activities. On the contrary, in accordance to Article 8 of the ICESCR freedom of association is guarantees in its limited scope of participation in trade unions for the promotion and protection of the economic and social rights. This means that stateless person cannot invoke the protection provided to them to establish political parties or civil organisations that are political in nature.

3.2.4 Other economic, social and cultural rights

Under the 1954 Statelessness Convention there are provisions which protect the right to adequate standard of living, the right to social security and the protection of intellectual property. Article 20 states that stateless persons have the right to access any system of rationing equal to nationals irrespective of their status in the state. However, this does not oblige states to provide adequate food, other basic commodities to stateless persons apart from the existing rationing systems. Similarly, article 21 provides for housing only to a stateless persons lawfully staying in the country. Nevertheless, this right is not absolute and there is no requirement as to the nature and standard of housing.

Articles 23 and 24 of the 1954 Stateless Convention provide that lawfully staying stateless persons have the right to social security.¹⁵² Again, this right is not absolute and stateless persons can be excluded by states from enjoyment when the social security is payable from public funds.¹⁵³ The other problem with the Convention is that the level of protection is left to domestic laws.

Human rights law provides much clearer rights as compared to the 1954 Convention. Under article 11 of the ICESCR the overall obligation of states towards the right to adequate food, clothing and housing is still subject to the progressive realisation of these rights. Paragraph 2 of this article provides that state have the obligation to provide the minimum core in relation

¹⁵¹ Article 15 of the 1954 Stateless Convention “as regards to non-political and non-profit-making and trade unions...”

¹⁵² Waas(n 23 above) 325

¹⁵³ Article 24 of the 1954 Convention. See also Nehemiah Robinson, ‘Convention relating to the status of persons-its history and interpretation,’ (1955) *UNHCR* 72.

to the right to food.¹⁵⁴ Similarly, Article 9 of ICESCR explicitly states the right of everyone to social security and social insurance.¹⁵⁵

Similarly, Article 14 of the 1954 Statelessness Convention protects the right to intellectual rights of a stateless person with a habitual resident is to the same extent of protection as a national. Besides, pursuant to paragraph 2 of Article 14, for the purpose of the right to intellectual property a habitual resident stateless person is considered as a national of the state.¹⁵⁶ In contrast, Article 15 paragraph 1 (c) of the ICESCR provides authors with the protection of the moral and material interests resulting from their scientific, artistic and literary innovations. However, unlike the 1954 Statelessness Convention cultural rights are well protected under human rights law. General Comment No. 30 of the Committee on the Elimination of Racial Discrimination request states to take necessary measures to protect the cultural identity of non-citizens.¹⁵⁷

3.2.5 Conclusion

In this chapter we have discussed the extent to which the civil and political rights and the socio economic rights are formulated which rights are protected under the 1954 Statelessness Convention. Under civil and political right some rights such as the right to vote, to be elected and political participation and assembly which are closely related to nationality are excluded. The exclusion of other rights such the right to protection from arbitrary detention, the right to expression and opinion from the 1954 Statelessness Convention is one of the shortcomings. Most importantly, the exclusion of the right to health as part of the socio-economic right of a stateless was also among the short comings that have been witnessed in the convention.

The rights contained under the Convention are useful in providing a minimum threshold that states must respect and fulfil. Therefore, the protections provided by the 1954 Statelessness Convention are complimented by international human rights law to provide adequate protection to stateless persons.

¹⁵⁴ See article 11 paragraph 2 of the ICCPR provides for “the fundamental right of everyone to be free from hunger”.

¹⁵⁵ See for further explanation on what is covered by the terms “social security and social insurance”, the Committee of ESC, *Revised general guidelines regarding the form and content of reports to be submitted to states under articles 16 and 17 of International Covenant on Economic, Social and Cultural Rights*, E/C.12/1991/1, 17 June 1991.

¹⁵⁶ “In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of a country in which he has his habitual residence.”

¹⁵⁷ Committee on the Elimination of Racial Discrimination, General Comment No. 30, Discrimination against non-citizens, New York, 8 October 2004, para 37. See also Article 5 paragraph 1(f) of the UN Declaration on the Rights of Non-nationals.

Chapter 4

African Human Rights System and Statelessness

4.1 Introduction

The African human rights system is the product among other factors of the on-going struggle for freedom, dignity, equality, and social justice. The African regional human rights system has been developed under the auspices of the Organization of African Unity (OAU), which was transformed in 2002 into the African Union (AU).¹⁵⁸ This led into the adoption of the core human rights instrument - African Charter on Human and Peoples' Rights (African Charter) in 1981.¹⁵⁹

It is noteworthy however that when we refer to the African human rights system, we are referring to many human rights instruments such as the African Charter on Human and Peoples' Rights, the African Charter on the Welfare of the Child, the Protocol on the African Charter on the Rights of Women and the organs which are responsible for interpreting, implementing and monitoring these human rights instruments and other mechanisms.¹⁶⁰ The main focus of this chapter is to explore the adequacy of the African human rights system in addressing the issue of statelessness in the continent using the above mentioned instruments.

4.2 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights is the primary instrument for the promotion and protection of human rights in Africa. It has been ratified by fifty-three African member states of the AU.

The first crucial achievement of the African Charter is its recognition of the civil and political rights of African people similar to those recognised in other international instruments.¹⁶¹ The other important achievement of the African Charter is its incorporation of socio-economic

¹⁵⁸ Constitutive Act of the African Union CAB/LEG/23.15 (May 26, 2001). See R Murray, *Human rights in Africa: from the OAU to the African Union*, (2004) 22.

¹⁵⁹ C Heyns and Killander (eds) 'Compendium of the key human rights documents of the African Union,' (2010) *Pretoria University Law Press*. 92-94. The African Charter was adopted by the OAU in Nairobi, Kenya on June 27 1981 and entered into force on 21 October 1986. (hereinafter African Charter) is also sometimes called the 'Banjul Charter'.

¹⁶⁰ C Heyns, 'African Human Rights system: the African Charter,' (2004) *Penn State Law Review* 683.

¹⁶¹ See Articles 2 – 14 of the African Charter.

rights such as the right to a right to work under equitable and satisfactory conditions (Article 15), the right to health (article 16), and the right to education (article 16).

Some of the criticisms forwarded against the Charter are related to the right to a fair trial and the right of political participation which are given scant protection in comparison with standards enshrined in other international instruments.¹⁶² The other criticism advanced against the Charter is its failure to mention the right to food and water, social security, and housing.¹⁶³

4.1.1 Enforcement Mechanisms

In 1982 the OAU established the African Commission on Human and Peoples' Rights (the African Commission) the body responsible for monitoring and implementation of the African Charter.¹⁶⁴ The African Commission is the first active supervisory body in the African human rights system. It constitutes 11 commissioners and is based in Banjul, The Gambia.¹⁶⁵

The Commission have adopted several enforcement mechanisms to ensure state compliance to the Charter. These enforcement mechanisms include: communication, state reporting,¹⁶⁶ Special Rapporteurs,¹⁶⁷ and Working Groups.¹⁶⁸ It should be mentioned that though they are not part of the Commission's enforcement mechanisms, NGOs have played a pivotal role in bringing cases, submit shadow reports, propose agenda items, organising NGO workshops and participate actively in the public sessions of the Commission.¹⁶⁹

If we look at the jurisprudence of the African Commission, the Charter has been interpreted expansively to incorporate some rights which are not explicitly included. The Commission

¹⁶² Heyns (n 160 above) 687.

¹⁶³ As above 691.

¹⁶⁴ Article 30 of the African Charter.

¹⁶⁵ Article 31 of the African Charter.

¹⁶⁶ Heyns and Killander (n 159 above) 'Guidelines for National Periodic Reports under the African Charter' (1998) 205.

¹⁶⁷ The Special Rapporteur on Summary Arbitrary and Extrajudicial Executions and Prisons and other Conditions of Detentions and on the Right to Women are among the examples.

¹⁶⁸ See the Working Groups: on Freedom of Expression, Indigenous Populations/ Communities and Fair Trial and their contribution. See for example Resolution on the Freedom of Expression, May 2001; Resolution on the Rights of Indigenous People/ Communities in Africa, November 2000; Dakar Declaration on the Right to Fair Trial, 1999.

¹⁶⁹ Heyns (n 160 above) 697. See also Resolution on the Cooperation between the African Commission on Human and Peoples' Rights and NGOs having Observer Status with the Commission, October 1998.

was able to read words into the provision of the Charter based on articles 60 and 61 which allow the Commission to draw inspiration from international human rights law in interpreting the Charter. For example, on *SERAC v. Nigeria*,¹⁷⁰ drawing inspiration from the international human rights systems, the Commission was able to read words into the Charter. The Commission for the first time clearly stated the four obligations of African states to respect, protect, promote and fulfil under the Charter.¹⁷¹ Furthermore, the Commission stated that the explicit provisions on health, property and family life have an implicit right to "housing or shelter" and read those rights in to the Charter.¹⁷² Similarly, a right to food has to be read into the right to dignity and other rights.¹⁷³ This in shows that the Commission was creative in its interpretation to infer rights not expressly guaranteed in the African Charter.

In addition, the OAU adopted the Protocol to the African Charter establishing an African Court on Human and Peoples Rights (the African Court).¹⁷⁴ The African Court has jurisdiction over the interpretation and application of the Charter and other relevant human rights instruments ratified by states. It can accept complaints and/or applications submitted to it either by the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations.¹⁷⁵ However, individuals and Non-Governmental Organizations with observer status before the African Commission can institute cases directly before the Court only in respect to those states that have made an additional declaration specifically authorising them to do so.¹⁷⁶ The most important characteristic of this supervisory body is the binding nature of its decision.

¹⁷⁰ Communication 155/96, *the Social & Economic Rights Action Center & Another v. Nigeria*, (2001) AHRLR 60 (ACHPR 2001) (hereafter the *SERAC* case).

¹⁷¹ n 170 above, para 44.

¹⁷² n 170 above, para. 60

¹⁷³ n 170 above, para. 65.

¹⁷⁴ Heyns and Killander (n 159 above) "Protocol on the African Human Rights Court (1998/2004)" 41- 47. It was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998 and came into force on 25 January 2004. Until now 26 countries only have effectively ratified the Protocol.

¹⁷⁵ Article 5 paragraph 3 of the Court Protocol. As of October 2012, only five countries Burkina Faso, Ghana, Malawi, and Tanzania made such a Declaration.

¹⁷⁶ Article 5 Court Protocol.

4.1.2 The African Charter and statelessness

In this section we are going to address two significant questions. Are the rights of stateless persons adequately protected under the African Charter? Does the Charter contains provision that prevent statelessness? From the outset it is noteworthy that the African Charter provisions do not make any reference to the right to nationality. However, the Charter includes several provisions that can be applied in the protection of rights related to nationality. The principles of non-discrimination (Article 2), equality before the law (Article 3), the right to human dignity (Article 5), the rights to due process of law and fair trial (Article 7), the right to movement and protection against mass expulsion (Article 12) are among the rights that can be employed to protect the rights of stateless persons and reduce statelessness in Africa. Similar to what was referred in chapters two and three about the international human rights, the Charter provisions also restrict the condition under which nationality may be denied and revoked. For example, Articles 2 and 3 of the Charter prohibit any kind of discrimination based on “race, ethnic group, colour, sex, language, religion, political or other opinion, national or social origin, fortune, birth or other status”. Further, Article 7 also prohibits arbitrary denial and deprivation of citizenship without due process of law and proper hearing. Though Article 13 seems to make a distinction between citizens and non-citizens concerning the right to political participation and standing for office, this does not affect basic rights of a stateless person’s protection under the Charter.

If we shift our focus to the jurisprudence of the African Commission, we can see that the Commission was able to apply provisions on non-discrimination, equal treatment before the law, dignity, and the due process of law to address issues of nationality adequately. In the case *Modise v Botswana*, the Commission found against the Botswana government and ruled that the Botswana government refusal to recognise the complainant’s nationality was a violation of his right to dignity under Article 5 of the African Charter.¹⁷⁷ The Commission urged Botswana to confer the complainant Mr Modise citizenship by descent (*jus sanguinis*) which would enables him to freely participate in the politics of his country rather than a citizenship by registration that hindered him from political participation.¹⁷⁸ Thus, the

¹⁷⁷ Communication 97/93, *Modise v Botswana* (2000) African Human Rights Law Reports (AHRLR) 30 (ACHPR 2000), para 91.

¹⁷⁸ As above para 96 “Considering the fact that his first deportation came soon after he founded an opposition political party, it suggests a pattern of action designed to hamper his political participation. When taken together with the above action, granting the complainant citizenship by registration has, therefore, gravely deprived him

Commission was able to evaluate the quality of citizenship conferred to the complainant by interpreting the right to dignity and political participation in the Charter.

Similarly, in *Amnesty International v Zambia*, the Commission found that the deportation of Mr William Banda and Mr John Chinula from Zambia to Malawi which amounted to “forcing them to live as stateless persons under degrading conditions the Government of Zambia depriving them of their families and their families the support they deserved was in violation of Article 5”.¹⁷⁹ In another case known as *Legal Resources Foundation v Zambia*, the Commission had also found the Zambian government in violation of Articles of 2, 3 and 13 of the Charter for amending the Zambian Constitution to exclude anyone who wanted to compete for the presidency to prove that both his parents were Zambians by birth.¹⁸⁰ The Commission explicitly stated that “rights which have been enjoyed for over 30 years cannot be lightly taken away. To suggest that an indigenous Zambian could only be a person who himself was born in and whose parents were born in what came later to be known as the sovereign territory of the state of Zambia would be arbitrary”.¹⁸¹ The Commission then rightly concluded that the retrospective application of such a law could not be justified according to the Charter.¹⁸² Though these cases are only related to denationalisation or deportation of politically active individuals, they elaborated that the Charter Articles if interpreted creatively and expansively, can address issues of statelessness in the continent. Moreover, these cases also indicated the readiness on the part of the Commission to deal with nationality matters and address the issue of statelessness in the continent.

of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives. It also constitutes a denial of his right of equal access to the public service of his country guaranteed under article 13(2) of the Charter.”

¹⁷⁹ Communication No. 212/98, *Amnesty International v Zambia*, (2000) AHRLR 325 (ACHPR 1999) para 50.

¹⁸⁰ Communication No. 211/98, *Legal Resources Foundation v Zambia*, (2001) AHRLR 84 (ACHPR 2001).

Para 63. Equality or lack of it affects the capacity of a person to enjoy many other rights. For example, [a person who is disadvantaged because] of his place of birth or social origin suffers indignity as a human being and an equal and proud citizen”.

¹⁸¹ As above para 71.

¹⁸² As above para 71.

4.2 The Protocol on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in Maputo, Mozambique, in 2003 and entered into force on 25 November 2005.¹⁸³ So far, 34 countries have ratified this Protocol. The Protocol contains four broad categories of rights: civil and political rights; economic, social and cultural rights; the rights to development and peace; and reproductive and sexual rights. The African Commission is the body responsible for the implementation and monitoring of the Women's Protocol. It is also noteworthy that the African Commission in its 52nd session for the first time adopted a general comment on article 14(1)(d) and (e) of the Protocol on the Rights of Women in Africa which provides for women's human rights in the context of the HIV pandemic.¹⁸⁴ The General Comments aim is to guide the 34 member states that have already accepted the Women's Protocol as binding, in adopting appropriate legislative, administrative and other measures to give effect to the relevant provisions of the Protocol. The adoption of the General Comment should not only be seen as a big achievement in the protection of women's right in African, but should also be seen as significant development that can take the African human rights system to another level.

This being said the Protocol on the Rights of Women in Africa Article 6 protects the right of women to nationality.¹⁸⁵ On the one hand, the Protocol protects women's right to nationality by stating that "a woman shall have the right to retain her nationality or to acquire the nationality of her husband".¹⁸⁶ This makes it clear that if the woman has no right to acquire the nationality of her husband she must be able to hold onto her original nationality, thereby preventing her from becoming stateless. The Protocol seems to suggest that a woman either has the right to keep her original nationality or has the right to acquire the nationality of her husband. Nevertheless, Waas warns that the way the provision is formulated can allow states to freely revoke the nationality of a women upon marriage to a non-national so long as the state of nationality of her husband provides a right to acquire that nationality.¹⁸⁷

¹⁸³ Heyns and Killander (n 159) 'the Protocol on the Rights of Women (2003/2005),' 61-71.

¹⁸⁴ Centre for Human Rights, "African Commission on Human and Peoples' Rights adopts first General Comment clarifying article 14 1 (d) and (e) of the Protocol on the Rights of Women in Africa," October 2012 <http://www.chr.up.ac.za/index.php/centre-news-2012/1052-african-commission-on-human-and-peoples-rights-adopts-first-general-comment-clarifying-article-141d-and-e-of-the-african-womens-protocol.html>. (accessed 24 October 2012).

¹⁸⁵ Article 6 of the Protocol on the Rights of Women in Africa.

¹⁸⁶ Article 6 section g) of the Protocol on the Rights of Women in Africa.

¹⁸⁷ Waas (n 23 above) 76.

On the other hand, Article 6 (h) also provides that “a man and a woman shall have equal rights, with respect to the nationality of their children”.¹⁸⁸ However, Unlike Article 9 of the CEDAW, the Protocol added a claw-back clause that states “except where this is contrary to a provision in national legislation or is contrary to national security interests.” This claw-back clause appears to nullify the effect of the entire provision and is in contradiction with the. As we have seen in chapter three the prohibition of discrimination belongs to the group of human rights which derogation from is not allowed, even in an emergency situation. Thus, the provision has the potential of rendering some children stateless unless the African Charter on the Welfare of the Child provides otherwise. Furthermore, as the history of the drafting process indicates the content of this provision were limited to accommodate the strong opposition forwarded by the North African States.¹⁸⁹

4.3 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child was adopted in 1990 and entered into force on 29 November 1999.¹⁹⁰ To date 45 countries have ratified the Charter. In line with the approach taken in the African Charter on Human and People’s Rights, the African Children’s Charter provides for the civil, political, economic, social and cultural rights of children. Hence, states parties are obliged to implement the African Children’s Charter without making any distinction among the different categories of rights.

The African Committee of Experts on the Rights and Welfare of the Child was established in Lusaka, Zambia, in July 2001. The Committee of Experts is established to promote and protect the rights and welfare of the child and is also mandated to collect and document information, commission interdisciplinary assessment of situations on African problems relating to the rights and welfare of the child.¹⁹¹ It also monitors the implementation of the African Children’s Charter and review reports from states parties. The unique function of this

¹⁸⁸ Article 6 section h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests.

¹⁸⁹ Freda Banda, ‘Protocol to the African Charter on the Rights of Women in Africa,’ in Malcolm Evans and Rachel Murray (eds), *the African Charter on Human and Peoples’ Rights: The System in Practice* 1986-2006, Cambridge University Press 2008 as cited Manby (n 22 above) 20.

¹⁹⁰ Henys and Killander (n 160 above) ‘The African Charter on the Rights and Welfare of the Child’ 77-89.

¹⁹¹ Article 32 of the African Charter on the Rights and Welfare of the Child. (hereafter African Children’s Charter).

Committee is it entertains consider communications.¹⁹² The communications can be correspondence or complaint by a state, individual, or NGO related to violation of to a right of the child.¹⁹³ The Committee can also provide General Comments, concluding observations, and resolution related to child rights.

It is important to note that the African Charter on the Rights and Welfare of the Child contains provision that deal with the child's right to nationality.¹⁹⁴ Accordingly, the Charter provides that nationality should be granted *jus soli* to a child who would otherwise be stateless. Concerning such provision the African Committee in *Nubian Children's case*¹⁹⁵ expounded that:

“Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1), that ‘every child has the right *from his birth* to acquire a nationality’. It only says that ‘every child has the right to acquire a nationality’. Nonetheless, a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth.”¹⁹⁶

The Committee goes further and explains that Article 6 (4) “is not suggesting that States Parties to the Charter should introduce the *jus soli* approach”,¹⁹⁷ but confer nationality to a child born in their territory when other state fail to do so. Additionally, it stated that “statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education.”¹⁹⁸ Similar to the assertions made by the African Commission in the *SERAC* case the Child Committee acknowledge the indivisibility of rights in the African Children's Charter and stated that “all Charter rights generate obligations to respect, protect, promote and fulfil. This is no less so in respect of the rights implicated when nationality and identity rights are violated.”¹⁹⁹ Based on that it also

¹⁹² Article 44 the African Children's Charter. This provision is unique in that the CRC does not provide for an individual complaints procedure at the moment, though there is a move to adopt one.

¹⁹³ Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child, ACERWC/8/4, Chapter 1, Article 1(1) and Chapter 2, Article 1(I)(1)..

¹⁹⁴ Article 6 paragraph 3 and 4 of the African Children's Charter states that “every child has the right to acquire a nationality; and states Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws”.

¹⁹⁵ *Nubian Children's case* (n 31 above) “The complainants alleged that the Kenyan government had refused to give the Nubians Kenyan nationality. Nubian children could not obtain Kenyan birth registration. [...] Nubian children could not obtain Kenyan birth registration. This has left Nubian children stateless.”

¹⁹⁶ n 31 above, para 42.

¹⁹⁷ Article 6 paragraph 4 of the African Children's Charter.

¹⁹⁸ n 31above, para 46.

¹⁹⁹ n 31above, para 58.

addressed violations related to prohibition on unlawful and unfair discrimination (Article 3), equal access to education (Article 11(3)), and equal access to health care (Article 14) and recommended that the Kenyan government should take all appropriate measures: to ensure that all Nubian children acquire Kenyan nationality, to discontinue all forms of discrimination regarding birth registration processes, and to guarantee the fulfilment of the children's right to health and education. Therefore, it can be easily concluded that the Nubian Children case has adequately dealt with the prevention, reduction and protection of child statelessness in African and shows the new progress towards the recognition of human rights of stateless people in Africa.

4.4 Conclusion

In this chapter attempts have been made to investigate the position of the African human rights system on nationality matters and statelessness. Though the African Charter failed to mention the right to nationality, the Women's Protocol and the Children's Charter have explicit provisions that grant the right of nationality to women and children.

We have also navigated through the different enforcement mechanisms that are employed to ensure the implementation and monitoring of the three instruments. It was also noted that the African Commission has been the sole active body in the implementation of the Charter for the last 20 and more years. Further, in realising its task the Commission has used communication from individuals, states and NGOs to interpret the Charter. It also employed special mechanisms like the Special Rapporteur and Working Groups to address the weakness and ambiguities in the Charter. It is important also to point out that these special mechanisms enabled the African human rights system to come up with different resolution and recommendation that ensure the smooth operation of the Commission. Reference can be made to the "Principles of Freedom of Expression (2002)" and "Dakar Declaration on the Rights of a Fair Trial (2003)".

Furthermore, the Commission has also introduced concluding observations which provides it with a chance to expound on the contents of the Charter. Recently, it employed a General Comment for the first time to clarify ambiguities and concerning Article 14 1 (b) of the Women's Protocol which opened a new avenue on the African human rights system.

If we shift our focus to the African Commission's jurisprudence, we witness that the Commission has been creative in its interpretation of the provision of the Charter. Employing what is provided Article 60 and 61 of the Charter, it creatively and proactively was able to read in rights such as the right to food and housing into the Charter from the explicit provisions of the right to health, life and dignity. In particular, it had also used provisions on the non-discrimination, equal treatment under the law, and the right to dignity deal with cases of arbitrary deprivation of nationality adequately. In addressing some of the issues, the Commission implicated that there is a link between the right to nationality and the right to dignity. Most importantly, in the case *Madison v. Botswana* it appropriately used the Charter to determine whether complainant is entitled to be attributed of citizenship by descent or by registration, which affects the political life of a person.

The Women's Protocol, unlike the African Charter provides the right to nationality of women and their children. Though some criticism was forwarded against the claw-back clause that seems to allow states to prevent women from passing their nationality to the Children in case of state of emergency, a purposive interpretation or general comments by the Commission can remedy such ambiguity. The Africa Court can also be approached for its interpretive jurisdiction on the Protocol.

Apart from the above, the Children's Charter also provided the right to nationality of the children. The provisions unequivocally oblige states to provide nationality to a child who would otherwise be rendered statelessness. The Committee of Experts in its decision on the *Nubian Children's* case was able to explore and expound the position of Children's Charter on the nationality matters of a child. The Committee also appropriately employed the right to non-discrimination, equal treatment to address the issue of arbitrary deprivation of nationality. It underlined that the right to nationality is part and parcel of indivisible human rights from which states have the obligation to respect, protect, promote and fulfil.

We have also explored that the Committee other than hearing case has other mandates similar to that of the commission, which can be utilised to clarify ambiguities and doubts with in the Children's Charter. Thus, the chapter revealed that there is ample potential with in the African human rights system that can be utilised to address the issue of nationality and statelessness in the continent.

Chapter 5

Conclusion and Recommendations

5.1 General conclusion

The underlining cause of statelessness in Africa can be traced back to the legacy of the colonial period. First and foremost, by dismantling the pre-colonial political and social structures, colonialism created new imaginary political entities with artificial boundaries that did not suit the social, cultural, and linguistic make-up of the people of Africa. Moreover, colonialism had also introduced many-tiered citizenship structures that discriminatory between the Europeans and slaves, Asians and black Africans, and native and migrants that created mistrust among these communities. This legacy was reflected in a different fashion in the post-colonial nationality laws. It resulted in the denationalisation and exclusion of communities which lead to devastating civil wars, mass expulsion and statelessness in the continent. Consequently, these stateless persons are exposed to tremendous amounts of hurdles and hardships. They cannot enrol their children to school, cannot vote, cannot stand for office, cannot travel freely and own property etc...

The other factor that caused statelessness in the continent is the result of nationality principles. It is noted that African states in applying the *jus sanguinis* and the *jus soli* doctrines either separately or collectively caused statelessness. The policy choice made across these nationality doctrines also resulted in discrimination based on race, ethnicity, and language. It is also observed that several African countries still deny women's right to pass their nationality to their foreign spouses and children. It is noted that several nationality laws fail to provide procedures for naturalisation or put stringent requirement that makes the naturalisation very difficult. Moreover, nationality laws of several countries provide authorities with unfettered power to revoke nationality without due process of law.

If we start looking at what is provided in international law to remedy such problems, we see that most provisions of the 1961 Statelessness Convention are designed to address the technical causes of statelessness. Among the achievements of the 1961 Statelessness Convention is its ability to prevent children from rendered statelessness, by obligating states to grant children nationality which otherwise be stateless. The Convention also ensured better protection to abandon and adopted children than international human rights does. It also offers a better solution to statelessness related to a foundling child. It confers *jus sanguinis* or

jus soli nationality to a foundling child. Furthermore, it prohibits the loss of nationality as the result of change of status such as marriage, divorce and adoption. Nevertheless, international human rights law is better placed in the prohibition of any discriminatory treatment regarding the conferral of nationality and gender sensitive nationality laws than the 1961 Statelessness Convention. Among the noticeable weaknesses of the Convention is its limited non-discrimination clause which excludes gender from the list. In contrast, international human rights law offers a broader protection when it comes to arbitrary deprivation of nationality.

In relation to statelessness in the context of state succession, the 1961 Statelessness Convention is more advanced than international human rights law which seems to be silent on the issue. The Convention attempts to address the issue of statelessness by obligating the successor state to confer nationality to those persons otherwise be rendered stateless. However, The ILC Draft Articles address these issues better than the convention for the following two reasons. First, it obligates the predecessor state to withhold the withdrawal of nationality from any person affected by state succession. Second, it also provides a broader protection against any kind discriminatory deprivation that might arise as the result of state succession. It can be conclude that the protection provided in the 1961 Stateless Convention is way back from perfect. Nonetheless, the Convention if seen as integral part of the human rights framework and complimented by what is provided under the human rights regimes there is ample possibility of it can play a pivotal role in the reduction and prevention of statelessness in the African.

If we shift our focus from the reduction and prevention of statelessness into the protection of rights of stateless persons, we see stateless persons are granted several human rights under the 1954 Statelessness Convention. Several civil and political rights such as the right to movement, access to the courts, freedom of religion, and the right to property; and socio-economic rights such as the right to work, the right to education, the right to adequate standard of living are protected under the Convention. However, several other important human rights are excluded from the Convention, which are considered rights that stateless persons have no claim to. Though full protection is not provided, cataloguing the rights under the Convention is beneficial in providing the minimum threshold that states must protect, respect and fulfil. Therefore, the protection provided by the 1954 Statelessness Convention complimented by the generic human rights law, can similarly provide an adequate protection to stateless persons.

If we look to the position of the African human rights system on nationality matters and statelessness, the three most important instruments that attract our attention are the African Charter, the Women's Protocol, and the Children's Charter. Though the African Charter failed to mention the right to nationality the latter two instruments explicitly provide the right of nationality for women and children. Nevertheless, the Commission utilising appropriately, some of the provisions was able to deal adequately issues related to arbitrary deprivation of nationality.

Apart from the above, the Committee of Experts in its decision showed that if properly implemented the Children's Charter can adequately address the statelessness related to children. This being said the African human rights instruments have shortcomings in addressing the whole issue of statelessness in the continent.

5.2 So what is to be done?

As mentioned above the issue of statelessness needs an urgent attention and it is very important that the African human rights system be formulated in a way to address issues nationality and statelessness. There are several strategies that can be employed to address this problem, having a Protocol on Nationality is among the options. Pursuant to Article 66 of the Charter, the Commission is mandated to adopt a Protocol when it deemed necessary. At face value a Protocol on the Rights of Nationality looks necessary to address the issues of nationality and statelessness in Africa. Ideally, a Protocol will close the gap that exist in the African Charter and also includes provisions that address statelessness in the context of state succession and procedures for naturalisation. It can also goes as far as addressing the new cases of statelessness not contemplated by the two Statelessness Conventions. Seen from this vantage point a protocol is an ideal solution to the statelessness in the continent.

It is worth noting that this issue should not only be seen from what a Protocol can accommodate with in its provisions, but should also be seen from the practical view point too. From the outset it is very important to refer to the experience of adopting a Protocol and Charter with in the African human rights system. In most cases, the time taken from the drafting to adoption and ratification of an instrument takes many years. Once adopted they take two to three years to enter into force. For example, the Children's Charter took ten years while the Women's Protocol took nine years. The other factor that needs consideration is the

debate that is going to surround the issue of nationality during the drafting and adopting process. It is noteworthy that there is no guarantee that these issues that are contemplated to be added and incorporated in the Protocol might all be acceptable by all states. If we take Article 6 (h) of the Women's Protocol the claw-back clause was included to accommodate the opposition showed by the North African countries. Thus, considering the economic, social and political issues surrounding citizenship and history, expected reaction is that states will cling to their sovereign rights. It is crucial to point out that the low rates of ratification of the two Statelessness Conventions. This is an indication of the reluctance and unwillingness on the part of the African states. Therefore, investing time and resource on drafting a protocol is not an ideal move, when other options are available.

Scholars have also warned the danger of proliferation and fragmentation of human rights instruments, which can affect the smooth operation of system. Last but not least, employing a Protocol to solve nationality matters seems also to come from the pessimism that revolves around the inability of the enforcement mechanisms in African human rights system. Therefore, the approach that should be taken on the issue of statelessness in African is not the adoption of a Protocol which does not seem feasible and easily achievable, but to employ what is available in the African human rights system.

5.3 If not a Protocol then what?

The question remains what is to be done to protect the right to nationality under the Charter. Is there any provision that can be expansively read to include the right to nationality in the Charter? Can the African Commission or African Court employ similar techniques of reading in implicitly rights into the explicit provisions of the Charter? Or what other mechanism are there in the African human rights system that can be employed to protect and prevent statelessness in the African continent?

There is an obvious challenge of translating human rights provisions into tangible rights. This requires commitment and change of attitude towards the available human rights instruments. Significant is also the change of attitude and creativity of those who are in charge of employing these instruments. Without exaggeration the Charter, as the foundational document of the African human rights system still has a potential to provide protection to

stateless persons in Africa through proactive interpretation and increased use of the individual communication.

Looking at the Commission's history of reading rights into the Charter, so far it had shown proactivity and creativity in interpretation of the provisions of the Charter. The Commission employing Articles 60 and 61 of the Charter creatively and proactively was able to read rights such as "the right to food and housing" into the Charter from the explicit provisions of the right to health and life. Similarly, if presented with the chance the Commission and the African Court might employ similar creative interpretation to read the right to nationality into the explicit right to dignity. Further, as has been evidenced in the *Nubia Children's* case, the Committee referred to the African Commission decision. Similarly, the Commission and the African Court can also draw inspiration from the Committee's decision to interpret the provisions of the Charter to prevent, reduce and protect statelessness in Africa.

It should also be mentioned that the way the Committee handled the *Nubia Children's* case is encouraging. If this is continued it has a potential not only to prevent and protect statelessness related to children but also the eradication of future statelessness in Africa. The Commission using what is provided in the Women's Protocol can also prevent and even reduce the possibility of statelessness among women.

In chapter four we were also able to see the role of the different enforcement mechanisms in implementation and monitoring of the African Charter. These special mechanisms enabled the African human rights system to come up with different resolutions to ensure the smooth application of the Charter and operation of the Commission. The recent introduction of a General Comment on the rights of women also opened a new avenue for the Commission to clarify ambiguities in the Charter. Therefore, establishing a 'Working Group on Nationality and Statelessness' with the tasks of formulating General Comments, Resolution, and Declarations and promotion of the two Statelessness Conventions is cost effective. The 'Working group' can channel the time and energy that would be employed in drafting a Protocol to achieve the above simple, quick and easily applicable solutions.

What Africa needs most urgently is not the adoption of a Protocol but the ratification of the 1954 and 1961 Statelessness Conventions. These two instruments, complemented by international human rights law and African human rights system can prevent, reduce and

protect statelessness in Africa. It is therefore advisable and crucial to focus on what is available and employable without attempting to reinvent the wheel.

5.4 Recommendations

1. The Commission must:

- encourage member African States to ratify the 1954 and the 1961 Statelessness Conventions ;
- encourage African States to consider examining their nationality laws and other relevant legislation with a view to adopting and implementing safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality;
- shall also use concluding observations to elaborate nationality issues and statelessness. .
- shall set up a Working Group that oversees on the issue on nationality and statelessness in Africa;

2. The Working Group must be tasked with:

- addressing the issue of statelessness in the continent through a Resolution, Declaration, and other appropriate mechanisms;
- prepare a model nationality law that can be used by countries;
- engage in helping countries to redraft their nationality laws to accommodate changes that prevent statelessness in their territories;
- undertake studies, research and other related activities to examine appropriate ways to enhance the protection of statelessness;
- publicise and encourage countries to ratify the two Statelessness Conventions and assist Member States to develop appropriate policies, regulations and laws for the effective protection of stateless persons;
- cooperate with the Special Rapporteur on the Rights of Women to formulate a General Comment related to Article 6 (g) and (h) of the Women's Protocol which can adopted by the Commission;

- cooperation with the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa to assess the severity of statelessness in Africa and providing practical solutions

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