

African legal frameworks on the right to nationality and statelessness

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Outline of the Presentation

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Nationality Rights and Statelessness under the African Charter on Human and Peoples' Rights

1) Adopted in 1981 and entered into force 1986

2) Monitoring Organ– The African Commission on Human and Peoples' Rights (The ACHPR)

3) Relevant provisions

- No specific/direct provision on Nationality
- However Art 2– Non-discrimination, Art 3–Equality before the law, Art 5–right to the respect of the dignity and legal status., Art 12 the right to leave and return to own country and Art 18 protection of the family

4) The ACHPR dealt with few Communications on matters of the right to nationality including:

- *Modise v. Botswana*
- *Amnesty International v. Zambia*
- *Legal Resources Foundation v. Zambia*
- *IHRDA v. Angola*
- *IHRDA V Republic of Guinea*

5) Initiatives of the ACHPR on the right to nationality and eradication of statelessness include:

- Resolution 234 on the Right to Nationality–affirmed the right to nationality,
- The Commission has launched a study on the rights to a nationality in Africa
- The Draft protocol to the ACHPR on the specific aspects of nationality and the eradication of statelessness

The Right to nationality under the Protocol to the ACHPR on the right of women

1. **Adopted**–2003 and entered into force in 2005
2. **Relevant provisions**
 - Art 6– a woman shall have the right to **retain her nationality** or to acquire the nationality of her husband;
 - 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.
3. **Cases**
 - No cases relating to the rights of women to transmit nationality to their children or husbands yet.
4. **Initiatives to rectify the gaps in the Women’s Protocol**
 - The Draft Protocol– rectifies the problem of the gap in the women’s Protocol by ensuring equal rights of men and women with respect to **acquisition, change or retention of their nationality and the nationality of their children** and equal rights to **obtain identity documents** and have the right to obtain these documents in their own name

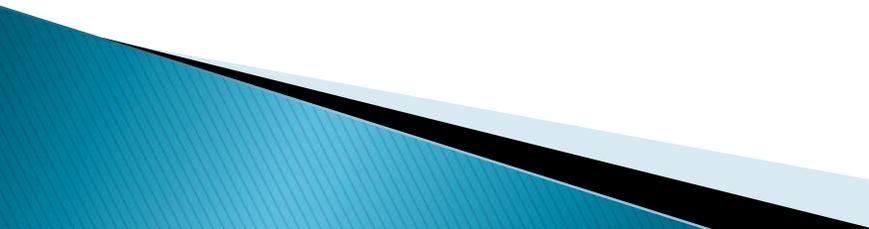
The right to nationality under the Protocol to the ACHPR on the establishment of the AfCHPR

- I. **Adopted**—1998 and entered into force in 2004
- II. **Monitoring Organ**— The African Court on Human and Peoples' Rights
- III. **Relevant Provisions**— No specific provision, however, Article 3 (1) of the Protocol and Rule 26 (1) and (2) are relevant to the right to nationality as they set the material jurisdiction of the Court on matters covered regional and international human rights instruments.
- IV. **Cases:**
 - *Anudo v. United Republic of Tanzania*
 - On arbitrary deprivation of Nationality, expulsion without judicial process, arbitrary denial of entry to own country
 - Invoking Article 15 UDHR, 12 (4) of ICCPR and 12 (2) & (4) of ACHPR.
 - The decision reinforces the international principle that the application of law in practice—as opposed to the written law alone—dictates a person's legal status as a citizen or a stateless person.

The right to nationality and statelessness among children under the African Charter on the Rights and Welfare of the Child

1. **Adopted in 1990 and entered into force in 1999**
2. **Monitoring Organ– The ACERWC**
3. **Relevant Provisions– Art 6 of the ACRWC– deals with the right name nationality and birth registration**
4. **Cases–** *IHRDA and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya V the Government of Kenya;* *African Centre of Justice and Peace Studies (ACJPS) and People’s Legal Aid Centre (PLACE) V the Republic of Sudan*
5. **Initiatives– The General Comment on Article 6 of the African Children’s Charter**

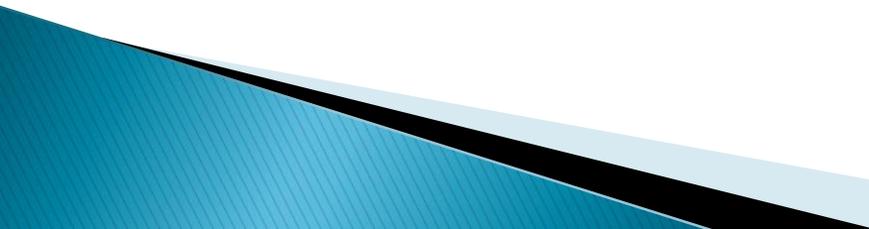
Article 6 of the African Children's Charter

1. Every child shall have the right from his birth and a name.
 2. Every child shall **be registered immediately** after birth.
 3. Every child has the **right to acquire a nationality**.
 4. 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.
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Elements of Article 6 of the African Children's Charter

- ▶ The Childs' right to be registered immediately after birth– art 6 (2)
 - ▶ The child's right to a nationality– art 6 (3)
 - ▶ Obligation of States to prevent of statelessness– art 6 (4)
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Birth Registration under article 6 of the African Children's Charter

- ▶ According to the ACERWC's General Comment on Article 6, birth registration to be effective it must be:
 1. **Universal**– for all the children, anywhere and anytime
 2. **Free and accessible**– no cost (direct and indirect including for late registration) simple, expeditious, effective and decentralized
 3. **Made immediately after the birth of a child**– Within few days or weeks
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The Right to Nationality under Article 6 of the African Children's Charter

- ▶ **General nature of state obligations:** Art 1 of the Charter– States to undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
 - ▶ **Guiding principles–** The four cardinal principles– The best interest of the child, non-discrimination, the right to participation, and the right to life, survival and development.
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The Right to Nationality of the child under article 6 as explained in the General Comment

- ▶ **When should a child get her/his nationality–** Conferral of nationality at birth– without waiting for attainment of majority
- ▶ **To whom should nationality be given:**
 - A child **born in the State** with one parent (either mother or father) also born in the State acquires the nationality of that State **at birth**.
 - Children who **were not born** in the territory of a State but have been **resident there for a substantial** portion of their childhood
 - **Foundlings** and abandoned children
 - **Adoption**– it is in the best interests of the child to possess the nationality of the person(s) who is (are) **primarily responsible** for his or her care.
 - **Nationality of a child in case of change of status of his or her parents–**
 - **When parents acquire new nationality**– child to have same nationality subject to the views of the child– evolving capacity
 - **Loss or deprivation** should not affect the child and in no case may a child lose or deprived of his or her nationality if he or she would be left stateless.
 - **Where a parent renounce nationality on behalf of a minor**– subject to the her or his own views should be heard and taken into account– State to ensure that another nationality is acquired.

State obligations under Article 6 (4) of the African Children's Charter

- ▶ Article 6(4) goes beyond general obligation of reduction of statelessness by introducing **specific obligation on a state where the child is born**—if the child who would otherwise be stateless.
- ▶ **The State should bear the burden of proof in cases applying the 'otherwise stateless child' principle**— both explicit communication and non-responsiveness should be considered.

ACERWC Decision on the case of children of Nubian Descents in Kenya

- ▶ **Allegation:** Nubian children in Kenya are systematically denied Kenyan nationality, constitutes violation of non-discrimination (Art 3) right to a nationality (Art 6 (3)), the State's failure to fulfill its obligation to avoid the statelessness of children under Article 6 (4).
- ▶ **Outcome:** Challenges related to registration and denying Nubian children Kenyan nationality amounted to **making them stateless**, which is against the best interests of the child.
- ▶ The vetting system put in place to decide who gets access to citizenship **"unlawfully discriminates" against Nubian children**, leaving them stateless or at risk of being stateless, which is a violation of Article 3 of the African Charter.
- ▶ Denied Nubians **access to adequate health care and education** was also found to be in breach of Articles 14 and 11 of the African Charter.

Other relevant legal and policy frameworks on matters of nationality and statelessness in Africa

- ▶ The Protocol to the ACHPR on the Rights of Persons with Disabilities in Africa—adopted in 2018
 - ▶ The Protocol on Free Movement of People—adopted in 2018
 - ▶ Migration Policy Framework for Africa and Plan of Action (2018 – 2030)
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Thank you!