

**BEFORE THE AFRICAN COMMISSION  
ON HUMAN AND PEOPLES' RIGHTS**

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**FRIENDLY COMMUNICATION IN SUPPORT OF  
COMMUNICATION 317/2006 –  
THE NUBIAN COMMUNITY IN KENYA/KENYA**

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## STATEMENT OF PURPOSE

The purpose of this submission is to provide the Commission with a legal analysis of the right to a nationality under international law and the applicability of this right to the questions before the Commission in *Communication 317/2006, The Nubian Community in Kenya/Kenya* (the Nubian Community Communication), which was submitted by the Institute for Human Rights and Development for Africa, the Open Society Justice Initiative, and the Centre for Minority Rights Development. The Allard K. Lowenstein International Human Rights Clinic at Yale Law School offers this submission because the human rights at stake in this proceeding are of profound importance. The international community has unequivocally condemned statelessness, because of the importance of nationality in ensuring fundamental rights. The case of the Nubian Community is an opportunity for the Commission to address the issue by articulating the implicit protection of the right to a nationality under the African Charter on Human and Peoples' Rights.

This submission is not intended to provide the Commission with new or independently collected facts. Rather, in considering the applicability of the African Charter and the relevance of general international human rights principles to this case, this submission will rely on the facts presented in the Nubian Community Communication. Based on these facts, the submission concludes that Kenya is in violation of its legal obligations under the African Charter and other international human rights instruments.

## STATEMENT OF INTEREST

This submission is respectfully offered by the Allard K. Lowenstein International Human Rights Clinic (the Clinic) at Yale Law School. The Clinic is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research on behalf of human rights organizations and individual victims of human rights abuses. The Clinic has prepared briefs and other submissions for the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and various bodies of the United Nations, as well as for United States courts. The Clinic has also investigated human rights conditions and prepared and published human rights reports. The Clinic's work is based on the human rights standards contained in international customary and conventional law and is dedicated to furthering the development and enforcement of human rights norms. The Clinic has done considerable work on the rights of national, racial, and ethnic minorities and of indigenous peoples, and it has an interest in ensuring respect for the right of all people to a nationality and not to be stateless. The Clinic is particularly concerned that the deprivation of these rights is likely to undermine protection of the most fundamental rights enshrined in international human rights conventions, including the African Charter on Human and Peoples' Rights.

The communication before the Commission concerning the Nubian population of Kenya raises important questions about individuals' right to a nationality. These questions are of great interest to the Clinic, its students, and its faculty. Therefore, the Clinic respectfully submits this friendly communication for the consideration of the Commission.

## **I. Introduction**

International law recognizes that each individual has a right to a nationality, and it seeks to protect individuals from the condition of statelessness. Many international human rights instruments include provisions guaranteeing the right to a nationality to all persons and require appropriate states to grant individuals nationality where they would otherwise be stateless. International rules governing nationality following state succession strongly affirm the international community's determination that states have an obligation to prevent statelessness. International human rights law provides special protection for a child's right to a nationality, because of the particular vulnerability that children without a nationality endure.

The right to a nationality is important because nationality brings individuals under the political and legal protection of the state. National status entitles individuals to the benefits of citizenship and gives them a stake in the governance of their country. Moreover, the right to a nationality is critical to the protection of other fundamental rights, including those enshrined in the African Charter on Human and Peoples' Rights (the African Charter). Although the right to a nationality is not explicitly guaranteed in the African Charter, the African Commission on Human and Peoples' Rights (the African Commission) has recognized the critical role of this right in the protection of other fundamental human rights. The African Commission has found unenumerated rights to be implied in the African Charter when they are pivotal for securing other rights explicitly guaranteed in the African Charter. Because the right to a nationality is a necessary condition for the protection of these other rights, the African Commission should find the right to a nationality to be implicit in the African Charter.

Even if the right to a nationality is not found to be an implied African Charter right, both treaty and customary international law prohibit the denial of nationality on arbitrary or

discriminatory grounds. Therefore, individuals of a particular ethnicity, race, or national origin cannot be discriminated against by the state in its conferral of national status. The state cannot, under international law, discriminate by requiring certain individuals to meet a higher standard for proving their nationality. Similarly, the state cannot impose arbitrary requirements on certain classes of people without violating the international prohibition against arbitrary and discriminatory treatment.

Because international law recognizes an individual right to a nationality, because the right is critical to the realization of other human rights, and because international law prohibits arbitrary and discriminatory treatment in granting national status, the Allard K. Lowenstein International Human Rights Clinic respectfully submits that the African Commission should find that Kenya has deprived the Nubians of their right to a nationality.

## **II. International Law Recognizes an Individual's Right to a Nationality**

International law and, in particular, international human rights law, has increasingly recognized an individual's right to a nationality. The right to a nationality generally requires appropriate states to grant nationality to individuals who would otherwise be stateless. This is particularly true in the context of state succession, where international law requires a successor state to grant nationality to an individual with an effective link to the nation if she would otherwise be stateless.

### *A. International Human Rights Instruments Guarantee the Right to a Nationality*

International declarations, treaties, and United Nations bodies recognize the international right to a nationality. The Universal Declaration of Human Rights, which articulates well-recognized principles of international law,<sup>1</sup> declares in Article 15 that “[e]veryone has the right

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<sup>1</sup> See, e.g., HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 41 (1996).

to a nationality.”<sup>2</sup> Shortly after the passage of the Universal Declaration, the U.N. Economic and Social Council “demanded action ‘to ensure that everyone shall have an effective right to a nationality.’”<sup>3</sup> International treaties also explicitly provide for the right to a nationality. The International Convention on the Elimination of All Forms of Racial Discrimination, to which Kenya is a party, specifically requires states parties to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (iii) The right to nationality.”<sup>4</sup> The Convention on the Reduction of Statelessness additionally insists that a “Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless” except under limited enumerated circumstances.<sup>5</sup>

Regional human rights treaties also recognize the right to a nationality, and regional human rights courts have affirmed the right. The American Convention on Human Rights explicitly embraces the right to a nationality, proclaiming that “[e]very person has the right to a nationality.”<sup>6</sup> Under the American Convention, this right is non-derogable and cannot be

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<sup>2</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., art. 15, U.N. Doc A/810 (Dec. 12, 1948). Even prior to the adoption of the Universal Declaration, one of the earliest international conventions on nationality proclaimed that “all its members should recognise that every person should have a nationality.” Convention on Certain Questions Relating to the Conflict of Nationality Laws, preamble, Apr. 12, 1930, 179 U.N.T.S. 89 [hereinafter Hague Convention of 1930].

<sup>3</sup> United Nations, Office of Public Information, *The United Nations and Human Rights*, at 59, U.N. Sales No. E.78.I.18 (1978).

<sup>4</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(iii), Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

<sup>5</sup> Convention on the Reduction of Statelessness, art. 8, Aug. 30, 1961, 989 U.N.T.S. 175; *see also* discussion of statelessness *infra* Part I(b). Circumstances under which a state may render an individual stateless under the Convention include “where the nationality has been obtained by misrepresentation or fraud.” *Id.* A state may also “make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority,” and “[a] naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years . . . if he fails to declare to the appropriate authority his intention to retain his nationality.” *Id.* art. 7.

<sup>6</sup> Organization of American States, American Convention on Human Rights, art. 20(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; *see also* American

suspended even during a state of emergency.<sup>7</sup> The Inter-American Court of Human Rights has affirmed the importance of this right.<sup>8</sup> In 2005, for example, the Inter-American Court found a violation of the right to a nationality, holding that two girls born in the Dominican Republic to Dominican mothers and Haitian fathers were effectively denied the right to a nationality because they were not allowed to register their births with the Dominican state.<sup>9</sup> Noting that the Dominican state had forced the children to endure a situation of continuing illegality and social vulnerability by refusing to recognize them as Dominican nationals, the Court recognized that “nationality is a juridical expression of a social fact that connects an individual to a State. Nationality is a fundamental human right enshrined in the American Convention, and other international instruments . . . .”<sup>10</sup>

The European Convention on Nationality explicitly recognizes the right to a nationality, stating: “The rules on nationality of each State Party shall be based on the following principles:

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Declaration of the Rights and Duties of Man, art. 19, Res. XXX, Final Act, Ninth Int’l Conference of American States (May 2, 1948) (“Every person has the right to the nationality to which he is entitled by law . . . .”). The American Convention also provides individuals with the right to nationality in the state in which they are born if they would otherwise be stateless, *see* American Convention, *supra*, art. 20(2), and prohibits arbitrary deprivation of nationality, *see* American Convention, *supra*, art. 20(3).

<sup>7</sup> American Convention, *supra* note 6, art. 27 (stating that the right to nationality cannot be suspended in “time of war, public danger, or other emergency that threatens the independence or security of a State Party”).

<sup>8</sup> For example, *see Case of Ivcher-Bronstein v. Peru*, in which the Inter-American Court explained that “[t]he right to a nationality provides the individual with a minimum measure of legal protection in international relations, through the link his nationality establishes between him and the State in question; and second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practical purposes of all his political rights as well as of those civil rights that are tied to the nationality of the individual.”

2001 Inter-Am. Ct. H.R. (ser. C) no. 74, ¶ 87 (Feb. 6, 2001) (quoting *Castillo Petruzzi Case*, 1999 Inter-Am. Ct. H.R. (ser. C) no. 52, ¶ 100 (May 30, 1999)) (alteration in original).

<sup>9</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) no. 130, ¶ 156 (Sept. 8, 2005); *see also infra* at notes 21-34 and accompanying text (discussing the special importance of a child’s right to a nationality).

<sup>10</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 136 (citing American Declaration of Human Rights, art. 19; Universal Declaration of Human Rights, art. 15; International Covenant on Civil and Political Rights, art. 24(3); Convention on the Rights of the Child, art. 7(1); International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, art. 29, and Convention on the Reduction of Statelessness, art. 1(1)).



a. everyone has the right to a nationality . . . .”<sup>11</sup> In its Explanatory Report accompanying the European Convention on Nationality, the Committee of Ministers of the Council of Europe emphasized that “[w]ith the development of human rights law since the Second World War, there exists an increasing recognition that State discretion in [the field of nationality] must furthermore take into account the fundamental rights of individuals.”<sup>12</sup> Although the European Convention on Human Rights does not expressly protect the right to a nationality, the European Court of Human Rights has recognized the importance of nationality to other fundamental rights.<sup>13</sup>

Other United Nations bodies have reiterated the individual right to a nationality. Over the past two decades, the United Nations Commission on Human Rights has reaffirmed the right

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<sup>11</sup> European Convention on Nationality, art. 4, Nov. 6, 1997, Europ. T.S. No. 166, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>. The European Convention has been signed by twenty-seven European nations and has been ratified by sixteen. European Convention on Nationality, Status as of 11/03/2007, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=8&DF=3/11/2007&CL=ENG>; *see also* Declaration on the consequences of State succession for the nationality of natural persons, adopted by the European Commission for Democracy through Law at its 28th Plenary Meeting, ¶ 5 (Sept. 1996), *available at* [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/foreigners\\_and\\_citizens/nationality/documents/legal\\_instruments/Declaration%20on%20consequences%20of%20State%20succession.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/foreigners_and_citizens/nationality/documents/legal_instruments/Declaration%20on%20consequences%20of%20State%20succession.pdf) (“The States concerned shall respect the principle that everyone has the right to a nationality.”). The European Convention on Nationality also includes provisions regarding statelessness, *see infra* at note 44, and arbitrary deprivation of nationality, *see infra* at note 99.

<sup>12</sup> Committee of Ministers, Explanatory Report to the European Convention on Nationality, CM(97)64 / 02 April 1997, *available at*: <https://wcd.coe.int/ViewDoc.jsp?id=574263&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

<sup>13</sup> *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8, 14, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights]; *see, e.g., Riener v. Bulgaria*, App. No. 46343/99 (Aug. 23, 2006), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Riener%207C%20Bulgaria&sessionid=9970601&skin=hudoc-en> (“Although a ‘right to nationality’ similar to that in Article 15 of the Universal Declaration of Human Rights is not guaranteed by the Convention or its Protocols, the Court has previously stated that it is not excluded that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual.”).

to a nationality as an “inalienable human right.”<sup>14</sup> In 2005, the Commission passed a resolution reaffirming Article 15 of the Universal Declaration of Human Rights, emphasizing “that the right to a nationality of every human person is a fundamental human right.”<sup>15</sup> The United Nations Special Rapporteur on the situation of human rights in Zaire (now the Democratic Republic of Congo (DRC)) has also based findings on the human right to a nationality. In 1996, for example, the Special Rapporteur found that the government of Zaire had violated the Banyarwanda and Banyamulengue peoples’ right to nationality guaranteed by the Universal Declaration of Human Rights as well as the customary international law prohibition against statelessness.<sup>16</sup>

Commentators acknowledge that international law has increasingly recognized the right to a nationality. Already in the 1990s, scholars noted the emergence of this right. One scholar explained:

[I]t can be safely concluded that there is a clear trend in international law towards a gradual recognition of an individual’s right to nationality. Since the Second World War, the international law of human rights has developed at an unprecedented pace. Many international instruments affording protection of

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<sup>14</sup> Human Rights and Arbitrary Deprivation of Nationality, Comm’n Hum. Rights Res. 1999/28, U.N. Comm’n Hum. Rts., 54th Sess., 55th mtg., ¶ 1, U.N. Doc. E/CN.4/RES/1999/28 (1999) [hereinafter 1999 U.N. Human Rights Commission Resolution on Arbitrary Deprivation of Nationality], *available at* [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.RES.1999.28.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.1999.28.En?Opendocument) (reaffirming “the importance of the right to a nationality of every human person as an inalienable human right”); Human Rights and Arbitrary Deprivation of Nationality, Comm’n Hum. Rts. Res. 1997/36, ESCOR Supp. (No. 3) at 122, ¶ 1, U.N. Doc. E/CN.4/1997/36 (1997) [hereinafter 1997 U.N. Human Rights Commission Resolution on Arbitrary Deprivation of Nationality] (same). The Commission was replaced by the Human Rights Council in 2006. *See* G.A. Res. 60, U.N. GAOR, 60th Sess, U.N. Doc. A/RES/60/251, *available at* <http://www.ohchr.org/English/bodies/hrcouncil/docs/A.RES.60.251-En.pdf>.

<sup>15</sup> Human Rights and Arbitrary Deprivation of Nationality, U.N. Comm’n Hum. Rts. Res. 2005/45, U.N. Comm. Hum. Rts, 61st Sess., 57th mtg., U.N. Doc E/CN.4/RES/2005/45 (2005) [hereinafter 2005 U.N. Human Rights Commission Resolution on Arbitrary Deprivation of Nationality], *available at* [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-45.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-45.doc).

<sup>16</sup> Report on the situation of human rights in Zaire, prepared by the Special Rapporteur, Mr. Roberto Garretón, in accordance with Commission Resolution 1995/69, U.N. Doc. E/CN.4/1996/66, ¶ 85, Jan. 29, 1996, *available at* <http://www.unhchr.ch/huridocda/huridoca.nsf/f247c38438f0ddcdc12569910037e669/25efd35ea2cd5fc0802566f200592db2?OpenDocument> (“Although Zaire is not a party to the Convention on the Reduction of Statelessness, the principles contained therein are nevertheless principles of international customary law that it is impossible for the States to disregard.”); *see also id.* ¶ 130; *infra* text accompanying note 46.

fundamental human rights irrespective of frontier or nationality have been ratified. . . . Recognition of these rights as fundamental human rights and the concerted efforts to guarantee these rights in international law exert a strong influence on the development of the right to nationality.<sup>17</sup>

Authoritative international law commentators have also confirmed the emergence of an international right to a nationality. After an eight-year study, the International Law Association, a worldwide association of international law scholars and practitioners that seeks to clarify and develop international law,<sup>18</sup> adopted a set of minimum standards to govern states of emergency and included the right to a nationality as one of the non-derogable rights that individuals should enjoy even under emergency conditions.<sup>19</sup> The Restatement of the Foreign Relations Law of the United States, which provides a synthesis of international law drawn from “customary international law and international agreements,”<sup>20</sup> also acknowledges that “[t]here has . . . been a growing recognition of a human right to nationality.”<sup>21</sup>

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<sup>17</sup> Johannes M.M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. L.J. 1, 13 (1991); see also Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT’L L.J. 315, 350 (1997) (“[T]here is growing support for a fundamental human right to nationality. Such an inherent right is found in numerous international human rights conventions.”).

<sup>18</sup> See International Law Association (ILA), available at <http://www.ila-hq.org/>. The ILA “has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies.” History of the ILA, available at [http://www.ila-hq.org/html/layout\\_about.htm](http://www.ila-hq.org/html/layout_about.htm).

<sup>19</sup> Paris Minimum Standards of Human Rights Norms in a State of Emergency, adopted by the ILA, Report of the 61st Conference (Paris, 1984). The study was conducted by a special subcommittee of the ILA and was subject to revision by the “full Committee on the Enforcement of Human Rights Law” which included members from 21 countries. Richard B. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT’L L. 1072, 1072-73, 1081 (1985). The standards built on several studies by prominent international law scholars and United Nations bodies as well as a report by special rapporteurs of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Id.* at 1072-73.

<sup>20</sup> American Law Institute (ALI) Publications Catalog (describing the Restatement of the Foreign Law of the United States). The Restatement of the Foreign Relations Law of the United States is published by the ALI, whose task is “to address uncertainty in the law through a restatement of basic legal subjects that . . . tell[s] judges and lawyers what the law [is].” ALI Overview of Institute Projects, available at <http://www.ali.org/index.cfm?fuseaction=about.instituteprojects>.

<sup>21</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 211, cmt. e (1987).

In addition to recognizing a general right to a nationality, international law has emphasized the right of children to a nationality. A child's right to a nationality is particularly important because of the vulnerability of children without a nationality.<sup>22</sup> In many instances, children who are unable to prove nationality or citizenship lack access to critical benefits such as health care or education. Recognizing this fact, many human rights instruments specifically address children's right to a nationality and right to register their birth.<sup>23</sup> For example, the 1989 Convention on the Rights of the Child, which has been ratified by 193 nations, including Kenya,<sup>24</sup> provides that children "shall be registered immediately after birth and shall have . . . the right to acquire a nationality" and requires state parties to "undertake to respect the right of the child to preserve his or her identity, including nationality."<sup>25</sup> The Committee on the Rights of the Child, the body created by the Convention on the Rights of the Child to review states' reports on their compliance with the Convention's provisions, has explained that the failure to register children's birth "implies the non-recognition of these children as persons before the law, which will affect the level of enjoyment of their fundamental rights and freedoms."<sup>26</sup> Article 24 of the

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<sup>22</sup> See, e.g., *Case of Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 167 ("Bearing in mind that the alleged victims were children, the Court considers that the vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled.").

<sup>23</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE 40, 44 (Geneva, 1994), *available at* <http://www.unhcr.org/protect/PROTECTION/3b84c6c67.pdf> (citing Article 24 of the International Covenant on Civil and Political Rights and Article 7 of the Convention on the Rights of the Child); see also UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 108 (2002).

<sup>24</sup> Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, Convention on the Rights of the Child, *available at* <http://www.ohchr.org/english/countries/ratification/11.htm>.

<sup>25</sup> Convention on the Rights of the Child, arts. 7, 8, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>26</sup> Concluding Observations of the Committee on the Rights of the Child: Madagascar, UN Doc. CRC/C/15/Add.26, 7th Sess. (Oct. 24, 1994). In its General Comment No. 3: HIV/AIDS and the Child, the Committee again emphasized the importance of birth registration and related human rights: "The Committee wishes to emphasize the critical implications of proof of identity for children . . . as it relates to securing recognition as a person before the law, safeguarding the protection of rights, in particular to

International Covenant on Civil and Political Rights also guarantees that “[e]very child has the right to acquire a nationality.”<sup>27</sup> International treaties dealing with the problem of statelessness also highlight the importance of conferring nationality on children who would otherwise be stateless.<sup>28</sup> The 1961 Convention on the Reduction of Statelessness has several provisions intended to protect children; for example, it provides that a child born in wedlock in the territory of a state party whose mother is a national of the state and who would otherwise be stateless should be granted that state’s nationality.<sup>29</sup>

Many regional human rights instruments similarly protect a child’s right to a nationality. For example, Article 6 of the 1990 African Charter on the Rights and Welfare of the Child, ratified by Kenya in 2000,<sup>30</sup> states that “[e]very child has the right to acquire a nationality” and requires state parties to enact legislation that will confer national status on a child born in that state if the child has no other nationality.<sup>31</sup> The American Convention on Human Rights states,

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inheritance, education, health and other social services, as well as to making children less vulnerable to abuse and exploitation.” Gen. Comment No. 3: HIV/AIDS and the Rights of the Child, Committee on the Rights of the Child, ¶ 32, 33rd Sess., U.N. Doc. CRC/GC/2002/3, (Mar. 17, 2003).

<sup>27</sup> International Covenant on Civil and Political Rights, art. 24, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>28</sup> For example, the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws provides that a child born to parents with no nationality or unknown nationality in a state that does not automatically confer its nationality on persons born within its territory is entitled to the nationality of the state in which he is born. This was the first international attempt to codify the principle of *jus soli*, which mandates that nationality shall be based on where an individual is born and not on the nationality of his or her parents. Hague Convention of 1930, art. 15, *supra* note 2 (“Where the nationality of a State is not acquired automatically by reason of birth on its territory, a child born on the territory of that State of parents having no nationality, or of unknown nationality, may obtain the nationality of the said State.”).

<sup>29</sup> Convention on the Reduction of Statelessness, *supra* note 5, art. 1(3) (“[A] child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.”); *see also id.* art. 5(2) (governing the ability of a child born out of wedlock who loses the contracting state’s nationality to recover that nationality).

<sup>30</sup> African Union, List of Countries Which Have Signed, Ratified/Accessed to the African Union Convention on African Charter on the Rights and Welfare of the Child, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>.

<sup>31</sup> African Charter on the Rights and Welfare of the Child, art. 6(3)-(4), *opened for signature* July 11, 1990, OAU Doc. CAB/LEG/24.9/49.

“Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”<sup>32</sup> The Inter-American Court of Human Rights has interpreted this article to extend the right to a nationality, enshrined by Article 20 of the Convention, to children.<sup>33</sup> The European Convention on Nationality has similar provisions specifically guaranteeing a child’s right to a nationality and requiring state parties to extend nationality to children found in their territory who would otherwise be stateless.<sup>34</sup>

International and regional treaties, declarations and reports from international bodies, and expert commentary, therefore, all recognize the international right to a nationality and the particular right of children to a nationality.

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<sup>32</sup> American Convention on Human Rights, *supra* note 6, art. 19.

<sup>33</sup> In the *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 135, the Inter-American Court found a violation of Article 19 (rights of the child) of the American Convention on Human Rights by virtue of the fact that the Dominican state had denied the petitioner children its nationality, protected under Article 20 of the Convention. The Court explained: “The prevalence of the child’s superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children.” *Id.* ¶ 134.

<sup>34</sup> European Convention on Nationality, *supra* note 11, art. 6. Article 6 provides:

Each State Party shall provide in its internal law for its nationality to be acquired *ex lege* by the following persons: a. children one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party, subject to any exceptions which may be provided for by its internal law as regards children born abroad. b. foundlings found in its territory who would otherwise be stateless.

*Id.* Furthermore, Recommendation No. R(99)18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness provides both that a state’s nationality should be available to children whose parents possess its nationality and to children born on its territory who would otherwise be stateless. Council of Europe Committee of Ministers, 71st Mtg., *adopted* Dec. 15, 1999 [hereinafter Committee of Ministers, Avoidance of Statelessness Recommendation], *available at* <https://wcd.coe.int/ViewDoc.jsp?id=458313&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

B. *The Right to a Nationality Requires That States Grant Nationality to Individuals Who Would Otherwise Be Stateless, Particularly in the Context of State Succession*

1. *States Have an Obligation to Grant Nationality to Individuals Who Would Otherwise Be Stateless*

International law dictates that, where an individual would otherwise be stateless, that is, without any recognized citizenship in a state, a state must grant that individual its nationality if the individual was born within the state's territory or has other important links to the state.<sup>35</sup>

The prohibition against statelessness has been articulated in a number of binding international treaties. The first international effort to codify the prohibition against statelessness was the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws.<sup>36</sup> In 1954, states reaffirmed the prohibition against statelessness by adopting the Convention Relating to the Status of Stateless Persons.<sup>37</sup> The 1954 Convention articulated both the rights of stateless persons and the obligations of state parties towards them.<sup>38</sup>

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<sup>35</sup> See, e.g., Convention on the Reduction of Statelessness, *supra* note 5, art. 1 (requiring states to grant nationality “to a person born in its territory who would otherwise be stateless”); see also discussion *infra* at note 60 (discussing effective link). Other international human rights instruments indicate that such a link may be established through descent or residence. The European Convention on Nationality, for example, provides that “[a]ccess to the nationality of a state should be possible whenever a person has a genuine and effective link with that state, in particular through birth, descent or residence.” Committee of Ministers, Avoidance of Statelessness Recommendation, *supra* note 34, ¶ 16. The United Nations High Commissioner on Refugees has further explained, “The [1961 Convention on the Reduction of Statelessness] does not oblige signatories to grant nationality to any stateless persons who enter its territory – *only those who already have a strong connection with the state* and for whom no other nationality is forthcoming.” UNHCR, THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN AGENDA, Chapter 6, p. 16 (1997-98) (emphasis added), available at <http://www.unhcr.org/publ/PUBL/3eb7ba7d4.pdf>.

<sup>36</sup> Hague Convention of 1930, *supra* note 2.

<sup>37</sup> Convention Relating to the Status of Stateless Persons, *opened for signature* Apr. 26, 1954, 360 U.N.T.S. 117.

<sup>38</sup> Rachel Settlege, Note, *No Place to Call Home: Stateless Vietnamese Asylum-Seekers in Hong Kong*, 12 GEO. IMMIGR. L.J. 187, 194-95 (1997).

The most significant international instrument addressing the rights of stateless persons is the 1961 Convention on the Reduction of Statelessness.<sup>39</sup> The Convention requires states to use their laws and administrative procedures to eliminate and prevent statelessness. Article 1 mandates that a party to the Convention “shall grant its nationality to a person born in its territory who would otherwise be stateless.”<sup>40</sup> Article 8 of the Convention on the Reduction of Statelessness also provides that, with limited exceptions, parties to the Convention “shall not deprive a person of his nationality if such deprivation would render him stateless.”<sup>41</sup> This article recognizes that a state’s sovereign power over granting nationality is limited by the obligation not to create stateless persons.

Regional treaties also emphasize the obligation to prevent statelessness. The American Convention on Human Rights, for example, provides: “Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.”<sup>42</sup> In interpreting the right to nationality under the American Convention, the Inter-American Court of Human Rights has held:

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State’s laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective.<sup>43</sup>

The European Convention on Nationality also requires states to ensure that their nationality rules avoid causing statelessness.<sup>44</sup>

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<sup>39</sup> Convention on the Reduction of Statelessness, *supra* note 5.

<sup>40</sup> *Id.* art. 1.

<sup>41</sup> *Id.* art. 8(1).

<sup>42</sup> American Convention on Human Rights, *supra* note 6, art. 20(2).

<sup>43</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 142.

<sup>44</sup> European Convention on Nationality, *supra* note 11, art. 4 (“The rules on nationality of each State Party shall be based on the following principles: . . . statelessness shall be avoided.”). A 1992 meeting at



At least one United Nations expert has maintained that the obligation to prevent statelessness is a part of customary international law. The Special Rapporteur on the situation of human rights in Zaire (now the DRC) invoked principles embodied in the Convention on the Reduction of Statelessness in calling on the government of Zaire to grant its nationality to the Banyarwanda and Banyamulenge peoples born and raised in Zaire with ancestral ties to the country. Although recognizing that Zaire was not a party to the Convention, the Special Rapporteur nevertheless regarded the principles therein to be a part of customary international law and thus binding on the state. The Banyarwanda and Banyamulenge had been denied Zairian nationality by operation of law and had no claim to any other nationality. The Special Rapporteur determined that in these circumstances, Zaire was obligated under principles of customary international law to grant its nationality to the Banyarwanda and Banyamulenge peoples because they would otherwise be stateless.<sup>45</sup>

The international prohibition against statelessness extends not only to those who are *de jure* stateless, but also to those who are *de facto* stateless. When an individual is entitled to citizenship of a particular country but is unable to prove his nationality due to restrictive or discriminatory requirements or because the country does not acknowledge him as a national, he may be *de facto* stateless. “[A] *de facto* stateless person is normally regarded as a person who does possess a nationality but does not possess the protection of his State of nationality and who

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Helsinki produced the Helsinki Document, which contained recognition of the right to nationality and of states’ obligations not to increase statelessness. The relevant section states: “The participating States[:] Recognize that everyone has the right to a nationality and that no one should be deprived of his/her nationality arbitrarily; Underline that all aspects of nationality will be governed by the process of law. They will, as appropriate, take measures, consistent with their constitutional framework not to increase statelessness . . . .” Declaration and Decisions from the Helsinki Summit, Helsinki, July 10, 1992, 31 I.L.M. 1385, 1413 (1992).

<sup>45</sup> Report on the situation of human rights in Zaire, *supra* note 16, ¶¶ 84-85.

resides outside the territory of that State, i.e. a person whose nationality is ineffective.”<sup>46</sup> The Inter-American Court of Human Rights, for example, has found that unreasonably burdensome requirements for obtaining nationality rendered an individual effectively stateless; the Court held that the Dominican Republic was obligated to ensure that the procedure for acquiring nationality be “simple, accessible and reasonable, because, to the contrary, applicants could remain stateless.”<sup>47</sup> If an individual is denied effective nationality, whether by operation of law or of fact, that individual is stateless, and the international prohibition against statelessness and protections guaranteed by the Convention on the Reduction of Statelessness apply to him.<sup>48</sup>

## 2. *International Rules Governing Nationality in the Context of State Succession Demonstrate the Importance of Avoiding Statelessness*

Out of concern for the prevention of statelessness, international law has also recognized and defined states’ obligations regarding nationality in the context of state succession. State succession occurs when one state “exercising sovereign powers over an inhabited territory is

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<sup>46</sup> PAUL WEISS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 1086 (1962); *see also Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 142 (explaining that statelessness “arises from the lack of a nationality, when an individual does not qualify to receive this under the State’s laws, owing to arbitrary deprivation *or the granting of a nationality that, in actual fact, is not effective*”) (emphasis added). Although refugees are a classic example of *de facto* stateless persons, other individuals that lack national protection may be *de facto* stateless, as well. *See* Executive Committee, United Nations High Commissioner for Refugees, ¶ 9, 26th Mtg., 46th Sess., U.N. Doc. No. EC/1995/SCP/CRP.2 (June 2, 1995) (“While initially it was assumed that all *de facto* stateless persons were refugees . . . it is now apparent that . . . there are individuals who do not qualify as refugees and whose nationality status is unclear. The situation of such a person in terms of a lack of national protection may be identical to that of a *de jure* stateless person.”).

<sup>47</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 239.

<sup>48</sup> RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW 194 (2d ed. 1994) (stating that when the resolution adopted by the United Nations Conference on the Elimination or Reduction of Future Statelessness and the Convention are read together, *de facto* stateless persons should “as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality” and benefit from the provisions of the 1961 Convention) (quoting recommendation contained in the Final Act of the 1961 Convention); *see also* Executive Committee, United Nations High Commissioner for Refugees, *supra* note 46, ¶ 11 (“The Final Act of the 1961 Convention, like the 1954 Convention, includes a recommendation that the provisions be extended to *de facto* stateless persons wherever possible. The Conference ‘Recommend[ed] that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality.’”).

replaced by another” such as when a state becomes newly independent through decolonization.<sup>49</sup> Under international law, certain individuals with appropriate connections to a successor state have the right to the nationality of that state. The successor state’s obligation to grant its nationality to individuals affected by the succession is particularly clear if they would otherwise be stateless.

The Draft Articles on Nationality of Natural Persons in Relation to the Succession of States adopted by the International Law Commission (ILC)<sup>50</sup> confirm the obligation of successor states to grant nationality to certain individuals who have appropriate links to the successor’s territory. The Draft Articles require states to “take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.”<sup>51</sup> Individuals who had the nationality of the predecessor state who also habitually reside in the successor state have the right to the successor state’s nationality.<sup>52</sup> Individuals who had the predecessor state’s nationality but who were not

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<sup>49</sup> DONNER, *supra* note 48, at 248; *see also* INETA ZIEMELE, STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA: PAST, PRESENT, AND FUTURE AS DEFINED BY INTERNATIONAL LAW 229-30 (2005) (“State succession occurs when one State replaces another in relation to a given territory.”).

<sup>50</sup> The International Law Commission is a United Nations body that exists to codify and promote the progressive development of international law. *See* International Law Commission, Organization, programme and methods of work of the International Law Commission, *available at* <http://www.un.org/law/ilc/> (citing Statute of the International Law Commission, art. 1(1)). It is made up of “experts having recognized competence in international law.” Michael P. Scharf et al., *International Institutions*, 34 INT’L LAW. 779, 787 (2000) (quoting THE INTERNATIONAL LAW COMMISSION AND THE FUTURE OF INTERNATIONAL LAW 22 (M.R. Anderson et al. eds., 1998)).

<sup>51</sup> Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, adopted by the International Law Commission, G.A. Res. 153, U.N. GAOR, 55th Sess., art. 4, U.N. Doc. A/RES/55/153 (2000), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N00/568/57/PDF/N0056857.pdf?OpenElement>.

<sup>52</sup> *Id.* arts. 1, 5. In its resolution annexing the draft articles and inviting states to take these provisions into account, the General Assembly noted that the articles “would provide a useful guide for practice in dealing with this issue.” *Id.* At least one scholar has noted, “In formulating these propositions, the International Law Commission was restating what it understood to be customary international law.” John Quigley, *Repairing the Consequences of Ethnic Cleansing*, 29 PEPP. L. REV. 33, 36 (2001). Draft articles on nationality prepared by Harvard Law School also reflected these principles. Draft Conventions and Comments on Nationality, Responsibility of States for Injuries to Aliens, and Territorial Waters, Prepared

habitual residents of the successor state have the right to opt for the nationality of either the predecessor or the successor state: 1) if they would otherwise become stateless as a result of the succession; and 2) if they have “an appropriate connection with that state.”<sup>53</sup> The ILC emphasized that this provision was made obligatory in recognition of the need to prevent statelessness.<sup>54</sup> Any child who is born in a successor state after the succession and who has not acquired any nationality also has the right to the nationality of that state.<sup>55</sup>

The European Convention on Nationality emphasizes a similar concern for the need to avoid statelessness in the context of state succession<sup>56</sup> and requires successor states to consider, among other factors, an individual’s effective link to the territory when conferring nationality.<sup>57</sup> Under the Convention, when successor states assign nationality, they are obliged to consider:

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by the Research in International Law of the Harvard Law School, 23 Am. J. Int’l L. Spec. Supp. 13, art. 18(a) (1929), *available at* <http://www.uniset.ca/naty/maternity/23AJILSS13.pdf> (“When the entire territory of a State is acquired by another State, those persons who were nationals of the first state become nationals of the successor state, unless in accordance with the provisions of its law they decline the nationality of the successor state.”). According to one commentator, the Harvard articles reflected “the practice recognized at the time.” DONNER, *supra* note 48, at 262.

<sup>53</sup> Draft Articles on Nationality, *supra* note 51, art. 11(2) (“Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of states.”); *see also id.* art. 2(f) (defining a “person concerned” as “every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession”). The ILC also clarified that the term “appropriate connection” should be interpreted more broadly than the term “genuine link” and includes “habitual residence, appropriate legal connection with one of the constituent units of the predecessor State, or [] birth in the territory which is a part of a State concerned” as well as “further criteria, such as being a descendant of a person who is a national of a State concerned or having once resided in the territory which is part of a State concerned.” Commentaries on the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, Yearbook of the International Law Commission, 1999, vol. II, Part Two, at 34, *available at* [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/3\\_4\\_1999.pdf#search=%22%22Draft%20Articles%20on%20Nationality%20of%20Natural%20Persons%20in%20Relation%20to%20the%20Succession%20of%20States%22%22..](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/3_4_1999.pdf#search=%22%22Draft%20Articles%20on%20Nationality%20of%20Natural%20Persons%20in%20Relation%20to%20the%20Succession%20of%20States%22%22..)

<sup>54</sup> ILC, Commentaries on the Draft Articles, *supra* note 53, at 34 (explaining that Article 11(2) of the Draft Articles was “couch[ed] in terms of an obligation, in order to ensure consistency with the obligation to prevent statelessness under article 4” and noting that the right of individuals with appropriate connections to opt for the nationality of the successor state if they would otherwise be stateless is “one of the techniques aimed at eliminating the risk of statelessness in situations of succession of States”).

<sup>55</sup> Draft Articles on Nationality, *supra* note 51, art. 13.

<sup>56</sup> European Convention on Nationality, *supra* note 11, art. 18(1).

<sup>57</sup> *Id.* art. 18(2) (a).

“a) the genuine and effective link of the person concerned with the State; b) the habitual residence of the person concerned at the time of State succession; c) the will of the person concerned; [and] d) the territorial origin of the person concerned.”<sup>58</sup> The Convention emphasizes that states “shall respect the principles of the rule of law, the rules concerning human rights and the principles contained in Articles 4 [general principles of nationality, including the right to a nationality, avoidance of statelessness and the prohibition on arbitrary deprivation] and 5 [non-discrimination] of this Convention and in paragraph 2 of this article [factors to be considered in assigning nationality, *infra*], in particular in order to avoid statelessness.”<sup>59</sup>

A number of commentators and international bodies agree that individuals with an effective link<sup>60</sup> to a successor state have the right to acquire that state’s nationality.<sup>61</sup> As one

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<sup>58</sup> *Id.* art. 18(2).

<sup>59</sup> *Id.* art. 18(1).

<sup>60</sup> “The term ‘genuine and effective link’ . . . was first used by the International Court of Justice in the *Nottebohm* case. It refers to a ‘substantial connexion’ of the person concerned with the State. The legal bond of nationality therefore has to accord with the individual’s genuine connection with the State.” Explanatory Report to the European Convention on Nationality, *supra* note 12, art. 18(2). In the *Nottebohm* case, the International Court of Justice held that international law required states to recognize nationality granted by other states only where that nationality was based upon an individual’s effective link to the granting country. *The Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (Apr. 6). The ICJ explained:

[International arbitrators] have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration . . . : the habitual residence of the individual concerned is an important factor, but there are other factors such as the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc. . . .

*Id.* at 22.

<sup>61</sup> See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 657 (5th ed. 1999) (“[T]he evidence is overwhelming in support of the view that the population follows the change of sovereignty in matters of nationality.”). Brownlie concludes that, according to international law, in the case of state succession, individuals with an effective link to the successor state should be granted that state’s nationality. *Id.* at 659 (“The general principle is that of a substantial connection with the territory concerned by citizenship or residence or family relation to a qualified person. . . .”); see also Chan, *supra* note 17, at 12 (“[U]pon change of sovereignty, all persons who have a genuine and effective link with the new State will automatically acquire the nationality of the new State. It is primarily within the competence of each State to determine what constitutes a genuine and effective link in the conferment of its nationality, subject to the presumption of avoidance of statelessness and the duty not to enact or apply any law on a

international law scholar notes, “International organizations involved in recent state successions have on several occasions expressed legal opinions to the effect that a successor state is obliged to extend nationality to individuals with a genuine effective link to the territory in question.”<sup>62</sup>

International law, thus, requires that, in cases of state succession, a successor state must grant its nationality to certain individuals with an effective or appropriate link to that country where those individuals would otherwise be stateless. This requirement evidences a strong international presumption against statelessness.

### **III. Because the Right to a Nationality Is Necessary to Prevent Statelessness and to Protect Other Fundamental Rights, Including Those Enshrined in the African Charter, the African Commission Should Find That This Critical Right Is Implicit in the African Charter**

The internationally recognized right to a nationality is not explicitly guaranteed by the African Charter, but it is crucial for the protection of other fundamental African Charter rights. When the African Commission has determined that an unenumerated right is essential for the protection of other fundamental enumerated rights, it has found such a right to be implied in the Charter. The African Commission should therefore affirm the importance of the right to a

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discriminatory basis.”). Although one prominent scholar, Paul Weis, has argued that *opinio juris* has not yet coalesced enough to lead to a conclusion that this principle is customary international law, *see* WEIS, *supra* note 46, at 143-44, Weis acknowledges that there is an international law “presumption” that individuals should acquire the successor state’s nationality, *see id.* at 144 (“As a rule, however, States have conferred their nationality on the former nationals of the predecessor State, and in this regard one may say that there is . . . a *presumption* of international law that municipal law has this effect.”); *see also* The Ottawa Declaration of the OSCE Parliamentary Assembly, Chapter III, ¶ 34 (July 8, 1995), *available at* <http://www.oscepa.org/admin/getbinary.asp?FileID=153> (urging that “upon a change in sovereignty, all persons who have a genuine and effective link with a new State should acquire the citizenship of that State”); Declaration on the consequences of State succession for the nationality of natural persons adopted by the European Commission for Democracy through Law at its 28th Plenary Meeting, ¶ 8 (Sept. 1996), *available at* [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/foreigners\\_and\\_citizens/nationality/documents/legal\\_instruments/Declaration%20on%20consequences%20of%20State%20succession.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/foreigners_and_citizens/nationality/documents/legal_instruments/Declaration%20on%20consequences%20of%20State%20succession.pdf) (stating that “the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on the transferred territory”).

<sup>62</sup> Jeffrey L. Blackman, *State Succession and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 MICH. J. INT’L L. 1141, 1164 (1998).

nationality as a necessary condition for the protection of other rights by finding that it is implicit in the African Charter.

A. *The Right to a Nationality Is Critical for Protecting a Wide Range of Fundamental Rights*

Nationality is the legal bond between the state and the individual that guarantees the enjoyment and performance of reciprocal rights and duties.<sup>63</sup> The result, in practice, is that “nationality is the prerequisite for the realization of other fundamental rights.”<sup>64</sup> Deprivation of an individual’s nationality greatly limits her ability to claim state protection and fulfillment of other duties and responsibilities that the state owes her, including the state’s duty to protect and enforce rights enshrined in the Universal Declaration on Human Rights and other international documents, including the African Charter on Human and Peoples’ Rights. The heightened vulnerability of individuals who are stateless, and who lack the protection of their country of residence or that of any other state, makes clear that the right to a nationality is essential for securing broader rights. As one international law scholar has explained:

To be stateless, to be without the nationality of any state, is . . . a particularly grave situation. Without the link of nationality, states may not effectively exercise diplomatic protection on behalf of an individual. . . . [T]he stateless person has no vehicle for exercising rights or obtaining protections available under international law. International law is rendered inoperable for the stateless individual.<sup>65</sup>

An individual without a nationality is also denied many of the domestic protections afforded nationals. Freedom of movement, reentry into the country, and access to health care and education are often conditioned upon an individual’s ability to prove her nationality. When an

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<sup>63</sup>See *Nottebohm Case*, *supra* note 60, at 23 (“According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”).

<sup>64</sup>Blackman, *supra* note 62, at 1148.

<sup>65</sup>*Id.* at 1150.

individual is stateless, whether *de jure* or *de facto*,<sup>66</sup> the basic human, social, and political rights to which she is entitled are more susceptible to state violation. International and regional human rights jurisprudence, therefore, has recognized the right to a nationality as a necessary guarantor of these fundamental rights.

The African Commission itself has affirmed the essential role that nationality plays in protecting other rights, finding that withholding the right to a nationality deprives an individual of other fundamental rights guaranteed under the African Charter. In *Modise v. Botswana*, the African Commission held that the Botswana government's denial of the complainant's right to nationality was "in violation of Articles 3(2) and 5 of the Charter,"<sup>67</sup> which respectively guarantee an individual's right to equal protection of the law and the right to the recognition of one's legal status. In 1978, the government of Botswana detained and then deported the complainant, John Modise, to South Africa on the grounds that he was a "prohibited immigrant."<sup>68</sup> Modise, who was born in South Africa, based his claim to Tswana citizenship on descent—his father was a Botswanan national—and his residence in Botswana since childhood. The government of Botswana repeatedly denied him citizenship and, without proof of a nationality, he could not work in Botswana, where he lived in permanent fear of deportation. The African Commission found that by denying the complainant the right to a nationality, the government

gravely deprived him of one of his most cherished fundamental rights, the right to freely participate in the government of his country, either directly or through

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<sup>66</sup> In 1995, the Executive Committee of the United Nations High Commissioner for Refugees affirmed that definition of statelessness includes *de facto* statelessness: "[Statelessness] also includes *de facto* stateless which refers to those persons with an ineffective nationality or those who cannot establish their nationality." Settlage, *supra* note 38, at 189-90 (quoting EXCOM Conclusion No. 78 (1995)).

<sup>67</sup> *John K. Modise v. Botswana*, "Holding," Comm. No. 97/93 (2000), African Commission on Human and Peoples' Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/97-93c.html>.

<sup>68</sup> *Id.* ¶ 4. The complainant alleged he was assigned this status as a result of his involvement in an opposition party.



elected representatives. It also constitute[d] a denial of his right of equal access to the public service of his country guaranteed under Article 13(2) of the Charter.<sup>69</sup>

Because of the critical role that a nationality plays in protecting and securing the enjoyment of other fundamental rights, the African Commission urged the government of Botswana “to take appropriate measures to recognise Mr. John Modise as a citizen.”<sup>70</sup>

International bodies have also affirmed the right to a nationality as critical to the protection of other fundamental rights. The International Court of Justice (ICJ) has stated: “According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”<sup>71</sup> Following the lead of the ICJ, international commentators have also emphasized that “[c]itizenship is the embodiment of the strongest link between the individual and the State, a link which is reflected by the fact that the citizen is entitled to all the rights which the State grants and is subject to all the duties which it imposes.”<sup>72</sup>

The United Nations Human Rights Committee,<sup>73</sup> in finding that Estonian citizenship requirements had arbitrarily deprived members of Estonia’s Russian-speaking minority of their right to a nationality, emphasized that this deprivation affected other rights such as the “right to participate in the process of land privatisation and the right to occupy certain posts or practice

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<sup>69</sup> *Id.* ¶ 97.

<sup>70</sup> *Id.* “Holding.”

<sup>71</sup> *Nottebohm Case*, *supra* note 60, at 23.

<sup>72</sup> Yaffa Zilbershats, *Reconsidering the Concept of Citizenship*, 36 *TEX. INT’L L. J.* 689, 690 (2001); *see also* Blackman, *supra* note 62, at 1148 (“Nationality is the means by which an individual acquires and exercises the rights and responsibilities of membership within the state.”).

<sup>73</sup> The Human Rights Committee was established by the ICCPR, *supra* note 27, to monitor states’ compliance with that treaty’s provisions.

some occupations,”<sup>74</sup> which were accorded only to Estonians citizens. Similarly, a resolution passed by the U.N. Human Rights Commission noted that “the full enjoyment of all human rights and fundamental freedoms might be impeded as a result of arbitrary deprivation of nationality.”<sup>75</sup>

Other regional bodies also share the African Commission’s condemnation of statelessness, on the ground that without a nationality, individuals’ fundamental rights are more vulnerable to violation. The Inter-American Court of Human Rights has held that “nationality is a requirement for the exercise of specific rights.”<sup>76</sup> In an advisory opinion, the Inter-American Court stated that “nationality [is] the basic requirement for the exercise of political rights, [and] . . . also has an important bearing on the individual’s legal capacity.”<sup>77</sup> The Inter-American Court has further emphasized the importance of protection “against . . . deprivation of [the individual’s] nationality,” noting that such an action results in the deprivation “for all practical purposes of all . . . political rights as well as of those civil rights that are tied to the nationality of the individual.”<sup>78</sup> According to the Inter-American Court, “[s]tatelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme

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<sup>74</sup> Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Estonia, ¶ 13, 55th Sess., CCPR/C/79/Add.59 (Nov. 9, 1995), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/449f130231d3aeb08025656100520bc8?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/449f130231d3aeb08025656100520bc8?Opendocument).

<sup>75</sup> 2005 U.N. Human Rights Commission Resolution on Arbitrary Deprivation of Nationality, *supra* note 15, at 2-3, Rec. No. 6.

<sup>76</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 137; *see also id.* (stating that “[t]he importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community”) (internal citation omitted).

<sup>77</sup> Advisory Opinion, OC-4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 1994 Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 32 (Jan. 19, 1984), available at [http://www1.umn.edu/humanrts/iachr/b\\_11\\_4d.htm](http://www1.umn.edu/humanrts/iachr/b_11_4d.htm).

<sup>78</sup> *Id.* ¶ 34 (emphasis added). The Inter-American Court has also held that the denial of the right to a nationality for discriminatory reasons made it impossible for the complainants in the case before it to “receiv[e] protection from the State and hav[e] access to the benefits due to them,” which included the right to attend school with one’s peers. *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶¶ 173, 185.

vulnerability.”<sup>79</sup> The Inter-American Commission on Human Rights has also emphasized that the right to nationality “is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community—the State—stem from or are supported by this right.”<sup>80</sup>

The African Commission’s holdings are consistent with decisions of other international and regional bodies recognizing that the right to a nationality is essential for the protection of other fundamental rights.

*B. Because the Right to a Nationality Plays a Critical Role in Guaranteeing Other Rights Provided for Under the African Charter, the African Commission Should Affirm and Protect the Right to a Nationality by Finding It Implicit in the African Charter*

Given the critical role that the right to a nationality plays in protecting other rights explicitly guaranteed by the African Charter, the African Commission should affirm and protect the right to a nationality by finding it to be implicit in the African Charter. The African Commission has read rights into the African Charter where those rights, although not explicitly enumerated, are critical for the realization of other provisions of the African Charter and find support in international human rights law. In *The Social and Economic Rights Action and the Center for Economic and Social Rights v. Nigeria*, the African Commission held:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, . . . the right to property, and the protection accorded to the family forbids the wanton

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<sup>79</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 142.

<sup>80</sup> Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Chile, “Chapter IX: ‘Right to Nationality,’” Inter-Am. C.H.R., OEA/Ser.L/V/II/40, Doc. 10, Feb. 1977, ¶ 10, available at <http://www1.umn.edu/humanrts/iachr/country-reports/chile1977-ch9.html>.

destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected.<sup>81</sup>

Based on the “provisions of the African Charter and international human rights standards,”<sup>82</sup> the African Commission interpreted the “combined effect” of these three provisions—the rights to health, property, and the protection of the family—to “read[] into the Charter”<sup>83</sup> the right to housing and shelter. The African Commission found the Nigerian government in violation of this implied right to housing and shelter, distinct from all the other violations of explicit rights.<sup>84</sup> The African Commission also held that although there is no explicit right to food in the African Charter, this right is implied by “the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22).”<sup>85</sup> The African Commission ultimately concluded that the Nigerian government had violated both the explicit rights protected by the African Charter *and* the separate implicit right to food.<sup>86</sup> The African Commission based its decision to find unenumerated rights implicit in the African Charter on these rights’ importance in guaranteeing the protection of enumerated rights.

Although the African Charter does not explicitly provide the right to a nationality, the right is essential for guaranteeing rights enumerated in the African Charter, including the right to equality before the law and equal protection of the law;<sup>87</sup> the right to recognition of one’s legal status;<sup>88</sup> “the right to freedom of movement” and to leave any country and return to one’s own;<sup>89</sup>

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<sup>81</sup>*The Social and Economic Rights Action and the Center for Economic and Social Rights v. Nigeria*, ¶ 60, Comm. No. 155/96 (2001), African Commission on Human and Peoples’ Rights, available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>.

<sup>82</sup>*Id.* ¶ 66.

<sup>83</sup>*Id.* ¶ 60.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* ¶ 64.

<sup>86</sup>*Id.* ¶ 66.

<sup>87</sup> African Charter on Human and Peoples’ Rights, arts. 3(1)-(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>88</sup>*Id.* art. 5.

the right to “participate freely in the government of [one’s] own country . . . [and] the right of access to public property and services in strict equality of all persons before the law;”<sup>90</sup> the right “to work under equitable and satisfactory conditions” and to equal pay for equal work;<sup>91</sup> the right to education;<sup>92</sup> and the right to be equal with all other peoples and to not be dominated by another.<sup>93</sup> The African Commission should therefore affirm and protect the right to a nationality by finding that it is necessarily implied by the fundamental rights enumerated in the African Charter.

#### **IV. Under Customary International Law and Treaty Law, States May Not Deny Individuals Nationality on Arbitrary or Discriminatory Grounds**

Whether or not the African Commission chooses to find that the right to a nationality is implied in the African Charter, it is clear under the African Charter and international law that states may not discriminate in law or practice when providing people with or depriving them of nationality.

Well-established *jus cogens* norms of customary international law prohibit discrimination and arbitrary treatment.<sup>94</sup> Virtually all major international and regional human rights treaties

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<sup>89</sup> *Id.* art. 12(1)-(2).

<sup>90</sup> *Id.* art. 13(1)-(3).

<sup>91</sup> *Id.* art. 15.

<sup>92</sup> *Id.* art. 17(1).

<sup>93</sup> *Id.* art. 19.

<sup>94</sup> A *jus cogens* norm “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, art. 53, *entered into force* May 23, 1969, 1155 U.N.T.S. 331. The prohibition against discrimination and arbitrary treatment is generally considered a *jus cogens* norm. *See Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. 3, ¶¶ 33-34 (Feb. 5) (providing examples of *erga omnes* international law obligations including, *inter alia*, “protection from . . . racial discrimination”); Advisory Opinion OC-18/03, *Undocumented Migrants*, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 110 (Sept. 17 2003), *available at* [http://www.corteidh.or.cr/docs/opiniones/seriea\\_04\\_ing.doc](http://www.corteidh.or.cr/docs/opiniones/seriea_04_ing.doc) (“[T]he fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entail obligations *erga omnes* of protection that bind all States . . . .”); *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 141 (describing

prohibit discrimination on grounds such as race, ethnicity, and national origin, and many also provide that all individuals are entitled to equal protection of the law without discrimination.<sup>95</sup>

Indeed, the African Charter itself guarantees non-discrimination and equal protection:

Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3: (1) Every individual shall be equal before the law. (2) Every individual shall be entitled to equal protection of the law.<sup>96</sup>

The prohibition against arbitrary and discriminatory treatment applies explicitly to the right to a nationality. For example, although recognizing that a state has authority to decide

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the “equal and effective protection of the law and non-discrimination” as a “peremptory legal principle”); BROWNLIE, *supra* note 61, at 602 (“There is indeed a considerable support for the view that there is in international law today a legal principle of non-discrimination which applies in matters of race.”).

<sup>95</sup> See, e.g., ICCPR, *supra* note 27, art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); International Covenant on Economic, Social, and Cultural Rights, art. 2(2), *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3 (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); Convention on the Rights of the Child, *supra* note 25, art. 2(1) (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”); American Convention on Human Rights, *supra* note 6, arts. 1(1), 24 (providing that “[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition” and that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law”); European Convention on Human Rights, *supra* note 13, art. 14 (“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”); see also Universal Declaration of Human Rights, *supra* note 2, art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); *id.* art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).

<sup>96</sup> African Charter on Human and Peoples’ Rights, *supra* note 87, arts. 2, 3.

questions of nationality,<sup>97</sup> the International Convention on the Elimination of All Forms of Racial Discrimination specifically requires state parties to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . iii) The right to nationality.”<sup>98</sup> The European Convention on Nationality similarly provides: “The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.”<sup>99</sup> The Convention on Reduction of Statelessness declares, “A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”<sup>100</sup> The protection against arbitrary treatment has also been enunciated in the specific context of nationality. As the Universal Declaration on Human Rights clearly establishes: “No one shall be arbitrarily deprived of his nationality . . . .”<sup>101</sup> The American Convention on Human Rights also declares: “No one shall be arbitrarily deprived of his nationality . . . .”<sup>102</sup> International and regional treaty law

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<sup>97</sup> CERD, *supra* note 4, art. 1(3) (“Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, *provided that such provisions do not discriminate against any particular nationality.*”) (emphasis added).

<sup>98</sup> *Id.* art. 5(d)(iii).

<sup>99</sup> European Convention on Nationality, *supra* note 11, art. 5; *see also* 1999 U.N. Human Rights Commission Resolution on Arbitrary Deprivation of Nationality, *supra* note 14, ¶ 2 (recognizing “that arbitrary deprivation of nationality on racial, national, ethnic, religious or gender grounds is a violation of human rights and fundamental freedoms”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 211, cmt. e (1986) (“Increasingly, the law has accepted some limitations on involuntary termination of nationality, both to prevent statelessness . . . and in recognition that denationalization can be an instrument of racial, religious, ethnic, or gender discrimination, or of political repression.”).

<sup>100</sup> Convention on the Reduction of Statelessness, *supra* note 5, art. 9.

<sup>101</sup> Universal Declaration of Human Rights, *supra* note 2, art. 15(2); *see also* RESTATEMENT (THIRD) ON FOREIGN RELATIONS, § 211, note 4 (1986) (“As concerns involuntary loss of nationality, international law is moving toward limits on state discretion. Article 15 of the Universal Declaration of Human Rights says that no person should be ‘arbitrarily deprived of his nationality.’ The term ‘arbitrarily’ should encompass racial, sexual, and other forms of discrimination. . . . The deprivation of nationality is most serious in its impact when it renders a person stateless.”).

<sup>102</sup> American Convention on Human Rights, *supra* note 6, art. 20(3).

therefore makes clear that states may not arbitrarily or discriminatorily deprive individuals of nationality.

International bodies have likewise emphasized the prohibition against arbitrary or discriminatory deprivation of nationality. In 2005, the U.N. Commission on Human Rights passed a resolution expressing “deep concern at the arbitrary deprivation of persons or groups of persons of their nationality, especially on racial, national, ethnic, religious, gender or political grounds” and recognizing that “arbitrary deprivation of nationality on racial, national, ethnic, religious, political or gender grounds is a violation of human rights and fundamental freedoms.”<sup>103</sup> The Commission further explained that “the full enjoyment of all human rights and fundamental freedoms of an individual might be impeded as a result of arbitrary deprivation of nationality, thereby hampering his or her social integration.”<sup>104</sup>

When granting or denying nationality, states may not discriminate either in law or in practice.<sup>105</sup> As the Inter-American Court has held:

[T]he peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.<sup>106</sup>

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<sup>103</sup> 2005 U.N. Human Rights Commission Resolution on Arbitrary Deprivation of Nationality, *supra* note 15, ¶ 2.

<sup>104</sup> *Id.* ¶ 6.

<sup>105</sup> *See, e.g.*, Human Rights Comm., Gen. Comment No. 18: Non-discrimination, ¶ 7, 37th Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1994) (“[T]he Committee believes that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”).

<sup>106</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 141 (internal citation omitted); *see also* Human Rights Comm., Gen. Comment No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5), ¶ 2, 48<sup>th</sup> Sess., Mar. 15, 1996, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8b3ad72f8e98a34c8025651e004c8b61?Opendocument)



Thus, a state does not comply with the international prohibition against arbitrary and discriminatory treatment merely by enacting laws and regulations that appear on their face to apply equally to all. Instead, a state must ensure that the actual effect and implementation of these laws is not arbitrary or discriminatory.

Requiring individuals of particular ethnic or national origins to meet different, more burdensome requirements than others in order to establish their nationality or to obtain birth certificates has been found to violate the prohibition against arbitrary and discriminatory treatment. For example, the Committee to Eliminate Racial Discrimination held that requiring the Banyarwanda people to “prove that their ancestors had lived in Zaire since 1885”<sup>107</sup> in order to establish Zairian nationality violated the requirement set out in the International Convention on the Elimination of All Forms of Racial Discrimination that states ensure the right to nationality “without distinction as to race, colour, or national or ethnic origin.”<sup>108</sup> The Inter-American Court of Human Rights also found in the *Case of the Girls Yean and Bosico* that the Dominican Republic had violated the American Convention right to nationality by requiring children *under* the age of thirteen born in the Dominican Republic to at least one *Haitian* parent to comply with the more burdensome birth registry requirements that, for children of *Dominican* parents, apply only if they are *over* the age of thirteen. The Court stated that “by applying to the children requirements that differed from those requisite for children under 13 years of age in

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(“Whenever a State imposes a restriction upon one of the rights listed in article 5 of the Convention which applies ostensibly to all within its jurisdiction, *it must ensure that neither in purpose nor effect is the restriction incompatible with* [the] article 1 [prohibition of discrimination] . . . as an integral part of international human rights standards.”) (emphasis added).

<sup>107</sup> Committee for the Elimination of Race Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Democratic Republic of the Congo, 49th Sess., Sept. 27, 1996, UN Doc. CERD/C/304/Add.18, ¶ 17, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.304.Add.18.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.304.Add.18.En?Opendocument).

<sup>108</sup> CERD, *supra* note 4, art. 5.

order to obtain nationality, the State acted arbitrarily, without using reasonable and objective criteria, and in a way that was contrary to the superior interest of the child, which constitutes discriminatory treatment.”<sup>109</sup> The Court further noted that the Dominican Republic at times also allowed administrative officials to require “without any objective criteria” that children of the same age group meet a different number and type of requirements in order to register their birth.<sup>110</sup> Throughout its decision, the Court emphasized that this arbitrary treatment was “situated within the context of the vulnerable situation of the Haitian population and Dominicans of Haitian origin in the Dominican Republic.”<sup>111</sup> When a state requires some individuals to provide additional or more burdensome evidence of nationality or birth than others, based on arbitrary or discriminatory grounds, it violates the international prohibition against arbitrary or discriminatory treatment.

States, therefore, have a *jus cogens* obligation, as well as international treaty obligations, to ensure that individuals are not denied nationality on arbitrary or discriminatory grounds. Even though a state’s laws on their face may provide individuals with an equal right to nationality, enforcing these laws in an arbitrary or discriminatory way violates this international prohibition. When a state requires certain individuals or groups to provide additional, more burdensome evidence of nationality than other similarly situated groups, international bodies have found the state in violation of the prohibition against arbitrary and discriminatory treatment.

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<sup>109</sup> *Case of the Girls Yean and Bosico v. Dominican Republic*, *supra* note 9, ¶ 166.

<sup>110</sup> *Id.* ¶ 161 (“In the Dominican Republic the lists of requirements have been drawn up based on the age of the child to be registered, but distinctions have also been made involving the number and type of requirements for the same age group, according to the competent authority who applies them, without any objective criteria being followed.”).

<sup>111</sup> *Id.* ¶ 168.

## V. Conclusion

International law recognizes the right to a nationality and has persistently affirmed the importance of eliminating statelessness, particularly in the case of state succession. Moreover, international human rights law affirms the critical role that nationality plays in protecting other fundamental rights, including those for which the African Charter provides. In light of these international human rights law standards, the African Commission should affirm and protect this crucial right by finding it to be implicit in the African Charter. If the facts stated in the Nubian Community Communication are proven, the African Commission should find that the Kenyan government has deprived the Nubians of their implied right to a nationality. The Nubian Community Communication states that the Nubian people, most of whom were born in Kenya,<sup>112</sup> are currently entitled to Kenyan citizenship under the Kenyan Constitution<sup>113</sup> but are prevented from obtaining proof of this citizenship. According to the Communication, many Nubians are *de facto* stateless persons because they have no claim to any other nationality and are unable, due to the Kenyan government's restrictive and discriminatory requirements, to provide proof of their entitlement to Kenyan nationality.<sup>114</sup> Kenya's failure to provide effective nationality to Nubians born in Kenya, who constitute the vast majority of the Nubian population, therefore violates the international prohibition against statelessness. This failure to provide effective nationality places these Nubians in a particularly vulnerable situation by, among other things, depriving them of

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<sup>112</sup> Comm. 317/2006 - the Nubian Community in Kenya/Kenya [hereinafter The Nubian Community Communication] states that the Nubians first arrived in Kenya in the early 1900s and have resided there ever since. The Nubian Community Communication, at 2.

<sup>113</sup> *Id.* at 2-3 (stating that under Chapter IV of the Constitution of Kenya and the Registration of Persons Act, the Nubians are *de jure* citizens of Kenya).

<sup>114</sup> *Id.* at 3 ("Most Nubians . . . live as *de facto* stateless persons without adequate protection from the state and without enjoying their rights under national and international law as a result of systematic discrimination by the Kenyan government.").

access to employment and impeding their access to health care and education.<sup>115</sup> The international legal presumption that successor states will grant nationality to individuals with appropriate links to the country strengthens Kenya's obligation to grant effective citizenship.<sup>116</sup> Based on the facts stated in the Nubian Community Communication, international law requires Kenya to make effective the nationality of all Nubians because of their appropriate links to the state. If the African Commission finds that the right to a nationality is implicit in the African Charter, the facts alleged in the Nubian Community Communication would justify a finding that Kenya is depriving the Nubians of this right.

Even if the Commission does not find that the right to a nationality is implicit in the African Charter, the Charter and international law clearly prohibit the deprivation of nationality on arbitrary or discriminatory grounds. The Nubian Community Communication presents facts that, if proven, demonstrate that Kenya employs discriminatory administrative practices that deny the Nubian people effective nationality and render them stateless. The Nubians are required to present far more evidence of birth and ancestry than other individuals seeking proof of Kenyan citizenship and face much longer delays in processing requests for identification

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<sup>115</sup> *Id.* at 4.

<sup>116</sup> The British government forcibly recruited the Nubians into the British army and, following World War II, took the Nubians to Kenya. The British subsequently refused to repatriate them to the then-British colony of Sudan. *Id.* at 2. After the British transferred power to the Kenyan government in 1963, Kenya became the successor state of the British colony. The Nubian Community Communication alleges that at the time of decolonization, the Nubians had established habitual residence in Kenya and were "British subjects under colonial rule." *Id.* The Communication further notes that "the British Nationality Act of 1949 defines a British protected person as one who, being a British subject, had a close relationship either through birth or descent with the UK and its remaining colonies. This group included indigenous populations and ethnic communities living in Kenya under colonial rule, like the Nubians." *Id.* at 3. Under international law, therefore, if the Nubians were considered to have the nationality of the predecessor state, they were presumably entitled to Kenyan citizenship at the time of transfer. The Nubians' effective link to Kenya strengthens their claim to Kenyan citizenship under international law in the context of state succession. Additionally, any Nubian child born in Kenya after the succession who had not acquired the nationality of any other state, would be presumed entitled to Kenyan nationality under international law. *See supra* Part II(B)(2).

documents than other similarly situated individuals entitled to Kenyan citizenship.<sup>117</sup> In some cases, the Nubians are not able to obtain this documentation at all, which places an enormous burden on them and infringes many of their other Charter rights. Based on the facts stated in the Nubian Community Communication, therefore, Kenya deprives the Nubians of nationality on arbitrary and discriminatory grounds in violation of the African Charter.

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<sup>117</sup> The Nubian Community Communication, *supra* note 112, at 6.