RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

Addressing the Question of Stateless Children in the Great Lakes Region:

Lessons from African Jurisprudence on Statelessness

Elizabeth Wanjiru

RAOUL
WALLENBERG
INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

Abstract

The African continent has experienced frequent protracted conflicts and crises situations. War and conflict often exposes populations to vulnerabilities such as displacement leaving populations stateless. Children are often left exposed in situations of statelessness. The Great Lakes Region has experienced war and the ramifications of war in form of displaced and stateless communities. The Region has taken steps to resolve the problem of stateless populations. This paper looks at the question of statelessness in the region. The overarching argument in the paper is that African jurisprudence on the questions of nationality have embraced and promoted solutions that can be imported to the region's context. The paper uses three African Commission cases and one case determined by the African Committee of Experts on the Rights and Welfare of a Child to espouse the lessons that the region can learn in eradicating the problem. The four cases are: Children of Nubian Descent in Kenya versus Kenya, Nubian Community in Kenya versus the Republic of Kenya, Mouvement Ivoirien des Droits de l'Homme v Côte d'Ivoire and Open Society Justice Initiative v. Côte d'Ivoire. The paper is divided in four parts namely: Introduction, Conceptualising Statelessness in Africa and a discussion on the four decisions. The paper reveals that the decisions in the four cases provide valuable lessons that can complement the efforts to resolve statelessness in the region.

Introduction

The name 'Great Lakes Region' (GLR) was originally coined from the freshwater basins found within the central Africa and eastern Africa.[1] The region has been an arena of strife since the 1960s after many countries in the region gained independence, and this civil strife has usually been protracted in nature. With political instability and conflicts as a common feature, the countries came together to form a regional entity known as the International Conference on the Great Lakes (ICGLR). The ICGLR was part of concerted efforts towards promoting sustainable peace and development. The regional entity comprises Burundi, Central African Republic (CAR), Democratic Republic of the Congo (DRC), Kenya, Rwanda, South Sudan, Sudan, Tanzania, Uganda, and Zambia.

Most notable among the conflicts that have had cross-border impacts or origins are the 1994 Rwandan genocide that led to the loss of more than 800,000 lives, and the political instability in DRC. These conflicts constituted a major threat to international peace and security. The threats in peace and stability displaced populations taking the form of internally displaced persons or refugees were inevitable. According to a report by the United Nations High Commission on Refugees, populations within the ICGLR are at risk of being rendered stateless as a result of cross border movements in instances of war and conflict.[2] The report particularly singled out the situation of children who are rendered as potentially stateless as a result of political instability in the region.[3] The situation is particularly grim for children who are sometimes displaced and separated from their families in times of war and conflict. Such displaced children often find themselves in foreign countries, seeking refuge and with no ascertained nationality or identification documents. This often forms a long term challenge for the children to enjoy their rights. The question of statelessness therefore becomes paramount in addressing the restoration of peace and stability in the ICGLR.

Additionally, recent reports show continued resurgence of war in these countries and hence the reason for the interest.[4] Further, African Union reports demonstrate that war and conflict in the ICGLR left

[1] M.Van Leeuwen 'Imagining the Great Lakes Region: Discourses and Practices of Civil Society Regional Approaches for Peacebuilding in Rwanda, Burundi and DR Congo ' (2008) 46 *Journal of African Modern Studies* 393, at page 394.
[2] UN High Commissioner for Refugees (UNHCR), *Statelessness and Citizenship in the East African Community*, September 2018, available at <www.refworld.org/docid/5bee966d4.html>, visited 15 October 2022.
[3] *Ibid*. p. 3.
[4] United Nations Security Council (UNSC) Report of the Secretary General, 'Implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region' UNSC/2020/951(2020) Reports on resurgence of conflict. *See also* United Nations Security Council (UNSC) Report of the Secretary General, 'Implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region' UNSC/2021/306 (2021). United Nations Security Council (UNSC) Report of the Secretary General, 'Implementation of the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region' UNSC/2022/276 (2022).

many children displaced. [5]Another strand of statelessness arises where families flee from their countries of origin with no identification documents, settle in other countries where they are not issued with identification documents or documents conferring nationality.[6] This in turn results into long term statelessness problems where children attain the age of majority with no ascertained nationality and subsequently makes it a perennial problem of statelessness inherited through generations.

A report by the African Union on statelessness observed that stateless persons constitute one of the Continent's most vulnerable groups of people, and are therefore exposed to many forms of discrimination and human rights violations.[7] The report by the Department of Political Affairs, also attributed the state of statelessness to growing generation of displaced children and refugee children in the Continent as a result of war and conflict situations in the region. In establishing the ICGLR, the member states took cognizance of the link between resolving the question of statelessness and reconciling post-war societies. The countries therefore agreed to resolve the problem of stateless populations within the region as one of the peacebuilding strategies and facilitate citizens to enjoy their rights.[8]

In a bid to resolve the question of statelessness in the ICGLR it is important to examine the jurisprudence on nationality and statelessness as espoused by the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The paper seeks to answer the question whether the African jurisprudence can elucidate lessons on statelessness and nationality that can be applied to the Great Lakes Region.

In terms of methodology, this paper uses doctrinal legal research. The paper will employ the use of doctrinal research methodology to analyze the African Commission and ACERWC jurisprudence on the question of statelessness and nationality. The doctrinal research methodology will also be useful in analyzing the regional provisions governing nationality and statelessness. The paper will also examine the commitments made by the ICGLR towards addressing statelessness in the region and how the commitments co-relate with the African jurisprudence.

In order to address the research question and research objectives, this paper is divided in four main parts. The first part is the introduction that contextualizing statelessness in the within different normative frameworks and legal definitions. The second part will examine the definition of statelessness, the African position on nationality and the position taken by the ICGLR on statelessness. The third part discusses the African Commission cases as well as the ACERWC decisions on

---

[5] African Union Commission Report of the Department of Political Affairs, 'Member States Experts Meeting on the Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa.' (2018)
[6] P.K. Mbote 'Environment and conflict linkages in the Great Lakes Region' *International Environmental Research Centre* (2012).
[7] African Union 'Statelessness Impact on Africa's Development and the Need for Eradication' (2017).
[8] Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 2004 at paragraph 68 Available at <www.icglr.org/wp content/uploads/2020/07/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development-1.pdf>, visited on 15th October 2022.

statelessness. Lastly, the fourth part discusses the four cases and the principles brought out in the decisions with regard to statelessness.

1. What is Statelessness?

In order to respond to the question of statelessness in this paper it is important to define and scope the meaning of statelessness. The 1954 Convention Relating to the Status of Stateless Persons, defined a stateless persons as 'an individual who is not considered a national by any state under the operation of its law.'[9] This means that *de jure*, a stateless person is not a national of any state owing to a legal inability to meet the requirements of statehood or *de facto* statelessness where nationality is unclear.

In the same vein, at the global level, the United Nations Convention on Children Rights (UNCRC) assert that every child has a right to be registered at birth, and right to acquire citizenship. [10] The Universal Declaration of Human Rights (UDHR) recognizes that every person has a right to nationality. The UDHR further prohibits arbitrarily deprivation of nationality for any person. [11] The International Covenant on Civil and Political Rights (ICCPR) reaffirms that every child has a right to a nationality. [12]Like the UNCRC, the ICCPR further provides a roadmap towards the acquisition of nationality by providing that every child has a right to be registered immediately after birth and shall have a name.[13] At the regional level, the African Charter on Human and People's Rights does not mention the aspect of nationality within the substantive rights. The regional Children rights instrument, the African Charter on the Rights and Welfare of the Child (ACRWC) addresses the question of statelessness by providing the right to nationality as a substantive right under the framework.[14] The Charter further makes provision for processes that are incidental to acquisition of nationality by providing that every child ought to be registered immediately after birth.[15] The Charter also places an obligation on the State to make necessary constitutional provisions that require that a child becomes a national of the country where they are born if at the time the child is not granted nationality by another State[16]. The ACRWC, as the latest entrant into the human rights framework body sought to address the question of statelessness by not only making nationality a substantive right but also embodying critical incidental processes that inform the fulfillment of acquisition of nationality.

[9] Article 1, Convention on Stateless Persons, 1954.
[10] Article 7(1), United Nations Convention on the Rights of the Child, 1989
[11] Article 15, Universal Declaration on Human Rights, 1948
[12] Article 24 (3), International Covenant on Human and People's Rights, 1966
[13] *Ibid.*, Article 24 (2)
[14] Article 6(3), African Charter on the Rights and Welfare of the Child, 1990
[15] *Ibid.,* Article 6(2)
[16] *Ibid.,* Article 6(3)

Statelessness affects millions of people around the world and the Great Lakes Region is no exception, thousands of people living in the region cannot establish their nationality. This has a devastating consequences on the effective enjoyment of their human rights, leaving them marginalized and not able to access services such as education and health.

Statelessness and failure to recognize nationality creates a missing link between individuals and states. The landmark case on statelessness, the *Nottebohm* case emphasized that the duty to confer nationality is vested on the State following satisfactory fulfilment of stipulated conditions. [17] The case espoused that nationality creates a linkage and creates reciprocity of rights and duties. It is therefore important to recreate the link and rights by eradicating statelessness.

1.1 The African Region and the Question of Statelessness

Within the regional context, the question of statelessness is examined from a human rights perspective and the right to a nationality. It is therefore important to examine how the regional human rights instruments provide for the right to a nationality. The African Charter on Human and People's Rights (ACHPR), makes no mention of the right to nationality under the treaty. Article 2 ACHPR prohibits discrimination on a number of varied grounds, including national origin. This infers that the Charter recognizes that complexities of national origin can hinder an individual's access and enjoyment of rights. Article 12 of the Charter also captures the right to freedom of movement and provides that any individual has a right to leave any country including his own country.

Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

The provision affords individuals a right to movement within or outside his/her own country. The use of the words 'any country including his own, and to return to his own country' equally infers an implied right to nationality in one's own country. Nationality creates a legal bond between an individual and the state.[18] This means that an individual has recognized links with their country and hence rights such as those mentioned under Article 12 (2) on freedom of movement inside or outside their country emanate from the connection of an individual to a state, making them a national.

The Protocol on to the African Charter on Human and People's Rights on the Rights of Women in Africa establishes a right for women to retain their nationality or acquire the nationality of their spouses.[19] The provision affords both men and women equal rights in passing nationality to their children.

---

[17] *Liechtenstein v Guatemala*, second phase, Judgment of 6 April 1995, ICJ Reports 1955.
[18] B. Manby 'Statelessness in Southern Africa' Briefing Paper on UNHCR Regional Conference (2011) p.7.
[19] Article 6, Maputo Protocol.

The ACRWC, expressly provides the right to a name and nationality for every child as a fundamental right.[20] The ACRWC is the only regional instrument that expressly addresses the right to acquire a name and nationality for an individual upon birth. The ACERWC addressed itself on the question of nationality *vide* General Comment No.2.[21] The Comment noted that children are often at risk of being left stateless as a result of inefficient civil registration systems, migration and war. The ACERWC noted that without the necessary recognition of a child's nationality, the child cannot identify their linkages to a particular territory. More grievously, the failure to recognize nationality often leads to violation of other rights.

Beyond the legal instruments, African Union organs have also adopted soft law principles on nationality. The African Commission adopted a Resolution on nationality.[22] The Resolution noted the importance of the right to nationality in achieving human rights for African populations. The Resolution specifically called upon countries to adopt legislation and policies that granted children their right to a nationality.

Statelessness in Africa has been driven by the colonial history, displacement as a result of war and lack of good births and deaths registration systems.[23] Additionally, many post-independence countries modelled their laws including nationality laws based on colonial laws and dictates.[24] African countries have varied rules on conferral of nationality. The African Commission in the *Open Society Justice Initiative v Côte d'Ivoire* observed that nationality was intricately connected to other units including ethnicity, social and cultural values.[25] This then presented a problem when it came to delineation of boundaries inherited from colonial units which occasioned a split of entities of nationalities that pre-existed before colonization. The African Commission observed that post-colonial societies were characterized with regrouping and break away from homogeneous ethnic and sociocultural entities to constitute groups of States of different origin.

Conferral of nationality in most African countries is based on two principles namely *jus soli* (right of soil)[26] and *jus sanguinis* (right of blood).[27] The rules often dictate a requirement to demonstrate origin as pointed out in the two Ivorian cases discussed in the next part. This translates to persisted systemic discrimination and exclusion of some persons that has led to statelessness. Cognizant of this problem,

---

[20] Article 6, ACRWC.
[21] African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014), available at: <www.refworld.org/docid/54db21734.html>[accessed 14 November 2022.
[22] African Commission on Human and People's Rights Resolution 234 of 2013 on the Right to Nationality - ACHPR/Res.234(LIII)2013.
[23] ACERWC, *supra* note 14, page 17.
[24] Manby, *supra* note 11, page 7.
[25] Communication No. 318/2006, 25 February 2015 para 98.
[26] Manby, *supra* note 11, page 7 Relates to a right to acquire citizenship in the country where one is born.
[27] Manby, *supra* note 11 page 7 Relates to a right to acquire nationality parents who are themselves, citizens. See example, Article 14 Constitution of Kenya, 2010, *A person is a citizen if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father is a citizen.*

in 2018 African countries came together with a commitment to eradicate statelessness and commenced the process of drafting the Protocol on the right to nationality. To this end, the draft Protocol on the Right to Nationality and Eradication of Statelessness was birthed. It is not lost that the draft Protocol, takes into account the complexities that surround statelessness as a teething problem on African soil.

The draft Protocol proposes to eliminate barriers that arbitrarily deprive individuals of their right to nationality. For instance, in terms of conferral of nationality to children the draft Protocol proposes to expressly provide that both the mother and father have equal rights in conferral of nationality to their children.[28] This provision is critical in addressing the discriminatory position that has been upheld with regards to maternal parental right to transmit nationality. Additionally, the draft Protocol proposes to have countries strengthen their civil registration systems.[29] It also takes cognizance of migrant populations such as communities that lead pastoralist lifestyles right to have their nationality recognized in at least one of the countries where they have a connection to.[30] Further, it captures specific rights that relate to children and nationality and provides that for children born by unknown parents, the child is presumed to be a citizen of the country where they are found. [31] In 2018, during a Member States Committee meeting, the African Union called upon African nations to take action towards reforming their nationality laws. [32] Notably, during the December 2022 African Union meeting, the Protocol was scheduled for consideration and adoption. [33]The African Union is yet to adopt the Protocol.

1.2 The ICGLR and statelessness

The ICGLR has recognized the problem of statelessness in building peace and stability in the region. It has hence taken significant steps in recognizing the statelessness menace and actively taken significant initiatives to eradicate statelessness as part of restoration of peace and security. In its establishing instrument, the Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 2004 (Dar es Salaam Declaration) the member states noted that the endemic conflicts and persistent insecurity in the region resulted in refugees and displaced persons.[34] The Heads

[28] Article 6 & 9 of the Draft Protocol on the Right to Nationality and Statelessness (May 2017 Draft) , Article 6 & 9.
[29] *Ibid*., Preamble
[30] *Ibid*., Article 8.
[31] *Ibid*., Article 5.
[32]African Union 'Member States Experts Meeting on the Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa
' <www.au.int/en/newsevents/20180507/member-states-experts-meeting-draft-protocol-african-charter-human-and-peoples> visited on 10 February 2023.
[33] Centre for Human Rights Pretoria 'Centre for Human Rights and SANN call for the adoption and ratification of the Draft Protocol on Statelessness in Africa' <www.chr.up.ac.za/news-archive/2022>visited on 10th February 2023
[34] Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 2004 at paragraph 48 Available at <www.icglr.org/wp

of States in adopting the Dar es Salaam Declaration agreed to forge a common approach towards addressing statelessness in the region.

In 2017, during the regional inter-ministerial meeting, the region adopted a more detailed plan on eradication of statelessness through the Brazzaville Declaration on Eradication of Statelessness and a Regional Action Plan 2017-2019.[35] This step marked a pragmatic approach towards addressing and offering solutions to the question of statelessness in the region. The member states committed to end statelessness in the region by 2024.[36] Notably, in coming up with the commitments under the Brazzaville Declaration, the member states relied on various instruments that relate to statelessness within the African region particularly. The African Charter on Human and People's Rights and the African Convention on the Rights and Welfare of the Child form a substantive legal base as a reference point for African States. To this end, it then follows that the ICGLR in making its commitments on addressing statelessness anchors these pledges on fundamental human rights instruments in Africa.

In the Brazzaville Declaration, the ICGLR member states agreed to accede to the 1954 Convention on Stateless Persons that is the global bedrock of the question of statelessness. The 1954 Convention regulates the status of stateless persons and confers them with rights. Under the Brazzaville Declaration, ICGLR member states also made a political commitment to adopt the 1961 Convention on Reduction of Stateless Persons.[37] The 1961 Convention complements the 1954 Convention in that it lays down the rules on conferment and withdrawal of citizenship in a bid to reduce the statelessness menace. It provides guidelines and possible legal measures to avoiding the situation of statelessness. Acceding to the 1961 Convention, obligates states to domesticate clear guidelines and conditions to confer nationality.

The Declaration also urged the ICGLR member states to forge for legal and policy reforms relating to nationality towards putting in place necessary safeguards towards reducing statelessness. Notable implementation points under the Declaration included a move towards equal application of the law relating to conferment of nationality where both women and men have equal rights to acquire, change confer nationality to their children and spouses. The Declaration also urged members to ensure that every child acquires nationality at birth and any stateless child found within the jurisdiction of a Member State is conferred with the nationality of State where they are found. [38]**3. African Jurisprudence on Stateless Persons**

The African continent has grappled with the question of statelessness. The ICGLR is equally no stranger to the phenomenal and has demonstrated willingness to address the same. Disputes relating to statelessness have been instituted and addressed at the regional stage. Notably, some of the four cases

content/uploads/2020/07/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development-1.pdf>, visited on 15th October 2022.

[35] Declaration of International Conference on the Great Lakes Region (ICGLR) Member States on the Eradication of Statelessness ICGLR/RIMC/DEC/STA/15/10/2017 Available at <file:///C:/Users/hp/Downloads/Brazzaville_Declaration_ENG.pdf> visited on 29th September 2022.

[36] *Ibid*.

[37] Convention on the Reduction of Statelessness, 1961.

[38] Convention on Statelessness, *supra* note 9.

relate to a member state to the ICGLR. The first two cases involved the Government of Kenya. The first case was the Nubian Community in Kenya v The Republic of Kenya, the complainants sought the audience of the African Commission on the question of the status of their citizenship.[39] The second case was the *Children of Nubian Descent in Kenya v Kenya* sought the intervention of the ACERWC.[40] The case was filed after several failed attempts to seek local redress. At the backdrop of lodging the Communication, were numerous attempts of activism for recognition of Nubians as Citizens in Kenya and Sudan. In the case of Sudan, the Nubians had been displaced during the British Colonial rule and as such the Sudan Government was unwilling to recognize them.[41] The African Commission decision reaffirmed the occasioned delay by pointing out several instances such as failure to constitute a bench and refusal to transimt the file to the Chief Justice on grounds that there were unascertained applicants.[42] As pointed out in the case, the local avenues for recourse posed prolonged delays and hindrances.[43] In the course of preparing the communication before the African Commission, the Complainants took notice of glaring children rights violation.[44] The Complainants then decided to lodge a communication with the ACERWC to address the child specific violations.[45]

The two other cases entail nationality laws of Cote d'Ivoire and were brought before the African Commission namely*: Mouvement Ivoirien des Droits de l'Homme (MIDH) v Côte d'Ivoire*,[46] *and Open Society Justice Initiative v\ Côte d'Ivoire*,.[47] Notably, the cases were instituted by different human rights groups before the Commission. The former case was instituted first, alleging a violation of article 2 and 14 of the ACHPR on the right to equal treatment and right to property respectively. This section seeks to look at the jurisprudence set out in the cases relating to conferment of nationality and stateless and draws a nexus between the jurisprudence and the situation of statelessness in the ICGLR.

a. Institute for Human Rights and Development in Africa (IHRDA) And Open Society Justice Initiative On Behalf of Children of Nubian Descent in Kenya v The Government of Kenya

The case was brought before the ACERWC by the IHRDA, an organization in Gambia with observer status and the Open Justice Initiative in 2009. The Complainants alleged that the Nubian Community originated from Sudan but were displaced in Kenya during the British Colonial Rule in Sudan and

[39] *The Nubian Community in Kenya v The Republic of Kenya* Communication 317 of 2006.
[40] *Institute for Human Rights and Development in Africa (IHRDA) And Open Society Justice Initiative On Behalf of Children of Nubian Descent in Kenya v The Government of Kenya* (Decision) No 002/Com/002/2009.
[41] *Ibid*., para 24,25&27
[42] *Ibid.,* para 53&54
[43] *Ibid.,* para 25
[44] E.Durojaye & E.A. Foley 'Making a first impression: An assessment of the decision of the African Committee of Experts on the Rights and Welfare of the Child in the Nubian Children communication' *African Human Rights Law Journal* (2012) p. 564
[45]*Ibid*., p.567
[46] Communication No. 246/2002, 21-29 July 2009.
[47] Communication No. 318/2006, 25 February 2015.

Kenya. They alleged that the Kenyan Government had since independence considered them as foreigners owing to the fact they did not have any ancestral origins in Kenya. At the crux of the dispute was the lack of recognition of the Nubian communities which meant that children born in Nubian homes were denied the right to a nationality stemming from the fact that their parents lacked the necessary legal documents to register them at birth. The failure to register the children further complicated the situation because once such children attained the age of majority, they were unable to acquire national identification cards. The future prospects of children born in Nubian families were severely limited by the lack of necessary identification documents. In 2011, the ACERWC determined that the non-recognition of the nationality of children of and failure to issue the children with birth registration documents was a human rights violation.

b. The Nubian Community in Kenya v The Republic of Kenya

The Complainants before the African Commission, alleged that the Kenyan Government had denied their nationality and subsequent conferment of documentation that proved citizenship. This infringement of the complainant's rights translated in systemic disenfranchisement and exclusion from political processes and social development. At the heart of the exclusion was the denial of national identification documents and consequently further aggravated violations such as benefits that accrue from the acquisition of the documents.

In May 2015, the African Commission found that the complainants were treated differently in terms of procedures relating to acquisition of identification documents. The Commission noted that the requirement to have the aggrieved group produce additional requirements was in breach of what was contemplated under Article 2 of the ACHPR relating to equal treatment before the law. The Commission took the decision that the requirement to avail additional documentation on the basis of their religious and ethnic background was against the precepts of human rights and human dignity. The Commission also noted that although the State had discretion to determine who qualifies to acquire nationality, the discretion is is limited by obligations to eradicate statelessness and human rights tenets on discrimination. In the case of the Nubian Community, the Commission noted that the administrative processes that introduced additional requirements for the aggrieved group were discriminatory. The Commission affirmed that the arbitrarily requirements were created to debar the Nubians from obtaining identification documents and enjoying their rights.[48]

[48] Institute for Human Rights (IHRDA) *supra* note. 40, para 147

c. Mouvement Ivoirien des Droits de l'Homme v Côte d'Ivoire, African Commission on Human and Peoples' Rights

Cote d'Ivoire although not a party to the ICGLR shares a common history with most Member States to the ICGLR. Cote d'Ivoire has ratified the two global instruments on statelessness and also is a party to the ACHPR and the ACRWC. Cote d'Ivoire has also in the past experienced armed conflict like most countries in the ICGLR. A 2016 study commissioned by the UNHCR study, attributed the armed conflict experienced in the West African state to statelessness in the country.[49]

In 2002, a human rights organization *Mouvement Ivoirien des Droits de l'Homme* (MIDH) lodged the Communication before the Commission. At the centre of the nationality disputes was the fact that Cote d'Ivoire consists of a big percentage of immigrants.[50] The State had come up with a law that discriminated against Ivorian citizens who were not originally from Cote d'Ivoire. Several public policy measures were adopted to ensure that only native Ivorians (*Ivoirien d'origine*) enjoyed preferential treatment in the labor market and public office. In addition, the Ivorian Parliament passed a major rural land tenure law in 1998 that denied foreigners the right to be land-owners. According to the Complainants the Ivorite laws compounded in denial of rights such as participation in political life, right to own property and equality before the law. In 2009 a suit was instituted before the African Commission alleging that the rules in force regarding nationality *(Ivoirité*) were discriminatory. The African Commission asserted that the law was a violation of the ACHPR because it retroactively denied a particular ethnic group of its nationality, notwithstanding its long-standing ties with the state.

In 2008, the Commission made a determination that the *Ivorite* policy was against provisions on equality before the law and the right to own property.[51] The Commission affirmed that the Charter prohibited discrimination on the grounds of origin, nationality, opinion, fortune or birth status. However, it is arguable that the decision of the Commission in this case did not speak directly to the question of nationality and acquisition of nationality seeing that the communication was anchored on the ACHPR which does not express provide for nationality as a substantive right.

d. Open Society Justice Initiative v Côte d'Ivoire

The Complaint entailed the extended situation of socio-political exclusion as a result of the *ivorite* policy. The implementation of *ivorite* policy meant only Ivorian nationals who were born by two Ivorain nationals enjoyed full citizenship rights. The policy affected a significant population in Cote d'Ivoire who had grown up and lived there. The ivorite policies aggravated xenophobic tendencies that affected

[49] M Adjami 'Statelessness and Nationality in Cote d'Ivoire' at p. 7 Available at < www.refworld.org/pdfid/58594d114.pdf>, accessed on 27th August 2022.
[50] *Ibid.,* p.12.
[51] Article 2 & 14 African Charter on Human and People's Rights, 1981

individuals not considered 'pure Ivorians'. The Dioulas community were denied access to nationality rights based on their foreign sounding names and Muslim affiliations.

In determining the case the African Commission introduced an interesting approach to the question of nationality. The judgement considered that the denial of nationality has ramifications on the right to human dignity and recognition of legal status as enshrined under Article 5 of the ACHPR. The Commission stated that Article 5 included the concept of legal status as the ability of an individual to have rights and obligations, and for that matter he has a role in the legal activity. The Commission observed that nationality is a basic component of this right in view of the fact that it is the legal and socio-political tool that affords the status of a refugee or a resident granted by a State to an individual for the enjoyment of rights and the exercise of obligations. The Commission held that it was an obligation of the Cote d'Ivoire Government to recognize the legal status of the Dioulas community by recognizing their right to a nationality. [52]

The cases revealed the plight of the stateless population and the need to address the question of statelessness in Africa. The cases provided valuable discussions on statelessness namely:

2. The significance of nationality as a panacea of human rights

The African Commission and ACERWC brought attention the significance of acquisition of nationality by the Nubian Community and enjoyment of fundamental rights of the Nubian Community in Kenya. The lack of recognition of the nationality of the Nubians occasioned inability to access critical services and deprived them of rights. The case before the African Commission was evidenced by deprivation of Nubians of fundamental rights such as participation in political processes, social services and acquisition of property. The case before the ACERWC, was particularly grim for the minor population who bore the brunt of being born in Nubian families. The ACERWC noted that the failure to register Nubian children at birth, gave way to numerous violation of their rights.

Additionally, nationality has been interpreted to constitute multiple elements. Possession of a nationality is essential for the full recognition of an individual legal status and access to human rights. For instance, in the Ivorian case of *Open Society Justice Initiative v Côte d'Ivoire*, African Commission noted that nationality constitutes a recognition of an individual's legal status. [53] The African Commission argued that the recognition of legal status allows individuals to access and enjoy their

[52] Open Society Justice Initiative, *supra* note 32 para 101.
[53] Open Society Justice Initiative, *supra* note 32 para 104.

rights. It therefore follows that failure to grant nationality deprives individuals and vulnerable populations such as stateless children of their fundamental rights.

2.1 The nexus between the place of residence and citizenship

In the context of statelessness that arises as a result of post conflict societies often results in resettlement of individuals. Post war societies entail destabilized populations who often opt to resettle in other countries. This resettlement in some instances even spans many decades and affects the nationality of generations. This sometimes leaves populations that have resettled permanently elsewhere without the ability to enjoy the rights that accrue from nationality and pre-disposes children populations to grave violations. The Nubian case, exemplifies the deprived situation that resettled populations are predisposed to.

The landmark decision of the *Nottebohm* case by the International Court of Justice (ICJ) buttressed the importance of demonstrating an effective or genuine link between an individual and a state to justify a conferral of nationality on the individual concerned that needs to be respected by other states.[54] Further within the regional context the African Commission in intervening in the case of *Mouvement Ivoirien des Droits de l'Homme v Côte d'Ivoire* noted that the small ethnic group had a valid claim over the Ivorian nationality because they demonstrated a substantiated link and ties with the Ivorian ethno-culture.[55]

2.2 The relationship between issuance of identification documents and nationality

The ACERWC in determining the question on nationality noted that even in instances when a birth certificate was issued, the same did not confer nationality. The ACERWC noted that the plain wording of the African Charter on the Rights and Welfare of the Child[56] conferred a child the right to a name at birth. On the contrary, the wording of Article 6(3) failed to explicitly confer nationality at the time of birth. However, from a holistic and purposive interpretation, the two elements of rights enshrined under Article 6, ought not be disparate. The overarching principle on matters relating to children requires that in all matters relating to a child, the best interest of the child is paramount. In this context, given the benefits and significance of both name and nationality to a child's welfare, conferment of documents that identify a child and nationality ought not be considered as dissimilar events for purposes of a child's

[54] Liechtenstein, *supra* note 10.
[55] *Mouvement* case, *supra* note 31.
[56] Article 6, African Charter on the Rights and Welfare of the Child 1990.

best interests. According to Kristin Henrard, birth optimizes the acquisition of nationality.[57] It then follows that with birth, certain benefits automatically accrue.

Additionally, contextualizing this provision to the case study under review, in the *Nubian* case the African Commission upheld the decision of the ACERWC noting that, it was obligatory for Kenya to ensure that its Constitutional legislation recognized the principles that a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.[58]

This inter twined approach was also buttressed in the Cote d'Ivoire cases involving *Mouvement Ivoirien des Droits de l'Homme v Côte d'Ivoire*.[59] The Commission observed that birth registration is the most important document for establishing which country's nationality a child can acquire as it provides an official record of place of birth and parentage. The challenge that this would then pose is the question of different approaches and interpretations in different legal systems. Within the context of the ICGLR, through the establishing instrument the Dar es Salaam Declaration, member states agree to adopt a common regional approach for ratification of international instruments of statelessness as well as a harmonization of standards on issuance of identification documents to refugees and internally displaced persons.[60]

However, with most of the ICGLR Member States yet to accede to the 1954 and 1961 Convention, the challenge of harmonized systems on conferment of citizenship remain unresolved.[61] This was observed and included in the Action Plan of the ICGLR on the eradication of statelessness in 2019 as a key action point to be undertaken by Member States. The accession to a treaty entails an individual state making political commitment. Additionally, beyond depositing the accession instruments the State must also come up with domestic implementation mechanism to realize the benefits of the treaty. This may pose as a challenge because it is dependent on individual state's willingness to acceded and be bound by a treaty. Achieving a common consensus when states accede to a treaty within the ICGLR may take time. However, by dint of association within the ICGLR and committing to end the situation of statelessness may also work as an incentive towards achieving harmonized standards on nationality and statelessness.

---

[57] K. Henrard 'The Shifting Parameters of Nationality' (2018) *Netherlands International Law Review* at page 272 Available at <www.//link.springer.com/article/10.1007/s40802-018-0117-6>, visited on 27th September 2022.

[58] *Children of Nubian Descent in Kenya* case, *supra* note 19, para 87

[59] *Mouvement* case , *supra* note 31

[60] Paragraph 68, Dar es Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, 2004

[61] 1954, Convention Relating to the Status of Stateless Persons United Nations Treaty Status Check Available at <www//treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en >, Accessed on 15th October 2022

2.3 Correlation of nationality and ethnicity

Nationality entails a recognition and affiliation to a population that constitutes a State. It creates legal and social links to a State and the population in the State. The social linkage to a State creates another layer to nationality that goes beyond the legal definition and recognition. It creates new affiliations, communities, traditions, aspirations and values. The Commission in determining the *Mouvement Ivoirien des Droits de l'Homme v Côte d'Ivoire* and *Open Society Justice Initiative v Côte d'Ivoire* noted that nationality creates new social and political dimensions. The Commission noted that the determination of nationality should entail historical, legal and political questions.

The historical perspective involves examining the history of communities in a State and taking note of key events in history. In response to the historical angle the Commission examined the history of Cote d'Ivoire. It noted that the country included many migrant populations that settled in Cote d'Ivoire. The Commission argued that in their view the migrant populace changed the ethno-political and ethno-cultural demographic of the country. The Commission noted that although this argument had not been espoused by the parties, it was critical in determining nationality. It also observed that acceptance and recognition of nationality of communities that were not necessarily indigenous would break inter-ethnic conflicts that confront many African countries.

The import of this in the ICGLR region is that it introduces a new paradigm in committing to resolve the question of statelessness. By examining the history of ICGLR countries, the social and political architecture is important. Moreover, ethnic disputes have also contributed to the war and strife in the region.[62] ICGLR countries have experienced war and post war effects of displacement of populations. This means that solutions to the question of statelessness should go beyond legal perspectives.

Concluding remark

The phenomenon of statelessness aggravates the human rights experience for the citizenry. It is therefore important to address the gaps and mainstream legal and administrative processes in recognition of nationality. The jurisprudence on the same equally raises key Afrocentric complexities that are useful in resolving statelessness. Notably, following the African Commission decision and the ACERWC in the Nubian cases there has been several steps taken by the Kenyan Government.

The 2010 Constitution, under Article 14 provides that a person is a citizen by birth if on the day of the person's birth, whether or not born in Kenya, either the mother or father is a citizen. This guarantees acquisition of citizenship to all citizens in the tenets of *jus soli* and *jus sanguinis*. Additionally, and

[62] E. Maloka 'The African Peer Review mechanism and silencing the guns in Africa' (2020) *The African Centre for Constructive Resolution of Dispute* 37.

specifically relating to children, the Children's Act,2022 under Section 7 makes it a mandatory requirement for every child to be registered in the Register of Births immediately after birth. [63] This therefore to a large extent seeks to abolish discriminatory practices and trends in registration of births as a panacea of recognition of nationality. Further to the legislative reforms, the government has also recognized the Nubian community as Kenyan nationals. In 2021, the Cabinet Secretary in charge of Interior and Co-ordination explained to a Parliamentary Committee that Kenya recognizes Nubians as citizens and issued national identity cards to a total of five thousand six hundred and forty-two as at 16th August 2021.[64] Conversely, the Parliamentary Committee report observed that the scrutiny process for the people of Nubian descent was still hurdled with challenges such as slow scrutiny processes. The Committee prescribed recommendations such as streamlining of the scrutiny procedures and the commencement of the process of recognizing Nubians as a tribe in Kenya.[65]

The statelessness menace has confronted many African countries. The question of nationality and statelessness has equally threatened countries within the ICGLR. The jurisprudence developed by the African Commission and ACERWC offers relevant solutions to the problem of statelessness. The solutions put out through African jurisprudence provide timely and relevant responses to the problem that can be adopted and incorporated by the ICGLR to speed up the problem of statelessness among vulnerable populations such as children. Additionally, the complexities posed by the cases before the African Commission and ACERWC are largely addressed under the draft Protocol. To this end, there is need to adopt the Protocol which will lay a basis for harmonization and streamlining of nationality in African countries and particularly the ICGLR to eradicate statelessness.

[63] Act No. 29 of 2022
[64] Parliament of Kenya 'Report of the Departmental Committee on Administration and national Security regarding Petition No. 023 of 2021 on accessing of National IDs by the Nubian Community' (2021) para. 22 Available at <www.parliament.go.ke/sites/default/files/2021-11/Report%> visited on 10th February 2023
[65] *Ibid*., para 36

RAOUL
WALLENBERG
INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW