

The Face of Statelessness: A Call for African Norms on the Right to Citizenship

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I. Intro:

The right to citizenship is under threat as never before. Citizenship reflects the legal tie between an individual and a state. The term ‘citizenship’ usually refers to the content of this relationship, the rights of citizens in the domestic context, while ‘nationality’ is commonly used to invoke the operational consequences of the relationship—that a state must protect those who hold its nationality. For ease of reading, ‘citizenship’ has been generally preferred in this text

An individual’s possession of citizenship obligates the state to protect that person, and creates an individual duty of loyalty and compliance with the laws of the state that apply to citizens. While one’s country of citizenship does not affect one’s human rights in principle, in practice different states offer different levels of protection. It is only through recognition by a state that individuals can exercise their political rights; access to social services, to formal sector employment, to peaceful enjoy of property and to legal remedies (to name just a few affected rights) may all be denied to those who do not have citizenship. Those who have citizenship of no state and are denied state protection necessarily suffer grave infringement of their rights.

Legally, statelessness is defined by Article 1 of the 1954 UN Convention Relating to the Status of Stateless Persons as any individual who “is not considered as a national by any State under the operation of its law”. Anyone who fits this definition is *de jure* stateless. However, this purely legal definition does not include the certainly much larger number of people who are entitled to citizenship of a given state under law, but who do not, as a matter of fact, enjoy the rights or protections of citizens do. Even those who hold documentary proof of their citizenship may suffer marginalization or exclusion so severe that their citizenship is ineffective, and they can be called *de facto* stateless.

The terms ‘citizen’ and ‘stateless’ suggest that citizenship is a yes or no question: either one has it, or one doesn’t. This is not the reality. A majority of people with citizenship-related difficulties exist in a grey zone of threatened, questioned, or imperfect citizenship. In order to discuss these problems clearly, we must employ the terms *effective citizenship* and *de facto statelessness*, which may be thought of as points on a citizenship continuum. Effective citizenship is one endpoint, enjoyed when the system works as it should and citizens have both legal recognition of belonging to their states, and in practice have the concomitant rights and protections of citizenship. De facto statelessness is the largely unrecognized and unexamined middle ground, where individuals may possess documentary proof, even if imperfect, of their citizenship, yet do not have the attached rights and protections. Compared to this group, the de jure stateless—at the far end of the continuum, having neither legal recognition nor state protection—might be considered fortunate at least in that the legal clarity of their position is sufficient to support a duty of international agencies to step in and provide to them the protection that their state does not.

A final, important category falls on the continuum between the effective citizens and the de facto stateless: those who are at risk of statelessness. As this paper will describe, there are distinct patterns of statelessness, and those who situation fits one or more of these patterns—for example, a national minority group in an ethnically polarized

democracy, or a transborder community whose members live across two countries—are at heightened risk. When marginalization of these groups increases over time, it is a subjective judgment at what point the severity of the marginalization amounts to de facto statelessness.

Overview: The Threat to the Right to Citizenship in Africa

Citizenship in Africa today is intersection points of several elements: multi-ethnic societies, the nation-state structure, the construction of identity, electoral democracy, and the legal character of citizenship. Populations in Africa have been historically mobile; prior to independence there were few important political borders or obstacles to movement. This free movement over thousands of years resulted in the mosaic societies of today. The end of colonialism transformed individuals from subjects of colonial powers into citizens with the right of political participation, in distinct geographically delineated political spaces known as nation-states. While the fathers of African independence articulated continental unity in pan-Africanism, the independent nation state model was the colonial state's legal successor.

The modern nation-state does not necessarily have any cultural identity; in law, most do not. Those that do—as certain African constitutions specify the 'tribes' considered indigenous to the territory—still provide for the inclusion of those outside that culture on an individual basis.

However, the idea that a community sharing specific cultural characteristics—the 'nation'—should be contiguous with the state has never been far from the surface of the nation-state ideology. This idea is at its heart antithetical to human rights: it suggests that an individual's belonging to a state is not analogous to a contract, in which each party has specific duties that are implemented repeatedly and deliberately in daily life, but rather that the basis of the state's duty to protect (and the individual's duty to state) rests on some immutable characteristic over which the individual has no control.

Paradoxically and tragically, democratization has created perverse incentives for political leaders to embrace race, ethnicity, religion, culture, lineage, language, or other identities as a tool of political mobilization. From elevating these immutable characteristics to mobilizing forces, it is only a small step to suggesting that those lacking these characteristics have no place in the national dialogue—that the nation-state cannot accommodate them. These ideologies cast doubts on the right to citizenship of entire communities, some numbering millions. Indeed, often political authorities go beyond casting doubts and actually deprive individuals of citizenship, in law, in fact, or both.

Citizenship is typically conferred according to two principal criteria, either through the place of birth or through descent, known respectively as *jus soli* (rule of the soil) and *jus sanguinis* (rule of blood). Both principles aim to approximate who will have the greatest ties to a country and will thus be natural citizens, needing the protection of the state (because they live there) and easily giving it loyalty. Both those born in a country and those whose parents are citizens will presumably be closely tied to that country. Many states have hybrid criteria; most state that apply *jus soli* apply *jus sanguinis* as well. Neither birth citizenship nor citizenship by descent, however, is a

perfect predictor of where individuals will need or want citizenship today. Nearly all states recognize this by providing for naturalization.

Jus sanguinis is the principle most subject to abuse. Rather than treating descent as a predictor of the state to which an individual will be tied, and the citizenship that individual will logically need, the worst citizenship policies elevate descent to the sole qualification for state protection—as if having a parent born in another country (which might not even have been a separate country at the time) were proof of fundamental unfitness for belonging to a society. *Jus sanguinis* is also often a proxy for some other immutable characteristic such as ethnicity, language or religion. If citizenship is based on these, then no amount of loyalty to the state, no number of years lived or social ties or great deeds done will make an individual qualify for citizenship. The greater the individual's ties to a country, the crueler is denationalization.

The most desperate are those who, when denationalized, have no other citizenship and become stateless. Lacking state protection, stateless individuals exist in a state of permanent vulnerability to government actions. Denied access to birth certificates, passports, or other identification documents, stateless persons become, in effect, “non-persons” with no claim on governments to protect their most basic rights. As a result, they are systematically denied access to the full range of public goods and services essential to a decent existence – from freedom of movement and police protection, to healthcare, education, housing, and employment. Groups suffering protracted statelessness usually suffer poverty as well, throughout successive generations. They wield no political power and their lack of no legal identity often prevents them from seeking justice or recourse.

The Faces of the Phenomenon

A few scenarios capture the range of mischievous manipulation of citizenship. These might be seen as distinct phenomena, but each has citizenship at its core. Rough categories of these might be called individual neutralization; ethnic cleansing by operation of law; and punishing those who ignore the border.

Individual neutralization occurs when the state denationalizes someone in order to frustrate or halt his or her ambitions or activities. The most famous examples of this are political figures: Kenneth Kaunda of Zambia and Alassane Ouattara of Côte d'Ivoire were poised to take power through elections when the governments in power ‘discovered’ that they were ineligible to stand for office since they were not of ‘pure’ descent. Others, such as John Modise of Botswana, had their political careers (and indeed their personal and economic lives) ruined at far earlier stages due to denationalization and sometimes, as in Modise's case, expulsion. Individual neutralization can also target journalists, as Trevor Ncube of Zimbabwe was recently threatened with denationalization, not coincidentally because Zimbabwean law specifies that the majority owner of a newspaper must be a Zimbabwe national, and some in positions of authority found his newspaper vexatious.

Ethnic cleansing through operation of law describes campaigns of denationalization, implemented either through adopting arbitrary legislation that

redefines who constitutes citizens of a state, or by changing the application of legislation so that members of specific groups are unable to obtain proof of, and thereby assert, their national identity. For example, in 1981 the Mobutu regime in Zaire adopted a nationality law that defined Zairian citizens as those individuals whose ancestors resided on Zairian soil at the time of the creation of the predecessor Belgian colony; this resulted in the denationalization of ethnic Banyamulenge in the east. In Côte d'Ivoire, the notion of *Ivoirité*, or ancestral Ivorian heritage, was promulgated since the mid-1990; since then, individuals from specific ethnic groups have suffered systematic obstacles in obtaining national identity cards and passports. Often, these policies are just the precursor to violence against the affected groups, who have already lost the legal protection offered by their citizenship. This has happened in Cote d'Ivoire, and in 1989 Mauritania expelled tens of thousands of black Mauritians, but not without systematically confiscating and destroying their identity documents, effectively denationalizing them. In all of these examples, the government in power sought to cement its power by evoking the ethnic identity of the state itself and prevent certain minorities from claiming state protection.

Thanks to longstanding freedom of movement and the late creation of political boundaries, all regions of Africa have transborder communities. Some of these communities do not simply exist on both sides of a border, but actively call the importance of the border into question by crossing and re-crossing it regularly as part of their social and economic lives. As if in punishment for a lifestyle that suggests that belonging to two states at the same time is possible, indeed, necessary, states usually resist granting basic identification documents to these populations. They therefore live in constant threat of statelessness and face a significant risk of mass expulsion by one or the other state in which they reside. Examples of ambiguous or tenuous citizenship status of transborder communities arise on the borders between Guinea and Sierra Leone, Chad and Sudan, Uganda and the Democratic Republic of Congo, Tanzania and Rwanda, Zimbabwe and Mozambique. In all of these instances, governments are prone to argue that transborder communities are illegal immigrants and therefore subject to expulsion.

II. The Human Rights Constraints on State Sovereignty over Citizenship

The pages above have outlined the many abuses of citizenship—both its theory and its application. But how are such citizenship-based human rights violations possible under existing international human rights law? This section will describe the existing norms and why they do not go far enough.

Although international law clearly establishes the prohibition on racial and ethnic discrimination and the right to citizenship as *jus cogens* norms, these principles are not articulated in African human rights instruments. To be sure, Articles 2 and 3 of the African (Banjul) Charter on Human and Peoples' Rights reaffirm the universal prohibition against racial and ethnic discrimination and the right to equality of all persons before the law, while Article 13 affirms equal access to public property and public services. Yet nothing in the African Charter explicitly acknowledges the right to citizenship.

Article 12 of the African Charter does address the human rights constraints that arise from the patterns of movement of peoples on the African continent. It guarantees the right to freedom of movement and residence within a state and affirms that every individual has the right to leave and return to any country in accordance with the law, including his or her own. This article affirms that the right to seek asylum in countries on the continent in accordance with national and international laws is a human right. Most significantly, Article 12 prohibits mass expulsion of non-nationals from the territory of a country and defines this: “[m]ass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.” If the expulsion of non-nationals is prohibited, it may be assumed that the mass expulsion of nationals is as well, and the African Commission has indeed found so in the case of Mauritania.

The African Charter on the Rights and Welfare of the Child goes further in guaranteeing the right to citizenship, specifying that every child has the right to an identity, and that children who would otherwise be stateless at birth should have the citizenship of the country in which they were born.

Beyond the African system, four well-established principles in international law govern the right to citizenship: the prohibition against racial discrimination, the protection of right to nationality itself, the prohibition against arbitrary deprivation of nationality, and the prohibition against statelessness.

The Prohibition against Racial Discrimination

State sovereignty over nationality is most clearly constrained by the prohibition against racial and ethnic discrimination. The principle against racial discrimination is integral to all international and regional human rights instruments,¹ representing a rule of customary international law.

Numerous courts have affirmed that racial discrimination is high priority in international and comparative law.² Discrimination on the grounds of national origin is a form of racial discrimination prohibited by international and comparative law, as confirmed by decisions of UN treaty bodies, including the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child.³ The Committee on the Elimination of Racial Discrimination has

¹ The prohibition on racial and ethnic discrimination is enshrined in the following provisions of international and regional human rights instruments: Article 1(3) of the *United Nations Charter*; Article 55(c) of the *United Nations Charter*; Articles 2 and 7 of the *Universal Declaration of Human Rights*; Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR); Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*; Article 14 of the *European Convention of Human Rights* (ECHR); Articles 1 and 2 of *Protocol No. 12 to the ECHR*; Article 21 of the *European Charter of Fundamental Freedoms*; Chapter 1, Article 2 of the *African Charter on Human and Peoples’ Rights*; and Articles 1(1) and 24 of the *American Convention on Human Rights*.

² See, e.g., *East African Asians v. U.K.*, 3 EHRR 76, ¶ 207 (1973); *Brown v. Board of Education*, 347 U.S. 483 (1954).

³ See, e.g., UN Human Rights Committee, *Concluding Observations of the Human Rights Committee Sweden 24/4/2002*, ¶ 12 UN Doc. CCPR/CP/74/SWE; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Ireland 03/08/93*, ¶ 17 UN Doc. CCPR/C/79/Add.21; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Dominican Republic 26/08/99*, ¶ 11 UN Doc. CERD/304Add.74; UN Committee

recommended that states “[r]ecognize that deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States Parties’ obligations to ensure non-discriminatory enjoyment of the right to nationality.”⁴

The Right to Nationality Is a Protected Right

International law has traditionally afforded states broad discretion to define the scope of, and access to, citizenship. Nonetheless, the inherent link between the right to nationality and the enjoyment of other human rights means that citizenship laws and practices must be consistent with the principles of international law.

The Permanent Court of International Justice first made clear that international law limits state sovereignty over citizenship in 1923, when it ruled that “[t]he question of whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relevant question; it depends on the development of international relations.”⁵ Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws affirmed this principle:

It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.⁶

Article 15 of the Universal Declaration of Human Rights guarantees that “[e]very one has a right to a nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁷ The right to nationality gained wider recognition through subsequent international and regional human rights instruments. For example, binding international legal instruments such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child further guarantee the right of every child to acquire a nationality and articulate the duty of states parties to undertake to respect this right as it pertains to children.⁸

The Prohibition against Arbitrary Deprivation of Nationality

The prohibition against the arbitrary deprivation of nationality was set forth as concomitant with the right to a nationality in Article 15 of the Universal Declaration of Human Rights.⁹

on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Iceland 31/01/2003*, ¶ 22 UN Doc. CRC/C/15/Add.203.

⁴ Id, para. 14.

⁵ *Nationality decrees issued in Tunis and Morocco – Advisory Opinion* [1922] PCIJ 3, ¶ 24 (Oct. 4, 1922).

⁶ *1930 Hague Convention on Conflict of Nationality Laws*, 179 LNTS 80; 1930 Can. T.S. No. 7.

⁷ Although the Declaration itself is not legally binding, international law scholars recognize that it has acquired the status of customary international law. See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 41 (1996).

⁸ Article 23(3) of the *International Covenant on Civil and Political Rights*; Articles 7(1) and 8(1) of the *Convention on the Rights of the Child*.

⁹ Article 20(3) of the *Inter-American Convention on Human Rights* similarly prohibits the arbitrary deprivation of nationality, as does Article 16 of the 1997 *Draft Articles on Nationality in Relation to the*

International law recognizes some permissible grounds for the deprivation of citizenship.¹⁰ But deprivation of nationality, even on these permissible grounds, must be accompanied by important procedural and substantive safeguards. Recent denationalizations of various populations and individuals show the urgency for the international community to articulate clear guidelines as to what constitutes a violation of the right to a nationality and to be free from arbitrary deprivation of nationality.

The notion of arbitrariness in the context of deprivation of nationality includes both procedural safeguards and at least two substantive constraints, namely the prohibition against discrimination and the prohibition against statelessness. As the *jus cogens* prohibition against racial and ethnic discrimination limits state discretion over citizenship, any deprivation of nationality based on racial or ethnic discrimination is arbitrary. UDHR Article 15(2)'s prohibition of arbitrary deprivation of nationality, taken together with the non-discrimination provision in Article 2 of the Universal Declaration, mandates as much.

Thus, the UN Commission on Human Rights in Resolution 2005/45 reaffirmed that the right to a nationality is a fundamental human right and that "arbitrary deprivation of nationality on racial, national, ethnic, religious, political or gender grounds is a violation of human rights and fundamental freedoms." Article 9 of the 1961 Statelessness Convention explicitly prohibits states from depriving "any person or a group of persons of their nationality on racial, ethnic, religious or political grounds." Similarly, any deprivation of nationality that results in statelessness must be considered arbitrary. This is affirmed by the protections afforded in Article 8 of the 1961 Statelessness Convention. With the right to nationality a fundamental human right, the deprivation of nationality that results in statelessness can only be deemed arbitrary.

The Prohibition against Statelessness

The Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness were adopted in 1954 and 1961 respectively. The first affirmed that fundamental rights of stateless persons must be protected. The second sought to create a framework in which future statelessness could be avoided. To this end, it constrains unfettered state regulation of citizenship by codifying the positive legal duty of states to eliminate and prevent statelessness in nationality laws and practices.

Article 1 of the 1961 Statelessness Convention mandates that a "Contracting State *shall grant* its nationality to a person born in its territory who would otherwise be stateless," while additional provisions specify protections to ensure that states grant citizenship or are constrained not to deprive citizenship to those who would otherwise be stateless. Another key provision of the 1961 Convention is its clear articulation of the duty of states not to create statelessness through the deprivation of nationality. Article

Succession of States prepared by the International Law Commission upon commission from the UN General Assembly.

¹⁰ Article 8 of the 1961 Convention on the Reduction of Statelessness, for example, recognizes that states are allowed to deprive an individual of nationality if that nationality is obtained through misrepresentation or fraud, among several other accepted grounds.

8(1) directs that a “Contracting State *shall not* deprive a person of his nationality if such deprivation would render him stateless.”¹¹

Though relatively few countries have ratified the 1954 and 1961 Statelessness Conventions, they mark significant steps forward in guaranteeing the rights of stateless persons and providing substantive protection to the individual right to a nationality. They recognize that states are limited in their sovereign power to regulate citizenship by the prohibition against statelessness. Affirming the primacy of human rights concerns, both the 1954 and 1961 Conventions addressing statelessness affirm the primacy of the prohibition against discrimination. Article 3 of the 1954 Convention confirms that “[t]he Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.” Article 9 of the 1961 Convention goes even further: “A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”

III. A Call for African Norms Guaranteeing the Right to Citizenship

Although the provisions of international human rights law described above provide for the right to citizenship, and clear human rights prohibitions constrain state sovereignty to regulate citizenship, the absence of an express acknowledgement of the right to citizenship in the African human rights system is a gap that must be remedied. A right whose components are scattered through different international instruments lacks the power of a right stated outright. The abuse of the institution of citizenship in Africa suggests that the strongest action is urgently needed. The existing international law described above is inadequate to deal with states determined to manipulate citizenship for discriminatory or political ends.

The principles of non-discrimination, right to nationality, prohibition of arbitrary deprivation of nationality and prohibition of statelessness should underpin a protocol to the African Charter on Human and Peoples’ Rights on citizenship. The provision for children’s citizenship in the African Charter on the Rights and Welfare of the Child is vitally important, but underscores the necessity to provide a similar protection for adults.

It is time to develop a conception of citizenship in Africa that builds on African heritage and understanding of community, and which strengthens the vision for Africa embodied by the African Union. To de-politicize citizenship and ensure its protection as a human right, Africa needs a protocol on citizenship supplementing the African Charter on Human and Peoples’ Rights. The African Charter, with its unique recognition of the existence of “people’s rights”, invites African leaders to examine how citizenship in Africa can be aligned with continental philosophies of belonging and the enjoyment of rights within a community. However, to effectively protect Africans, the Charter must protect their citizenship.

A Protocol to the African Charter on citizenship must:

¹¹ Though Article 8 lists limited legitimate grounds for the deprivation of nationality even if the deprivation would result in statelessness, it provides an important safeguard in mandating that such deprivation can occur only after providing individuals concerned with due process protections.

- (a) guarantee a legally enforceable right to nationality for persons or members of all races and ethnic groups found in Africa;
- (b) prohibit statelessness and measures that lead to statelessness;
- (c) propose concrete measures for resolving disputes as to nationality and citizenship;
- (d) place the burden of proof on the state in situations of disputed citizenship and fix the standard of proof at a high level
- (e) provide for interim remedies pending resolution of citizenship disputes.

These measures are necessary to address the legacies of a hurried post-colonial settlement, guarantee human security, arrest the continuing impoverishment of the continent through citizenship-inspired conflicts and protect the human rights of all persons irrespective of race, ethnicity, colour, sex or political opinion.

The African Union must redress the problems of citizenship swiftly, before they cause more instability and suffering. A Protocol on citizenship in Africa will show the way for the rest of the world to a just and humane citizenship regime.

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