

**DRAFT PROTOCOL TO THE AFRICAN CHARTER ON HUMAN
AND PEOPLES' RIGHTS ON THE SPECIFIC ASPECTS OF THE
RIGHT TO A NATIONALITY AND THE ERADICATION OF
STATELESSNESS IN AFRICA**

EXPLANATORY MEMORANDUM

Background, Preamble and Sources:

1. This draft Protocol is the result of a collective effort by the African Union, African Commission on Human and Peoples' Rights (the African Commission), the African Committee of Experts on the Rights and Welfare of the Child (the African Committee of Experts), the Office of the UN High Commissioner for Refugees (UNHCR), African civil society organisations, and others. It seeks to facilitate the inclusion of individuals within African States, by providing legal solutions for the resolution of the practical problems linked to the recognition and exercise of the right to a nationality, to eradicate statelessness, and above all to identify the principles that should govern relations between individuals and States in relation to these issues.
2. The African Commission has sought to take into account the particularities of the continent, notably the recurrent conflicts based on identity that have resulted in mass expulsions of foreigners, while also founding this text on the general principles of international law.
3. The draft Protocol was prepared following the adoption by the African Commission of two resolutions on the right to a nationality. Resolution 234, adopted at the 53rd Ordinary Session held in April 2013 in Banjul, The Gambia, assigned the task of carrying out an in-depth study on issues relating to the right to nationality to the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa. The Special Rapporteur then met with representatives of the African Union Commission Department of Political Affairs and of UNHCR in Addis Ababa in May 2013 and agreed a roadmap for the implementation of the resolution. Resolution 277, adopted at the 55th Ordinary Session held in May 2014 in Luanda, Angola, at which the final version of the study on *The Right to Nationality in Africa* was presented, assigned to the Special Rapporteur the task of drafting a Protocol to the African Charter on the right to a nationality and the eradication of statelessness.
4. The African Commission's study on the Right to Nationality in Africa was formally launched in the margins of the 24th Ordinary Session of the Assembly of the African Union held in January 2015 in Addis Ababa, Ethiopia. Speakers at the launch included their excellencies Alassane Ouattara, President of Côte d'Ivoire; Nkosazana Dlamini-Zuma, Chairperson of the AU Commission; António Guterres, UN High Commissioner for Refugees; Zainabo Sylvie Kayitesi, Chairperson of the African Commission on Human and Peoples' Rights and Maya Sahli Fadel, Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons of the African Commission on Human and Peoples' Rights. At the launch, Dr. Nkosazana Dlamini-Zuma emphasised the commitment of the African Union to take concrete action to address the concerns of stateless individuals.

5. The Preamble to the Protocol recalls other efforts to regulate the recognition and conferral of nationality in international and especially African treaties, norms and jurisprudence. It refers to the 50th Anniversary Solemn Declaration of the Assembly of Heads of State and Government of the African Union, in which States commit to “facilitate African citizenship to allow free movement of people through the gradual removal of visa requirements” and to “accelerate action for the ultimate establishment of a united and integrated Africa, through the implementation of our common continental governance, democracy and human rights frameworks”. It draws on the Agenda 2063 Framework Document, which envisions an African citizenship, as well as the integration of the African diaspora into democratic processes by 2030, including through the availability of dual nationality. The Protocol is also inspired by the February Abidjan 2015 Declaration of Ministers of ECOWAS States in which they undertook “to prevent and reduce statelessness by reforming constitutional, legislative and institutional regimes related to nationality” and “call[ed] on the African Union to prepare and adopt a Protocol to the African Charter on Human and Peoples’ Rights on the Right to Nationality.”
6. The preamble refers to the existing commitments of African States to the right to a nationality as enshrined in African and international instruments, and reaffirms resolutions and decisions of the African Commission on Human and Peoples’ Rights and of the African Committee of Experts on the Rights and Welfare of the Child that the right to nationality is a fundamental condition for the enjoyment and protection of the full range of other human rights. It therefore confirms that statelessness is a violation of the right to human dignity and to legal status established by Article 5 of the African Charter on Human and Peoples’ Rights.
7. Finally, the Preamble notes that the history of the African continent and the initial establishment of borders by colonial powers, have given questions of nationality and statelessness particular characteristics in our States that are not addressed by the existing African and international treaties. Many of the most longstanding populations affected by statelessness are indeed descendants of people who moved – or who were forcibly moved – from one part of Africa to another during the colonial period, or belonging to ethnic groups whose traditional territory is divided among one or more contemporary States. Statelessness and questions related to the right of such populations to the nationality of the State where they live have been at the heart of a number of conflicts within and between African countries. The resolution of the situation of these populations and the guarantee of the right to a nationality thus requires action by States, acting both alone and collectively within the framework of the African Union.
8. The African Commission has considered the following sources, in addition to its study on *The Right to Nationality in Africa*, in the preparation of this draft Protocol:

9. *African treaties*

- Constitutive Act of the African Union, 2000 and the Protocol on the Amendment of the Constitutive Act, 2003
- Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
- African Charter on Human and Peoples’ Rights, 1981
- African Charter on the Rights and Welfare of the Child (ACRWC), 1990

- Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003
- Convention on the Protection and Assistance of Internally Displaced Persons in Africa, 2009

10. Declarations and other non-treaty documents of the AU

- Migration Policy Framework for Africa, EX.CL/276(IX), June 2006
- Declaration on the African Union Border Programme and its Implementation Modalities BP/MIN/Decl.(II), June 2007
- Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities, 2010
- 50th Anniversary Solemn Declaration adopted by the 21st Ordinary session of the Assembly of Heads of State and Government of the African Union, Addis Ababa, 26 May 2013
- The Agenda 2063 Framework Document, 2014

11. Jurisprudence and commentary of the AU human rights bodies

- Decisions of the African Commission on Human and Peoples' Rights
- Decisions of the African Committee of Experts on the Rights and Welfare of the Child
- Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 2007
- General Comment No.2 of the African Committee of Experts on Article 6 of the African Charter on the Rights and Welfare of the Child, 2014

12. African regional treaties and other documents

- ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment, 1979, and its supplementary protocols
- ECOWAS Protocol on the Definition of Community Citizen, 1982
- Abidjan Declaration of Ministers of ECOWAS on the Eradication of Statelessness, February 2015
- SADC Protocol on Facilitation of Movement of Persons, 2005
- EAC Protocol on the Establishment of the East African Community Common Market, 2009, and its annexes
- Pact on Security, Stability and Development in the Great Lakes Region, 2006, and its protocols

13. International treaties

- Charter of the United Nations, 1945
- Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930
- Convention Relating to the Status of Refugees, 1951
- Convention Relating to the Status of Stateless Persons, 1954
- Convention on the Reduction of Statelessness, 1961
- Vienna Convention on Diplomatic Relations, 1961
- Vienna Convention on Consular Relations, 1963

- Optional Protocol Concerning Acquisition of Nationality to both the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963)
- International Covenant on Civil and Political Rights, 1966
- Vienna Convention on the Law of Treaties, 1969
- Convention on the Elimination of All Forms of Racial Discrimination, 1966
- Convention on the Elimination of All Forms of Discrimination Against Women, 1979
- Convention on the Rights of the Child, 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- Convention on the Rights of Persons with Disabilities, 2006

14. Declarations and other non-treaty documents of the UN

- Universal Declaration of Human Rights, 1948
- Declaration of the Rights of the Child, 1959
- Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 1970
- International Law Commission (ILC) Draft Articles on Nationality of Natural Persons in relation to the Succession of States, 1999
- ILC Draft Articles on Diplomatic Protection, 2006
- The Concept of Stateless Persons under International Law (The “Prato Conclusions”), UNHCR, 2010
- Statelessness Determination Procedures and the Status of Stateless Persons (The “Geneva Conclusions”), UNHCR, 2010
- Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children (The “Dakar Conclusions”), UNHCR, 2010
- Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality (The “Tunis Conclusions”), UNHCR, 2013
- Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, UNHCR, 2012
- Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, UNHCR, 2012
- Guidelines on Statelessness No.3: The Status of Stateless Persons at the National Level, UNHCR, 2012
- Guidelines on Statelessness No.4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, UNHCR 2012
- General Comments and jurisprudence of the UN treaty bodies relating to the interpretation of particular human rights treaties
- Resolutions of the UN Human Rights Council and Reports of the UN Secretary General on Human Rights and Arbitrary Deprivation of Nationality

15. Other regional systems

- Inter-American Convention on Human Rights, 1969
- Council of Europe Recommendation on Stateless Nomads and Nomads of Undetermined Nationality, 1983

- European Convention on Nationality (ECN), 1997
- International Commission on Civil Status Convention on the Issue of a Certificate of Nationality, 1999
- Arab Charter on Human Rights, 2004
- Covenant on the Rights of the Child in Islam, 2005
- European Convention on the Avoidance of Statelessness in Relation to State Succession, 2006
- OSCE High Commissioner on National Minorities Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, 2008
- Council of Europe Recommendation on the Nationality of Children, and explanatory memorandum, 2009
- Jurisprudence of relevant oversight bodies in other regional systems

ARTICLE 1. Definitions

16. Most AU treaties do not include definitions. However, given the highly technical nature of international conventions and national laws on nationality, as well as the different language used in different legal traditions, definitions have been included in this Protocol to aid States and the courts in the interpretation of the text. The definitions are mostly self-explanatory, but the following notes are provided for guidance on some less familiar terms:

“Appropriate connection” : This term for the link between a person and a State that can form the basis for the grant or recognition of nationality is derived from the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States. The term is used throughout the Draft Articles, and discussed in particular in the commentary provided by the ILC, especially at paragraphs 9 and 10 of the commentary on Article 11, as follows:

[...] The Commission chooses to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression “appropriate connection”, which should be interpreted in a broader sense than the notion of “genuine link”. The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.

The core meaning of the term “appropriate connection” in a particular case is spelled out in Part II, where the criteria, such as habitual residence, appropriate legal connection with one of the constituent units of the predecessor State, or the birth in the territory which is a part of a State concerned, are used in order to define categories of persons entitled to the nationality of the State concerned. However, in the absence of the above-mentioned type of link between a person concerned and a State concerned 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 a part of a State concerned, should be taken into consideration.

“Arbitrary”: The definition does not attempt to provide a comprehensive listing of all the factors that must be present to render a decision arbitrary, but rather refers to the African Charter itself, and the jurisprudence of the African Commission and the African

Court, to which States should refer for guidance. The African Charter establishes detailed provisions on non-discrimination and respect for the rule of law, which have been the subject of extensive jurisprudence from the African Commission on Human and Peoples' Rights. The Commission also clarified their content through the adoption in 2003 of the Principles and Guidelines on the Right to Fair Trial and Legal Aid in Africa. Also relevant is the guidance on due process given in the Tunis Conclusions on loss and deprivation of nationality, adopted by experts meeting at the initiative of UNHCR in 2013.

“Deprivation” and **“loss”** of nationality: The 1961 Convention on the Reduction of Statelessness uses the expression “loss of nationality” (*“perte de la nationalité”* in French) to describe withdrawal of nationality which is automatic, by operation of law, and the expression “deprivation of nationality” (*“privation”* in French) to describe situations where the withdrawal is initiated by the authorities of the State.

“Habitual Residence”: This definition attempts to provide some broad guidance on the interpretation of habitual residence and is based on the UNHCR Guidelines on Statelessness No.4, in which it is stated that “The term ‘habitual residence’ is to be understood as stable, factual residence... [and] does not imply a legal or formal residence requirement” (para.41). Other treaties have not provided such a definition. Although the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States use habitual residence throughout as the default basis for conferral of nationality, they do not provide a definition of the term. Similarly, while “habitual residence” is used in various contexts in European Union law, in the Council of Europe system, and in the laws of many European countries, there is no European treaty definition of the term. Nonetheless, in the context of marriage, divorce and parental responsibility, the EU Court of Justice has established a definition of the meaning of habitual residence as “the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence” (Explanatory Report to EU Council of Ministers Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (known as “Brussels II”) prepared by Dr. Alegría Borrás, para 32).

“Nationality”: This is the definition in international law. In order to facilitate translation and understanding across the continent the term nationality (*nationalité*) is used throughout this draft Protocol in both the English and French versions. It should be understood as synonymous with “citizenship”, the term most commonly used in national laws in Commonwealth countries. “National” shall be understood accordingly, and is used where “citizen” or *“ressortissant”* is often used in English or French texts, again to promote mutual understanding of the text. The language clarifying that nationality shall not be understood as a reference to ethnic or racial origin is included for the avoidance of doubt, given common misunderstandings of the concept, and is based on similar language included in the European Convention on Nationality, 1997.

“Parent” : This definition is included in order to take account not only of adoption but also of means of assisted reproduction, and draws on the language of principle 12 of the 2009 Council of Europe Recommendation on the Nationality of Children, which requires States to “apply to children their provisions on acquisition of nationality by right of blood

if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law”.

“Stateless person” : This definition is taken from the Convention relating to the Status of Stateless Persons, 1954, article 1(1), but expanded with the words “including a person who is unable to establish a nationality”, in order to take account of the specific situations of statelessness that arise in Africa. The clarification draws on the discussion in UNHCR’s *Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, in which it is stated in paragraphs 16 and 17 that :

Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law.... The reference to “law” in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.

“State succession”: the definition is taken from Article 2(a) of the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States (see also commentary on Article 20 of the Protocol).

ARTICLE 2. Object and Purpose of this Protocol

17. This Article establishes the object and purpose of the Protocol to guide interpretation of the remaining articles, in line with the provisions of the Vienna Convention on the Law of Treaties.

ARTICLE 3. General Principles

18. These principles are derived from the general principles of international and African law relating to the right to a nationality including the sources mentioned above.

19. The idea of including general principles is to update, make more precise and modify for the African context the statement of general principles included in the 1997 European Convention on Nationality (ECN). Article 4 of the ECN states:

The rules on nationality of each State Party shall be based on the following principles:

- a. everyone has the right to a nationality;*
- b. statelessness shall be avoided;*
- c. no one shall be arbitrarily deprived of his or her nationality;*
- d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.*

20. However, these general principles do not indicate to which nationality a person should have a right, and therefore do not clarify the means by which statelessness should be avoided.

21. Article 3(1) is based on Article 1 of the first international agreement on nationality, the Convention on Certain Questions Relating to the Conflict of Nationality Laws, adopted by the League of Nations in The Hague in 1930, which provides that

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

22. Article 3(2)(a) and (b) are drawn from the Universal Declaration on Human Rights, Article 15, which states:

(1) Everyone has the right to a nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

23. Article 15 of the Universal Declaration refers to arbitrary deprivation of nationality and makes no mention of loss or non-recognition of nationality. However, resolutions of the UN Human Rights Council and the reports of the UN Secretary General to the Council on arbitrary deprivation of nationality clearly establish that “deprivation” in the UDHR also includes arbitrary loss of nationality by operation of law or arbitrary non-recognition of nationality.

24. Article 3(2)(c) is innovative, and draws on a range of international instruments that endorse the right to a nationality and the imperative of eradicating statelessness. It responds, again, to the specific context of statelessness in Africa, where the nationality of many people is uncertain or unconfirmed. While the African Charter on the Rights and Welfare of the Child provides in Article 6 (4) that:

States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

However, this provision may not be sufficient to eradicate statelessness in all cases.

25. The concept of appropriate connection is derived, as noted above, from the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States, and this sub-article draws on the principles established in the Draft Articles, given that many of the challenges of statelessness in Africa date back to the succession of States from the colonial powers to independence. It is designed to ensure that African States take appropriate steps to ensure that persons have recognition of the nationality at least one of the States where they have an appropriate connection.

26. Article 3(2)(d): Both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child place the best interests of the child as the foundation of their other provisions. Article 4(1) of the African Charter on the Rights and Welfare of the Child states that:

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

Since the acquisition of nationality by children is fundamental to the eradication of statelessness, this principle is included here.

ARTICLE 4. Non-Discrimination

27. Non-discrimination is a foundational principle of the international and African human rights system, and non-discrimination in relation to the grant of nationality is specifically mentioned by the International Convention on the Elimination of all Forms of Racial Discrimination, the International Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities. The list of prohibited grounds here is taken from Article 2 of the African Charter on Human and Peoples' Rights, with the addition of discrimination on the basis of disability, and recognition that some forms of discrimination are specifically permitted in the context of nationality.

28. Given the principle of equality of the sexes that is recognised across all parts of the African treaty system, Article 4(2) is included in light of the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which states in its Article 6 (on marriage) that:

g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

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

29. The non-discrimination rule established in Article 4, and reflected also in Article 5 and 9 of this Protocol, thus applies equally to the rights of women to transmit their nationality to their spouse and children. The language is based on that contained in Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women.

30. Article 4(3) provides limited exceptions to a general principle of non-discrimination in relation to types of nationality, to accommodate the laws of some African States that specifically exclude dual nationals or naturalised citizens from the highest public offices and that provide for different rules on loss and deprivation of nationality for people attributed nationality at birth and those who have acquired it later.

31. The sub-article provides for a procedure by which States that already have such provisions at the time of ratification or accession to the treaty may retain the distinctions if they make a declaration at that time; this is inspired by Article 8(3) of the Convention on the Reduction of Statelessness which provides a similar procedure in the case of provisions relating to loss and deprivation. However, it should be noted that the European Convention on Nationality does not permit such discrimination, stating that:

Article 5(2): Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

Article 17(1): Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.

ARTICLE 5. Attribution of Nationality at Birth

32. Attribution of nationality at birth is used here as an expression that can establish a common understanding between the civil law and the common law countries, with their different legal systems and vocabulary surrounding nationality law. It means simply that the State must recognise that certain persons have their nationality as from the moment of birth (or, in some cases, the retroactive recognition of nationality from that moment). This nationality may be derived either from birth in the territory or from the fact that one or other parent is a national. In the civil law countries this concept is usually termed “nationality of origin” (*nationalité d’origine* in French), but *nationalité d’origine* has a specific legal definition in each State that is not necessarily consistent across States. Using the phrase “attribution of nationality at birth” therefore provides a more transparent meaning for the article. In the common law countries, “citizenship by birth” is often used for this concept, but creates a confusion with the idea of *jus soli* nationality based on birth in the territory, and so attribution of nationality at birth is also clearer in meaning.
33. The provisions in Article 5 provide for the minimum categories of people who must be attributed nationality at birth (Article 5(1)) or whose nationality at birth must be retroactively recognised at a later date (Article 5(2)), and do not preclude States making more generous provisions. These provisions are, indeed, already reflected in the content of many African and other national laws in relation to nationality.
34. Article 5(1): The International Covenant on Civil and Political Rights (Art. 24(3)), the International Convention on the Rights of the Child (Art. 7(1)) and the African Charter on the Rights and Welfare of the Child (Art.6(3)) provide for the right of a child to acquire a nationality. In its General Comment No.2 on Article 6 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts states that:

the clear recognition of nationality from the moment of birth is the best guarantee that nationality of the adult will also be recognised; and also because children may have their other rights restricted if they are not regarded as nationals, in particular in relation to their access to education, health care and other social services” (para 85).

Hence, the language in this Article provides for attribution of nationality by operation of law to certain children from the moment of birth, not for acquisition of nationality at a later date.

35. Article 5(1)(a): This provision reflects the situation in most African countries that the primary grounds for attribution of nationality at birth is based on the nationality of a parent (*jus sanguinis*). In most cases, there are now equal rights for men and women, for parents who are nationals from birth or by acquisition, and for a child born in or outside the territory of that State. The sub-article draws on Article 6(1)(a) of the European Convention on Nationality to allow for restrictions on transmission of nationality for children born abroad, as provided in a number of African countries; except that a national born in the country must have the right to transmit nationality to a child born outside, and

that a child born to a national outside the country must acquire nationality automatically if he or she would otherwise be stateless.

36. Article 5(1)(b) is innovative in international law, and draws on the common provision in many African states known as double *jus soli*: that is, for automatic attribution of nationality based on birth in the territory of one parent also born there. In the African context, this is perhaps the surest way of reducing the long-term populations of persons who are stateless or whose nationality is in doubt. In its General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts

encourages States Parties to adopt legal provisions – already in place in many African States – that a child born in the State with one parent (either mother or father) also born in the State acquires the nationality of that State at birth (para.92).

37. Article 5(1)(c) also draws on Article 6(4) of the ACRWC, which states that :

States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

38. This provision also reflects Article 1 of the Convention on the Reduction of Statelessness, which provides that:

A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.

39. Article 5(1)(c) clarifies that the protection against statelessness must be provided in all circumstances in which a child does not acquire nationality of one of its parents. A provision for attribution of nationality if the parents are stateless, as included in many African laws, is not enough to satisfy these existing treaty obligations, since in some cases a parent may not be able to transmit nationality even if he or she in fact is a national of another country (for example, for reasons of gender discrimination). Moreover, if the nationality of the parent is in doubt and cannot be established after reasonable efforts even if it would appear that the parent may be entitled to another nationality, the child will clearly not be able to obtain recognition of that nationality and so should obtain the nationality of the State where he or she is born. Finally, even if the nationality of the parents is known, they may be unable to transmit their nationality to their child, for various reasons.

40. Article 5(2) requires States to attribute nationality at birth retroactively in case of certain classes of people who have a particular connection to that state. In this, it goes beyond the European Convention on Nationality, which provides for facilitation of acquisition by some of these categories of person. The reason why this Article creates a different framework is because the European Convention forbids discrimination among different categories of national; whereas the proposed text of Article 4(3), recognising the common practice in the continent, permits African States to restrict some political rights for those who acquire nationality after birth or to provide for nationality by acquisition to be withdrawn more easily, so long as a declaration is made to this effect when the State becomes party to the Protocol. Since this is the case, the Protocol requires States to

provide retroactive recognition of nationality at birth for certain categories of person, rather than including these categories under Article 6(3) requiring states to facilitate acquisition of nationality. Moreover, while most African laws provide for children of unknown parents to have the right to retroactive attribution of nationality at birth (*nationalité d'origine*), this is often not the case for adopted children, and many provide no rights at all for children who are born and remain resident in the country; a substantial minority do not even provide for children of unknown parents. These gaps in the law leave those affected at great risk of statelessness.

41. Article 5(2)(a): Protection for children of unknown parents in international law dates back to the Hague Convention of 1930, which states (Art. 14):

A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known. A foundling is, until the contrary is proved, presumed to have been born in the territory of the State in which it was found.

42. The Convention on the Reduction of Statelessness (Art.2) provides that

A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

43. The laws of some African countries restrict the presumption of nationality for children of unknown parents to new born infants. However, many children of unknown parents are found at more advanced ages; thus any child who is too young to identify his or her parents should be included within the ambit of this provision. See the UNHCR Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, paragraphs 57-61; and the African Committee of Experts General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, paragraph 96.

44. Article 5(2)(b) provides for children born in the territory who remain resident there until majority to be retroactively recognised as having been attributed nationality at birth, either by option or by operation of law. In fact, many African countries provide for such rights already. This is especially in the case of those countries in the civil law tradition, but also several Commonwealth countries. The General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child makes clear that ideally such recognition should be before majority, while the child is still a child; but recognition at majority should be the minimum requirement.

45. Article 5(2)(c) ensures that adopted children are treated as biological children for nationality purposes. This provision relates to children who have been formally and fully adopted by the legal processes of the State concerned. The Council of Europe Recommendation on the Nationality of Children recognises a difference between two categories of adoption: where the adoptive family replaces the birth family; and where children retain links to their birth family. The retroactive attribution of nationality at birth at the time of adoption for fully adopted children where the original parental link is replaced(rather than providing the right to acquire nationality), is particularly important

in those countries where naturalised persons have fewer political rights and where nationality by acquisition is more easily taken away (see also commentary above and on Article 6(3)(c)).

46. Principles 13-16 of the Recommendation on the Nationality of Children provide that States should:

13. subject the granting of their nationality to children adopted by a national to no other exceptions than those generally applicable to the acquisition of their nationality by right of blood, if as a consequence of the adoption the family relationship between the child and the parent(s) of origin is completely replaced by the family relationship between the child and the adopter(s);

14. facilitate the acquisition of their nationality by children adopted by a national in the case of an adoption in which the family relationship between the child and the parent(s) of origin is not completely replaced by the family relationship between the child and the adopter(s);

15. provide that revocation or annulment of an adoption will not cause the permanent loss of the nationality acquired by the adoption, if the child is lawfully and habitually resident on their territory for a period of more than five years;

16. provide that foreign children lawfully residing on their territory with a view to adoption have the right to file applications for the acquisition of their nationality if the adoption is not finalised. States should not in this case require a period of more than five years of habitual residence on their territory;

ARTICLE 6. Acquisition of Nationality

47. This article provides both for acquisition of nationality through naturalisation on the basis of long term residence in a State and also for facilitated acquisition of nationality by other categories of person. The phrase nationality by acquisition is used rather than nationality by naturalisation, to avoid confusion caused by the range of different terms used at national level in African countries and to cover acquisition on the basis of a non-discretionary process such as is available in many countries to the spouse of a national.

48. The duty to “facilitate” acquisition of nationality is a term used in other international treaties that involves at least making such acquisition significantly easier than for foreigners generally, for example by reaching out to communities known to be lacking documentation of nationality, by providing a non-discretionary process of acquisition, such as those known in different countries as declaration, registration or option, or by reducing the period of residence required.

49. Article 6(1) provides that naturalisation shall in principle be open to foreigners on the basis of habitual residence, though other reasonable conditions may also be applied. The maximum period of 10 years is based on the example of the European Convention on Nationality, article 6(3). The most common provision of national laws in African States is to require five years of residence, and very few provide for a period of longer than ten years.

50. Article 6(): These provisions require States to facilitate the acquisition of nationality by different categories of persons if they are not attributed nationality at birth.
51. Article 6(2)(a): It is important that where a person is naturalised his or her children acquire nationality as part of the same process of naturalisation, rather than requiring a separate application. The laws of a number of African countries place the children of naturalised persons at risk of statelessness in this way.
52. Article 6(2)(b) and (d): In its General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts noted that
- A number of African States provide for a child born in the territory of parents who are lawfully and habitually resident there to acquire nationality at birth, and the Committee regards this as best practice. Further, the Committee encourages African States to facilitate the acquisition of nationality by children who were not born in their territory but who arrived there as children and have been resident there for a substantial portion of their childhood” (para.92).*
53. These provisions also draw on Article 6(4)(e) and (f) of the ECN, which provides for facilitated acquisition of nationality by persons born in a territory to parents who are habitual residents and by those who are resident during childhood; and on the Council of Europe Recommendation on the Nationality of Children (paragraph 17), which recommends that States shall:
- facilitate the acquisition of nationality, before the age of majority, by children born on their territory to a foreign parent lawfully and habitually residing there[...].*
54. Article 6(2)(c) This provision on children in the care of a national recognises that the nature of the extended family in Africa means that many children are cared for within families that are not headed by their birth parents, while still retaining a connection to one or both of their birth parents. The recognition of the role of foster parents may be particularly important in the case of children who have become separated from their birth parents through conflict. It draws also on the distinctions between different types of adoption noted in the Council of Europe Recommendation on the Nationality of Children quoted in the notes on Article 5(2)(c) above.
55. Article 6(2)(e): The vast majority of African countries already provide for easier acquisition of nationality by the spouse of a national. A minority of African countries still discriminate between men and women in this regard, but the principles of non-discrimination in the African Charter and in the Convention on the Elimination of All Forms of Discrimination Against Women make clear that transmission of nationality in marriage should be on an equal basis (see also commentary on Articles 4(2) and 9).
56. Article 6(2)(f) and (g): On stateless persons and refugees, note Article 32 of the Convention relating to the Status of Refugees (1951) and Article 34 of the Convention Relating to the Status of Stateless Persons (1954), which provide that states shall “as far as possible” facilitate the naturalisation of refugees and stateless persons.
57. Article 6(3) is necessary to avoid the risk of statelessness in cases where renunciation of another nationality is required to obtain the nationality of a State, in line with the Convention on the Reduction of Statelessness, as well as other regional treaties. The language used here draws in particular on the ECN Art.16, which states that:

A State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.

58. The text of Article 6(4) draws on the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations adopted in June 2008 by the OSCE High Commissioner on National Minorities (recommendation 11). It is aimed at avoiding the mass grant of nationality to persons in circumstances where the State may be suspected of having motives that are not compatible with the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

ARTICLE 7. Habitual residence

59. Provisions relating to nationality often depend on the concept of habitual residence. In addition to providing the definition included in Article 2, the Protocol therefore provides some guidance to States on the interpretation of this concept.

60. It also draws on the UN Conventions relating to the Status of Refugees and the Status of Stateless Persons, which require States to facilitate naturalisation of refugees (Article 34, Convention relating to the Status of Refugees, 1951) and stateless persons (Article 32, Convention relating to the Status of Stateless Persons, 1954).

61. Article 7(1): Most African States require proof of lawful residence as the basis for an application for naturalisation. While this requirement is permissible in international law, it should not apply in the case of stateless persons. A stateless person includes a person who, as provided in the definition in Article 2, cannot establish a nationality in another State. Without documents from another State, a person can not even regularise their residence. The sub-article thus addresses the common requirement in African States for a person who applies for naturalisation to provide proof of their original nationality; whereas many of those who most require access to naturalisation have no proof of another nationality and so naturalisation is not accessible to them and they are left stateless.

62. Article 7(2): A requirement that residence must be lawful should not be applied in such a way as to exclude on a permanent basis anyone who has at any time been present in the State without proper documentation. Article 7(2)(a) therefore provides that a State should take into consideration residence already completed before a person's status is regularised towards their period of habitual residence. Article 7(2)(b) also proposes that States should recognise periods of residence as a refugee, including periods during which an application was processed. Since a person who is stateless is included in 7(1), the situation of a recognised stateless person is not mentioned again here.

ARTICLE 8. Nomadic and Cross-border Populations

63. This language is an innovation for this Protocol, and is one way in which the Protocol recognises the specific aspects of nationality and statelessness in an African context, where many millions of people follow a nomadic lifestyle, or live in communities divided by a colonial border. The AU Policy Framework for Pastoralism in Africa estimates that the pastoralist population in Africa is 268 million – many (though not all) of whom are also nomadic. This policy document and similar documents adopted within the ECOWAS

and COMESA regions aim, among other things, to assist the management of cross-border transhumance, but they are focused on the documentation of the animals rather than the people concerned.

64. Article 8 therefore attempts to provide guidance to African States on the eradication of statelessness among such groups.
65. The Recommendation of the Council of Europe Committee of Ministers to Member States on Stateless Nomads and Nomads of Undetermined Nationality, adopted on 22 February 1983 (R(83)1), is the only previous international effort to accommodate those with a nomadic lifestyle in nationality matters. It states:

Principle 3:

Within the limits of its legislation on entry and stay of aliens in its territory, each state should take, as far as necessary, appropriate steps to facilitate in relation to stateless nomads or nomads of undetermined nationality the establishment of a link with the state concerned. For the establishment of such a link, one or more of the following criteria could in particular be taken into consideration:

- a. the state concerned is the state of birth or origin of the nomad or the state of origin of his immediate family;*
- b. habitual residence of frequent periods of residence of the nomad in the state concerned provided that the residence in question is not unlawful;*
- c. the presence in the state concerned of members of the nomad's immediate family lawfully staying in that state or possessing its nationality.*

ARTICLE 9. Marriage

66. There are a number of historical treaties containing provisions on nationality and marriage (including the 1957 Convention on the Nationality of Married Women), that assumed that a woman's nationality would change on marriage and aimed at avoiding conflicts of laws. These have now been superseded by the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
67. Most African states provide for spouses of nationals to have easier access to nationality than other foreigners. While some continue to discriminate on the basis of sex in providing nationality to spouses, the majority of African laws now provide for equal rights to men and women. Article 9 of CEDAW provides that:

1. States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States parties shall grant women equal rights with men with respect to the nationality of their children.

68. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides in its Article 6 only that

g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;

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

69. These provisions should be interpreted in light of the overall prohibition on discrimination on the grounds of sex contained in Article 2 of the African Charter itself (see also commentary on Articles 4 and 6(3)(e) of this Protocol).
70. Article 9 of the Protocol thus aims principally to supplement the provisions of the Protocol on the Rights of Women in Africa.

ARTICLE 10. Rights of Children

71. The provisions of this Article are drawn from the UN Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child, with additional provisions designed to reflect the African experience.
72. Article 10(1): This provision places the obligation on States to eradicate statelessness by ensuring that a child is, wherever possible, attributed a nationality at birth rather than acquiring one at a later date; and also that the child's birth is registered, providing evidence of the facts on which his or her claim to nationality is based.
73. Comprehensive guidance on the obligations in relation to birth registration is given by the African Committee of Experts General Comment on Article 6 of the ACRWC, especially paragraph 50 :

The Committee is of the view that the universality of birth registration must be understood in the context of universality of all other human rights to mean that human rights belong to all human beings, anywhere and anytime. Similarly, the right to birth registration is for all the children, anywhere and anytime. Article 6 (2) of the Charter uses the term "every child". It must be afforded to all children without discrimination, as a result of a birth occurring on a state's territory. Children born to foreigners, asylum seekers, refugees and undocumented immigrants qualify equally for birth registration in the same way as those born to citizens.

74. The Council of Europe Recommendation on Nationality of Children also specifies that this principle applies equally to nationals and non-nationals, requiring states to:

23. register the birth of all children born on their territory, even if they are born to a foreign parent with an irregular immigration status or if the parents are unknown, in order to safeguard their right to a nationality. The registration of birth should be free of charge and be performed without delay, even if the period within which the birth should have been declared has already expired.

75. Article 10(2): General Comment No. 17 on the Rights of the Child (Art. 24), adopted by the UN Human Rights Committee in 1989 clarifies that the general prohibition on non-discrimination also applies to discrimination on the basis of birth in or out of wedlock (para. 5). In the important case of *Genovese v. Malta*, the European Court of Human Rights ruled in 2011 that a Maltese nationality law that distinguished between children

born in and out of wedlock was discriminatory (founding its decision on the right to respect for private life under Article 8 of the European Convention on Human Rights).

76. Article 10(3) is drawn from Article 4(2) of the African Charter on the Rights and Welfare of the Child, which states that:

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

ARTICLE 11. Multiple Nationality

77. There is a strong trend in international law towards acceptance or even welcoming of dual nationality; this trend is also true in Africa, where a substantial majority of countries now allow dual nationality for their citizens. The ending of a prohibition of dual nationality is also favoured by the decisions of the African Union recognising the diaspora as the “sixth region” of the continent. Article 3(q) of the Protocol on Amendments to the Constitutive Act of the African Union states that the objectives of the AU shall include to

invite and encourage the full participation of the African Diaspora as an important part of our Continent, in the building of the African Union.

78. This objective is also reflected in the Declaration of the Global African Diaspora summit, South Africa, 28 May 2012, in the Declaration adopted by the Assembly of the AU on the 50th anniversary of the creation of the OAU and in the Agenda 2063 Framework Document. Nonetheless, international law has not yet accepted the concept that the ability to hold multiple nationalities is a right. The European Convention on Nationality notes, in its preamble:

[T]he varied approach of States to the question of multiple nationality and [...] that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality.

79. Article 11(2): The provisions here place restrictions on States’ right to restrict multiple nationality and are already included in the laws of many African States that do not allow dual nationality for adults. They draw on the terms of Article 14 of the ECN, which provides that :

1. A State Party shall allow:

- a. children having different nationalities acquired automatically at birth to retain these nationalities;*
- b. its nationals to possess another nationality where this other nationality is automatically acquired by marriage.*

80. Article 11(3) is drafted to prevent the risk of statelessness for persons who were not aware that they had the right to claim any other nationality or the responsibility to opt for one or another nationality at the age of majority. It requires States to allow a reasonable time for such an option to be exercised and to make exceptions where reasonably required. While the exceptions are not enumerated, a State should permit a person to argue that he or she

could not be reasonably expected to know of the requirement to make a declaration or to present the reasons why it could not be made. This is innovative language, but addresses a problem that is confronted globally and not only in Africa.

ARTICLE 12. Evidence of Entitlement to Nationality

81. Several African treaties note the importance of civil registration and identification systems, and the African Union has in recent years held a number of Ministerial Conferences on Civil Registration and Vital Statistics. The second conference, held in South Africa in September 2012, adopted a statement committing African States to improve their registration systems, and in particular to:

Formulate laws and policies that ensure timely and compulsory registration of all vital events occurring within our countries, with guarantees of equal access to the system for all persons, regardless of nationality or legal status. In this regard, we commit to continue our efforts in revising and updating civil registration and statistical legislation in our respective countries in line with regional and international guidelines and taking into account the evolving needs and innovations.

82. The third ministerial conference in this series, held in Yamoussoukro, Côte d'Ivoire, in February 2015, resolved to:

Pursue actively the ideal of "leaving no country behind" and "leaving no one out" especially the vulnerable including the refugees, Internally Displaced Person (IDP) and stateless people as well as implement the General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child".

83. As already noted, the African Committee of Experts' General Comment on Article 6 of the ACRWC provides extensive guidance on birth registration.

84. It is important, in light of the weakness of many African civil registration systems, that evidence of nationality other than civil registration documents be accepted in procedures for the recognition or grant of nationality. Article 12(2) therefore provides for alternative forms of evidence to be accepted where civil registration records are not available. This concept is captured particularly in those civil law countries that provide for recognition of nationality on the basis of *possession d'état de national*, that is on the basis of evidence that a person has always been treated as a national.

ARTICLE 13. Documentation of Nationality

85. Article 13(1) aims to ensure that in every African State there is a document that forms conclusive proof of nationality. The Convention on the Issue of a Certificate of Nationality, adopted in 1999 by the International Commission on Civil Status (an intergovernmental organization founded in Europe but open to any State Party to the ICCPR), provides guidance on the issue of certificates of nationality by the relevant nationality authorities, within a reasonable time on application by the person concerned, and which shall be accepted as correct unless the contrary is proved. Many African States in the civil law tradition already provide for such a system through the tribunals; however, in some countries either there is no such procedure, or it is entirely within the control of the administrative authorities and not easily accessible.

86. Article 13(2) provides that a State has in the first instance no discretion in the issue of identity documents or passports to a person who is a national; while Article 13(3) provides for due process protections in cases where withdrawal of a document may be justified.

87. The UN Human Rights Committee in its General Comment 27, on freedom of movement, notes that:

Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents.

88. The Convention on the Protection and Assistance of Internally Displaced Persons in Africa provides in its Article 13 on Registration and Personal Documentation that:

(2) States Parties shall ensure that internally displaced persons shall be issued with relevant documents necessary for the enjoyment and exercise of their rights, such as passports, personal identification documents, civil certificates, birth certificates and marriage certificates.

(3) States Parties shall facilitate the issuance of new documents or the replacement of documents lost or destroyed in the course of displacement, without imposing unreasonable conditions, such as requiring return to one's area of habitual residence in order to obtain these or other required documents. The failure to issue internally displaced persons with such documents shall not in any way impair the exercise or enjoyment of their human rights.

(4) Women and men as well as separated and unaccompanied children shall have equal rights to obtain such necessary identity documents and shall have the right to have such documentation issued in their own names.

89. Article 13(4) provides that, even where an identity document which records nationality is not conclusive proof of nationality, the possession of such a document places the burden of proof on the person challenging the person's status as a national to show that this is not the case. In some cases, for example for refugees, the burden of proof is reversed even if such a document has expired or otherwise appears to be no longer valid.

ARTICLE 14. Diplomatic and Consular Protection

90. This article is designed to ensure that African citizens receive appropriate protection from their States of nationality when they are resident in another country, as provided under the Vienna Conventions on Diplomatic Relations, 1961, and on Consular Relations, 1963.

91. Article 14(2) provides for agreements among African States to provide reciprocal assistance to nationals of the other State.

ARTICLE 15. Renunciation of Nationality

92. The provisions in this Article reflect general principles of international law on the right of any person to change their nationality and on the prevention of statelessness. These principles are already respected in the laws of most African countries, though some States do not have such a provision, and thus do not allow a person to change nationality, or do not provide explicit protections against statelessness by not permitting a person to

renounce nationality if they would therefore become stateless (that is, they do not require the State to verify that the person has another nationality before permitting renunciation).

ARTICLE 16. Loss or deprivation of nationality

93. These provisions are designed to prevent statelessness, and reflect the terms of the 1961 Convention on the Reduction of Statelessness as well as more recent developments in international law that strengthen its protections, especially in the European system. They also reflect the decisions of the African Commission on Human and Peoples' Rights in relation to cases of deprivation of nationality, based on the right to nationality as essential to respect for a person's dignity (Article 5 of the African Charter) and family life (Article 18), as well as the protections in relation to due process and non-discrimination (Articles 2, 3 and 7).
94. Article 16(1), stating that a person may not lose nationality by operation of law, is an important protection against the common situation where a person finds that it is alleged that he or she has lost nationality — for example because he or she has retained another at majority — without any decision or act being taken by the person concerned or by the competent authorities. Nationality is such an important legal status that it should not be lost except by a deliberate decision, either by the person concerned or by the State.
95. Article 16(2) permits, nonetheless, deprivation of nationality in case of retention or acquisition of another in those States where multiple nationality is not allowed. It ensures that where a person acquires another nationality or is attributed more than one nationality at birth a State may only provide for deprivation of nationality and not for automatic loss. Such deprivation shall of course be subject to the due process protections provided in Articles 16(5) and 21.
96. Article 16(3) permits a State to deprive a person of nationality where recognition or acquisition of nationality has been based on fraud or misrepresentation, but provides limits on the circumstances in which deprivation may take place. These are based on UNHCR's Tunis Conclusions on Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality.
97. Article 16(4) provides an exhaustive list of grounds for deprivation of nationality (by acquisition only), and draws on the lists of such grounds established in Article 8 of the Convention on the Reduction of Statelessness and ECN Article 7(1).
98. Article 16(5) emphasises the general prohibitions on arbitrary decision-making and discrimination in the African Charter and draws on Article 9 of the Convention on the Reduction of Statelessness.
99. Article 16(6) strengthens the protection provided in Article 6 of the 1961 Convention, which allows for loss of nationality by a person's spouse or children, conditional upon their possession or acquisition of another nationality and in Article 7(2) of the ECN, which also allows deprivation of the nationality of children whose parents lose nationality in some cases. See the African Committee of Experts General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, paragraph 98.
100. Finally, Article 16(7) restates the general prohibition on avoiding the creation of statelessness that is recognised in many international treaties.

ARTICLE 17. Recovery of nationality

101. This provision requires States Parties to provide in general for the possibility for a national to recover nationality, and to make such recovery non-discretionary in certain circumstances, including where a former national is now stateless. The ECN provides that:

Each State Party shall facilitate, in the cases and under the conditions provided for by its internal law, the recovery of its nationality by former nationals who are lawfully and habitually resident on its territory.

102. Recommendation 22 of the Council of Europe Recommendations on Nationality of Children requires States to permit a child to recover nationality if they have lost it when a parent has been deprived.

ARTICLE 18. Limitations on Expulsion

103. This Article reflects the well-established prohibitions on expulsion of people from a State where they have nationality, on the *refoulement* of refugees to a place where they may be in danger, and on the deportation of persons to a country where they may be at risk of torture. Article 12(5) of the African Charter includes a specific prohibition on mass expulsions of non-nationals (similar to that in Protocol 4 to the European Convention on Human Rights), adding that

Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

104. A decision to expel a person must, therefore, be taken on an individual basis, while the person affected must have the right to challenge in the normal courts both the assertion that he or she is not a national and the decision to expel him or her. These principles have been affirmed by the African Commission in numerous decisions relating to expulsion of alleged non-nationals.

105. Note also the UN Human Rights Committee General Comment 27 (on Article 12 of the ICCPR on freedom of movement), which states, in relation to the right to enter one's own country, that:

*The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; **it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.** This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.*

ARTICLE 19. Protection of Stateless Persons

106. The content of this article is a distilled version of the 1954 Convention Relating to the Status of Stateless Persons, but also aims to ensure that the first protection for a person whose nationality is in doubt is confirmation of the nationality of a State where he or she has an appropriate connection. Grant of the status of stateless person is to be made only if the nationality of the person cannot be established.

ARTICLE 20. Succession of States and Nationality

107. The provisions of this article are based on the Article 10 of the 1961 Convention on the Reduction of Statelessness and the International Law Commission Draft Articles on Nationality of Natural Persons in relation to the Succession of States, and also draw on the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession. The ILC Draft Articles have not been adopted by the UN General Assembly and are thus not formally binding. However, UN General Assembly Resolution 66/92 of 9 December 2011 emphasized the value of the articles in providing guidance to States.

108. The language of Article 20(1) is based on a recognition that, as noted in the commentary to the ILC draft articles “The effectiveness of national legislations in preventing statelessness is ... limited” (paragraph (5) in commentary to Art.4). Article 10(1) of the 1961 Convention provides that

Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer.

109. However, as recognised by Article 14 of the European Convention on the Avoidance of Statelessness in Relation to State Succession, the obligation to cooperate in the eradication of statelessness should reach further than these basic provisions.

110. Article 20(2) is based on Article 4 of the ILC Draft Articles and reflects the general obligation to avoid statelessness.

111. Article 20(3) provides for the obligation of States affected by State succession to adopt transitional measures, and follows the principles established by the ILC Draft Articles that every person who was the national of a predecessor State shall have the nationality of at least one successor State (Art.1, ILC Draft Articles); that the attribution of nationality should be based on the default principle of habitual residence (Art.5, ILC Draft Articles); and that a person shall have the right of option where he or she has an appropriate connection to more than one state, where multiple nationality is not permitted (Arts.11 and 23, ILC Draft Articles).

112. Article 20(4) reflects the provisions in the ILC Draft Articles that confirmation of a new nationality is required before nationality may be withdrawn (Arts.20 and 24).

ARTICLE 21. Rules and Procedures Relating to Nationality

113. The protections in this article in relation to the respect of administrative procedures for basic principles of due process are based on the provisions of the African Charter, as it has been interpreted by the African Commission, including in the Principles and Guidelines

on the Right to a Fair Trial and Legal Assistance in Africa. They also draw on provisions of the ECN Articles 10 to 13 on processing of applications, decisions, right to a review and fees.

ARTICLE 22. Monitoring and Implementation

114. This article provides for two main mechanisms to ensure that the Protocol is implemented in practice: first, the State periodic reports to the African Commission and the African Committee of Experts required by the African Charter and the African Charter on the Rights and Welfare of the Child should include information on nationality and statelessness; and secondly, States should notify the African Commission and the African Committee of Experts of the institution that is responsible for ensuring that its provisions are put into effect.

115. In addition, Article 22(3) confirms that individuals or States may bring complaints to the usual oversight mechanisms for the African Charter, according to the relevant procedures.

ARTICLE 23. Cooperation among States and with International Agencies

116. The situation of persons whose nationality is in doubt may often not easily be resolved at the level of individual States. The competent authorities are usually concerned rather to ensure that a person does not obtain recognition of nationality where he or she is not entitled than to ensure that the person is not stateless. There are many people who are clearly the national of at least one African state but cannot obtain recognition of nationality in any one State. States Parties to the Protocol are therefore required to cooperate with each other and with relevant international agencies in the determination of nationality and the eradication of statelessness.

ARTICLE 24. Signature, Ratification, and Accession

117. Only States Parties to the African Charter may become parties to this Protocol.

ARTICLE 25. Entry into Force

118. The usual number of ratifications required for a treaty of the AU to enter into force is fifteen, and the Protocol follows this pattern. The wording of this Article is taken from the Protocol to the African Charter on the Rights of Women in Africa, with the date on which its provisions come into effect for a State that ratifies or accedes to the Protocol after it has entered into force made to conform to the provisions in the Article on amendments, and with the addition of a time limit for the Chairperson of the Commission to notify States Parties of the entry into force of the Protocol.

ARTICLE 26 Saving Clause

119. This provision is based on similar language in the Convention on the Protection and Assistance of Internally Displaced Persons in Africa and the Protocol to the African Charter on the Rights of Women in Africa.

ARTICLE 27. Amendment and Revision

120. This Article is based on the language in the Protocol to the African Charter on the Rights of Women in Africa, with the addition of a provision acknowledging the role of the AU Commission on International Law.