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The African Committee of Experts
on the Rights and Welfare of the Child

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Droits et le Bien-être de l'Enfant

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GENERAL COMMENT ON ARTICLE 6 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

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Contents

	Paragraphs	*Page*
1. Introduction	1-9	3
1.1 Legal and contextual basis	1-8	3
1.2 Purpose	9	6
2. Main Objectives	10	7
3. General Nature of State Obligations	11-12	7
4. Key Principles underlying implementation of article 6	13	8
4.1 Best interests	14-15	9
4.2 Non-discrimination	16	9
4.3 Survival, Developpment and Survival	17-20	10
4.4 Participation	21-22	11
4.5 Interdependence and indivisbility of the rights within Article 6	23-24	12
4.6 Interdependence and indivisbility of the rights within the African Charter	25-37	13
5. Contents of the Rigths	38-101	18
5.1 The Right to a name Article 6 (1)	38-42	18
5.2 Birth registration	43-82	20
5.3 Right to acquire a nationality Article 6 (3) and the obligation to prevent statelessness Article 6 (4)	83-101	32
6. Remedies	102	45
7. Recommendations	103-114	45

GENERAL COMMENT ON ARTICLE 6 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD

1. Introduction

1.1. Legal and contextual basis

1. The African Committee of Experts on the Rights and Welfare of the Child (the Committee) was established with a mandate to promote and protect the rights enshrined in the African Charter on the Rights and Welfare of the Child (African Children's Charter). In particular, under Article 42 (a) (ii), the Committee is expected to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa.

2. Through the Reporting procedure provided for under Article 43 of the African Children's Charter, the Committee interacts with States parties by reviewing their reports and issuing observations and recommendations aimed at improving the implementation of the rights of the child where the desired standard of implementation is deemed not to have been achieved.

3. The right to birth registration is one of the rights that consistently appears not to be fully implemented by States parties. In its observations and recommendations to the states that have so far submitted at least one report, the Committee has been concerned about the low rate of birth registration.[1] Millions of children go unregistered every year. According to the UN News Centre, a 2013 UNICEF Report reveals that 230 million children under the age of five had not had their birth registered, and the lowest rate of birth registration is in South Asia and in Sub-Saharan Africa.[2] It is

1 See Recommendations and Observations sent to the Governments of Burkina Faso, Cameroon, Libya, Kenya, Mali, Tanzania and Uganda available at http://acerwc.org/state-reports/ accessed 3 October 2013.

2 UN News Centre 'One in three children do not officially exist, UNICEF reports' (11 December 2013)

believed that 20 million children in Sub-Saharan Africa do not have a birth certificate.[3] A number of factors explain this state of affairs including poverty, lack of education, discrimination against women, and membership of certain indigenous ethnic groups or belonging to vulnerable social groups such as refugees or migrants. A lack of decentralized, effective, well managed and affordable civil registration systems are also to blame. As a consequence, children become more vulnerable to all sorts of abuses such as recruitment into armed forces, sexual exploitation, child labour, human trafficking, early marriage, disinheritance, etc. Without a birth certificate, it is difficult to establish a child's parentage and his/her ties with the territory on which he/she was born. This puts the child in a precarious position when it comes to claiming a nationality and exposes him/her to the risk of becoming stateless. This alarming situation impelled the Committee to hold a theme day on birth registration and the rights of the child during its 20th session held in November 2012. At the conclusion of this day, the Committee decided to develop a General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child. The Article provides for the rights to a name, to birth registration and to acquire a nationality.

4. There are hundreds of thousands of people living in Africa who are stateless, and many more whose nationality is in doubt or dispute.[4] The causes of this situation can be found in Africa's history, in the arbitrary creation of the borders of African States, in problems related to the transition from the colonial era to independence and more recent creations of states or transfers of territory, in both historical and contemporary migration, and in deficiencies in nationality laws and their implementation.

3 See Humanium 'The right to an identity- The global situation: A look at a child identity across the globe' available at http://www.humanium.org/en/world/right-to-identity/ accessed 25 January 2014.

4 UNHCR estimates that there were at least 10 million stateless people globally in 2011, with the recognition that this is a very approximate figure. See "Stateless People" at http://www.unhcr.org/pages/49c3646c155.html, accessed 3 March 2014.

5. All African States have rules providing for the conferral of their nationality[5] established in their constitutions and/or in other legislation. However, these laws often do not reflect the States' commitments to avoid statelessness established by Articles 6(3) and 6(4) of the African Children's Charter. In addition, many African nationality laws are in conflict with basic principles enshrined in the African Children's Charter and other human rights treaties.

6. In particular, around one dozen African states discriminate between men and women with regard to the right to confer their nationality on their children. A smaller number of African States have laws with provisions that explicitly discriminate on the basis of race, religion, ethnic group or national origin in the right of a child to a nationality from birth. A large number of States have adopted laws that provide for citizenship to be conferred at birth only on the basis of descent from a citizen, providing no rights to children who were born on the State's territory, even if they are still resident there at majority, and even if their parents and grandparents were also born there. Such a purely descent-based system leaves substantial numbers of children at risk of statelessness. In some States where this is the general rule, there is an exception for abandoned infants or small children ("foundlings"), but some do not provide a right to a nationality in the case of foundlings, leaving unaccompanied children separated from their parents at particular risk. In some States there is also an exception providing for nationality to be given to children born in the country whose parents are stateless; but this exception does not provide for children whose parents possess a nationality but cannot transmit that nationality to their children. Due process is often not respected in the recognition, conferral and withdrawal of nationality, creating the serious risk of arbitrary decision-making in the administrative application of nationality law.[6]

5 Note that the countries with English as an official language often have laws that refer to "citizenship" rather than "nationality". In the context of this General Comment and in international law, the terms citizenship and nationality are used interchangeably.

6 For background on African nationality laws, see Bronwen Manby, *Citizenship Laws in*

7. At a practical level, the greatest obstacle to the effective realization of the right to a nationality in Africa is the lack of functional and universal civil registration systems. Absent proof of the circumstances of a child's birth – both the child's parentage and place of birth – it is very difficult to ensure that the child obtains recognition of its nationality, whether that of his or her parents, or of the State where he or she is born.

8. More importantly, the Committee recalls that the African Union Conference of Ministers in Charge of Civil Registration recommended the strengthening of Civil Registration and Vital Statistics (CRVS) Systems across the Continent as a development imperative. The Conference further recognized the importance of CRVS in ensuring good governance, in the realisation of human rights and in measuring the progress of development. The Committee is of the view that the rights to a name, to birth registration and to a nationality under review in this General Comment cannot be fully implemented without strong CRVS Systems in States parties.

1.2. Purpose

9. Notwithstanding its heading (Name and Nationality), Article 6 recognizes three interlinked rights namely the right to a name (Art 6 (1)), the right to birth registration (Art 6 (2)) and the right to a nationality (Art 6 (3)). It also provides for state obligations with regard to the implementation of the right to a nationality (Art 6 (4)). The purpose of this General Comment is to give the meaning and scope of these rights and explain the corresponding obligations of the States parties to the Charter for their implementation.

Africa: A Comparative Study, Open Society Foundation, 2nd edition, 2010.

2. Main Objectives

10. This General Comment is addressed to all stakeholders who play a role in the implementation of the African Children's Charter and especially the rights embedded in Article 6. This includes agencies of States parties - Parliaments and judiciaries, civil society organizations, academics, legal practitioners, and civil registry authorities. Its main objectives are to explicate principles contained in the rights provided for under Article 6 and to give the above stakeholders guidance on its implementation in practical sense.

3. General Nature of State Obligations

11. In order to give effect to the rights enshrined in Article 6, States parties have to keep in mind their overall obligation to respect, protect, promote, fulfill children's rights in accordance with their obligations stemming from Article 1 of the African Children's Charter requiring them "to undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter." The Committee specifically expects States parties which do not have civil registration laws to adopt them, those whose civil registration laws are not implemented to implement them, and those whose laws are deficient or outdated to align them to the required standards through law reform, drawing inspiration from the present General Comment and best practices from other States parties.

12. The Committee regards the existence of up to date, comprehensive and international law-compliant legislation underpinning civil registration as fundamental to the fulfillment of the child's right to a name, and to registration of birth. Legislation should specify, inter alia: the regulation of the role of government agencies involved in civil registration; the regulation of any semi government authorities involved in

civil registration; the regulation of time periods for the registration of birth; details concerning the attribution of names and surnames in accordance with both custom and practice (albeit with due attention to the principles of non-discrimination on the basis of gender and birth status); the regulation of the use of technology to ensure that civil records maintain their probative value; regulations related to costs, access, and privacy of data; regulation of late and delayed registration procedures; information concerning the extent of information to be contained on the birth certificate, noting in particular that stigmatising information is to be avoided in the best interests of the child; regulations for obtaining an abridged or short form birth certificate; regulations to ensure the first copy of the birth certificate is provided free of charge and immediately upon registration; measures to prevent and combat fraud and counterfeiting of birth registration information; and regulations specifying the use of any digital technologies in the recording or storage of birth registration data. State Parties are encouraged to explore international and continental best practice in the formulation and development of civil registration legislation.

4. Key Principles underlying the implementation of Article 6

13. Like other children's rights, the rights to a name, to birth registration and to acquire a nationality cannot be fully implemented unless the cardinal principles of children's rights are carefully observed. The implementation of those rights requires taking into account the best interests of the child, non-discrimination principles, his/her survival, development and protection as well as his/her participation. The implementation of Article 6 also depends on good understanding of the principle of interdependence and indivisibility of children's rights in general and the interdependence and indivisibility of the three rights provided for under Article 6 in particular.

4.1. Best interests of the children

14. The African Children's Charter provides in Article 4 (1) that the best

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

15. The Committee is of the view that the attribution and change of the name as well as the regulation thereof should always conform to the best interests of the child. Naming practices which are not conducive to the best interests of the child must be avoided. All laws, policies and programmes related to the improvement of the birth registration system as well as the acquisition of a nationality must also be in conformity with the best interests of the child.

1.2 Non-discrimination

16. Non-discrimination in the context of the rights to a name, birth registration and to acquire a nationality means that no child should be deprived of his/her right to a name, that no child's birth should go unregistered whatever his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status[7] and that none of those grounds should justify a child's deprivation of his/her right to acquire a nationality under Article 6 of the Charter. The Committee underlines the fact that discrimination on whatever ground puts in peril the principle of universality of birth registration. Thus, discrimination on the basis of the marital status of the child's parents or on the basis of gender should not prevent the child from carrying the name of either or both his/her mother and father. The status of the child as having been adopted and other potentially discriminatory or stigmatizing information should not be evident from any certificate issued, despite the fact that it may be recorded in registry databases.

7 Article 3, African Children's Charter.

1.3 Survival, development and protection

17. The rights of the child to survival, development and protection commend that he or she benefit from special measures of protection from his/her early infancy. The rights under discussion are crucial to the establishment of a child's identity. The Committee considers a child's identity as one of the cornerstones to ensure his/her survival, development and protection. For example, comprehensive information about births makes it easier for governments to plan for immunization, prevention of early infant diseases such as malaria, neonatal HIV, and other communicable diseases that contribute to the reduction of child mortality. For governments to be able to accurately plan for infant and child health, for early childhood education, for social grants where applicable, and for material and other support to parents in the fulfillment of their parenting responsibilities, they need accurate and comprehensive statistics on births.

18. Proof of identity through the birth registration system can also contribute to the prevention of and protection from harmful practices that particularly threaten children whose identity cannot be established such as abandoned and some separated children, as well as stateless children. Such practices as children trafficking, sexual exploitation, early marriage, illicit adoption, and child enrolment in armed forces, are also less likely to occur, and easier to prevent, when effective birth registration systems are in place.

19. The Committee wishes to introduce the concept of death registration, which, although not specifically present in the African Children's Charter, flows from the recommendation to strengthen CRVS systems in Africa. Death registration forms part of the civil registration system and can be as important in the protection of children's lives and rights as birth registration. Death registration can provide valuable information on the causes of the death.

Knowledge of the causes of infant mortality can equip State Parties to plan for better protection of children who are alive and those still to be born.

20. Failure to register deaths and their causes of death risks the lives of many more in the population, specifically in the instances where the death could be arise from communicable diseases. Cases of massive number of child deaths can easily occur in places where there are large settlements such as refugee or Internally Displaced Persons' camps, and even in respect of regular dwelling places such slum settlements. The significance of registering deaths and establishing the cause of death for purposes of sustaining life cannot be overemphasized.

1.4 Participation of children

21. Owing to the interdependence and indivisibility of human rights in general and children's rights in particular, the Committee reiterates that the Charter considers some aspects of children participation as falling within the guiding principles for what constitutes the best interests of the child. The Committee is aware that it may be impossible to seek the child's views on administrative or judicial proceedings about his/her naming, birth registration or acquisition of nationality at the early stage of his/her life. Nevertheless it is a requirement of Article 4 (2) of the Charter to give the opportunity to the child to be heard and to take into consideration the child's views whenever he/she is capable of communicating them during judicial and administrative proceedings where issues relating to name, nationality or identity are at stake. Where necessary, taking into account the particular circumstances, he/she should be given legal or other representation in such proceedings.

22. In situations where a child has parents who are of different nationalities, the Committee recommends that children be given the right to hold both nationalities at least until the age of majority. In those countries where dual nationality of adults is

not permitted, the child may then be afforded a prescribed period following majority within which to choose which nationality to hold. In this instance, States should take all appropriate measures to inform children on reaching majority that they need to make such a choice and of the procedures by which to do so.

1.5 Interdependence and indivisibility of the rights within Article 6

23. The Committee holds the view that the rights to a name, to birth registration and to acquire a nationality together constitute the pillars of a person's identity. At birth, acquisition of nationality under the law generally occurs automatically on the basis of either descent or birth in the territory, or a combination of both; parentage and place of birth may also be the basis for later acquisition of nationality as a child or at majority. Birth registration establishes the place of birth and parental affiliation, which in legal terms serve as proof of acquisition of the parents' nationality, or the nationality of the State where the child is born. While birth registration in and of itself does not normally confer nationality upon children, it is a key form of proof of the link between the child and a State. It thereby serves to ensure that every child acquires a nationality and prevents statelessness. The Committee therefore emphasizes, as noted in the Kenyan Nubian Children Case, that "there is a strong and direct link between birth registration and nationality"[8]; that is, that paragraphs (3) and (4) of Article 6 are closely linked to paragraph (2). A State's compliance with the obligation to prevent and reduce statelessness starts from taking all necessary measures to ensure that all children born on its territory are registered. These include: children born out of wedlock,

8 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian descent in Kenya v The Government of Kenya* Decision: No 002/Com/002/2009 (hereafter Kenyan Nubian Children Case) paragraph 42.

children born to a parent or parents who are foreigners (including those whose parents are in an irregular immigration status, or who are refugees or asylum seekers), children whose parents are unknown, and all other groups at risk of non-registration. Birth registration of all children born in a territory must be effected even where it is clear from the outset that the nationality of the state in question will not be conferred.

24. The Committee underlines that even where children are entitled to acquire the nationality of a particular State pursuant to the Constitution, nationality law or related legislation of that State, in some instances they may not be considered nationals of that State due to lack of documentary proof of their identity, including proof of the nationality of their parents or of their place of birth. While the obligation of States is to ensure that birth registration is universal, free and accessible, as outlined in this General Comment, States should also adopt laws and procedures that allow for alternative forms of evidence of possession of a nationality where a birth certificate is not available or accessible. These may include the notification of birth provided by a hospital or clinic, oral testimony from a birth attendant, religious leader or other person with knowledge of the birth, and other appropriate forms of documentary or non-documentary evidence.

1.6 Interdependence and indivisibility of the rights within the African Children's Charter

25. The Committee takes the view that all children's rights in the Charter are interdependent, indivisible and mutually reinforcing. The following are examples of how Article 6 provisions interact with a number of other rights contained in the Charter. This General Comment reiterates that the right to birth registration plays a significant role in the realisation of other children's rights.

1.6.1 Justice for children

26. Being registered is for a child of paramount importance for his/her enjoyment of protections guaranteed under recognised justice for children principles. It is the age of the child that determines whether he/she is criminally responsible or not; the birth certificate is the primary documentary proof that a child has attained the minimum age for criminal responsibility. If found criminally responsible, proof of age still serves to ensure that the criminal process is carried out in his/her best interests with the necessary protections.

27. The Committee notes in particular that a non-registered child may fail to invoke the protections under the provisions of Articles 5 and 17 of the Charter. Article 5 (3) protects a child found guilty of a crime from a death penalty while Article 17 guarantees numerous other protections such as the right to special treatment in a manner consistent with the child's dignity, the right to be separated from adults in places of detention or imprisonment, the right to a speedy trial, the right to privacy (prevention of the public and the media from trial) and the benefit of the application of sentences aimed primarily at reintegration and rehabilitation of the child.

28. The Committee further notes that without an effective functioning registration system, the system of justice for children is likely to be abused by non-qualifying adults, thus flooding juvenile courts (which are generally few in number and are expected to expedite trials) with cases which would otherwise have been tried by ordinary courts.

29. Proof of age can also be relevant where children are alleged to be victims or serve as witnesses, especially in relation to offences where statutory age criteria are established, such as in relation to the age for consent to sexual

activity. Valuable protections might be foregone in the absence of adequate proof of the age of child victims.

4.6.2 Prevention of harmful practices

30. The Committee defines harmful practices to include all practices that imperil the life of the child, undermine his/her dignity or are prejudicial to his/her health, to his/her mental or physical integrity, or to his/her growth and development regardless of their being condoned by a society, culture, religion, or tradition. Examples of common harmful practices in Africa include child trafficking, sexual exploitation, early marriage, illicit adoption, exploitative child labour, child enrolment in armed forces, and so forth. The Committee strongly believes that a universal well functioning birth registration system increases the visibility of the most disadvantaged children and enhances their protection against harmful practices.[9] An ill-functioning birth registration system on the other hand makes it difficult to prosecute perpetrators of harmful practices committed against children as it makes it less likely that laws which prohibit those practices will be effectively implemented.

4.6.3 Rights to education, health and social welfare

31. Birth registration is a prerequisite for the issuance of a birth certificate to a child. The Committee is aware that there are still many countries in Africa that require production of a birth certificate to enroll children for school or for enrolled children to sit for (national) exams. In those countries, the right to education becomes that of children whose birth has been registered - to the exclusion of the non-registered. A child who is not registered and does

9 For example parents or caregivers cannot conceal a child's age to force him/her into early marriage.

not go to school not only loses potential for his/her future but also becomes more vulnerable to other abuses of his/her rights. He/she becomes an easy target for child traffickers, child labour, early marriage, illegal adoption, sexual exploitation and other harmful practices. In this regard, when a child has not been registered at birth and has attained the school age, State parties shall take appropriate measures to register him/her, issue him/her a birth certificate and enroll him/her for school. Birth registration should be facilitated at the point where non –registration becomes apparent, rather than acting as an impediment to the child's access to other rights.

32. As regards the right to health and right to social welfare, the Committee notes that medical care and social welfare services, social security (where available), and health services are less easily available for non - registered children. Provision of essential services such as vaccinations, medicines and cash transfers to alleviate extreme poverty may be imperiled by the absence of suitable identification documentation.

1.1.4 Right to parental care and protection

33. The Committee recalls the commitment of States parties to ensure that a child grows up in a family environment in an atmosphere of happiness, love and understanding for the full and harmonious development of his/her personality.[10] The Committee also recalls the right of every child to the enjoyment of parental care and protection and whenever possible, the right to reside with his/her parents.[11]

34. The Committee observes that birth registration is crucial not only in establishing the identity and parental affiliation of a child but also to preserve

10 Preamble, African Children's Charter.

11 Article 19 (1), African Children's Charter.

his/her identity against illegal changes, such as name changes or falsification of family ties, which are easier to achieve when the child is not registered and thus lacks proof of identity. The Committee observes that children traffickers may use this strategy to traffic children, including for illicit inter-country adoption. The Committee is of the view that implementation of the right to birth registration through the establishment of a strong, integrated and universal birth registration system is one measure to combat illicit practice in inter-country adoption.

4.6.5 Right to inherit parental property

35. Having a proof of identity which indicates parental and familial ties renders birth registration important to the resolution of disputes related to the child's right to inherit parental and familial property. This is of heightened significance where a child is an orphan, a returning refugee or an internally displaced orphan; and where a child has been born out of wedlock, especially in predominantly patriarchal societies.

36. The Committee wishes to stress the overall importance of a well functioning civil registration system for the protection of inheritance rights of children, including orphans; that is, a civil registration system that systematically records and guarantees access to all vital statistics including births, deaths, marriages, changes of names, and affiliation. To enhance children's right to inherit parental property, proof of age and parental ties will not be enough: proof of the (parental) death and in some cases proof of the marriage of parents (for example in instances of communal ownership of property) will also be necessary.

4.6.6 Right to official documentation

37. The benefits of birth registration manifest throughout the life of a child including well beyond childhood. A birth certificate is often required for a person to be issued a national identity document, passport, a driving licence, a business licence, or a tax identification number. All these are services that are required into adulthood, are frequently required for participation in the economy of a country or enjoyment of civil and political rights, but which may not be secured if a child has not been registered and issued a birth certificate whilst still under the age of 18 years. Birth registration can thus be seen as an important adjunct to furthering democratic governance in Africa generally.

5. Content of the Rights

5.1. The right to a name: Article 6 (1)

38. Article 6 (1) provides that "Every Child shall have the right from his birth to a name". A name has a number of functions in a society. A name is used as a means of identification, expression and communication. A name serves both private and public purposes. It is privately attributed but subjected to state regulation. A name serves to distinguish one a person from another, to keep track of individuals, to promote public safety and to assign rights and responsibilities, among other things. Much as most of the identification documents provide space for a name, a surname and sometimes a middle name or maiden name, the Committee takes the position that the name as provided for under the African Children's Charter means any or all of those, as the case may be. It should be possible for the child to be registered under the name of his or her mother or father or both, in accordance with local custom and parental preference.

39. The name is an important element of an individual's identity.[12] Even if a person can be identified through the social, political, religious or cultural group he/she belongs to, a name remains the easiest personal identification tool for any person. In some societies, a name can even indicate the social, cultural or religious group (ethnicity, tribe or religion) an individual belongs to. The obligation to give a child a name lies with his/her parents or guardians. However, in order to give requisite effect to the right to a name, States parties have the obligation to regulate the attribution of names.

40. States parties shall take appropriate measures to ensure that a child's name does not undermine the best interests of the child[13] in his/her future private and public life. For example, names which under national laws, customs and traditions are found to fall in any of the following categories should not be permissible: names that have offensive or obscene references; could incite violence; are typographically unconventional; are bizarre or ridiculous; might defraud or mislead the public; might confuse the public; might interfere with the rights of others; or could be considered contrary to public policy.[14] In instances where the 'name of an individual is a fundamental aspect of the culture and ethnic identity', the State is under obligation to respect the particularities of children belonging to that specific ethnic group. However, where cultural interests conflict with the best interests of the child, the latter shall prevail.

41. States parties shall particularly take appropriate measures to regulate the attribution of a name to adopted as well as abandoned children (foundlings). In the case of an adopted child whose biological parents are known, the child

12 Ziemele, I. 'Article 7: The Right to Birth Registration, Name and Nationality and the Right to Know and Be Cared for by Parents' in Alen, A. and others (Eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007), para 20.

13 Ziemele, I. (2007) para 21.

14 It is suggested that States parties remain liable to provide grounds under which a name given to a child should be impermissible given the national, social and cultural sensitivity the issue can raise.

should keep at least the first name given by his/her biological parents. In the instance of the surname of an adopted child, the adoptive parent(s) should give the adopted child his/her surname to avoid any social stigma. In Muslim countries where the institution of '*kafala'* exists in lieu of adoption, the *makfoul* (the child raised under *kafala* regime) should be given the name of the *kafil* (the person who has been given the right to raise the child under the *kafala* regime) in instances where none of his/her biological parents is known or where he/she has been abandoned. But according to Islamic precepts, if the biological parents are known, the *makfoul* should keep the name given by his/her biological parent.

42. States parties shall also take appropriate legislative measures to regulate and facilitate change of one's name. In this regard, States parties should consider adopting administrative rather than judicial procedures for the change of a name.

1.2 Birth Registration

1.2.1 Definition

43. Registration of birth is a fundamental right of a child. Birth registration is the act of recording the birth of a child by an administrative authority. It establishes the existence in law of a child, and sets the foundation for the recognition of the child as a legal persona. A child who is not registered does not legally exist and runs a substantial risk of falling outside of the reach of government's protective actions towards the realization of child rights.

44. The Committee notes that birth registration is often considered a mere bureaucratic and administrative formality. Through this General Comment, the Committee wishes to draw the attention of the States parties to the significance of adopting a human/children's rights approach to birth

registration. Birth registration marks the legal existence of a child and brings with it enormous potential for the child to enjoy other rights immediately from his/her early childhood. Apart from legal existence which provides the child with a possibility to access immediately available health, social security, social care and education services, registration of a child provides a proof of his/her age against various potential abuses such as trafficking, sexual abuse, early marriage, child labour and enrollment in armed forces.[15] Proof of age is also important for children involved in criminal offences to benefit from justice adapted to their needs and specificities such as lower sentences of imprisonment and special protection measures for children in prison.[16] It also constitutes an irrefutable proof of a child's lineage against the risk of disinheritance of property particularly for orphans or children born out of wedlock.[17] Finally, the right to birth registration is closely related to the right of children to know and to be cared for by their parents.[18]

45. The Committee defines birth registration as

the official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government. It is a permanent and official record of a child's existence. Ideally, birth registration is part of an effective civil registration system that acknowledges the existence of the person before the law establishes the child's family ties and tracks the major events of an individual's life. [19]

15 Doek, J *In the best interests of the child: Harmonising laws in Eastern and Southern Africa* (African Child Policy Forum 2007), 38.

16 Doek, J (2007).

17 Doek, J (2007).

18 Doek, J (2007).

19 Definition adopted by the Committee in the Kenyan Nubian Children Cate (note 8 above) para 38. See Cody, C. *Count every child: The right to birth registration* (Plan Ltd, Woking 2009) 10. See also UNICEF *Birth Registration: Right from the Start* (Innocenti Digest 2002) 2; and UNICEF 'A Passport to Protection: A guide to birth registration programming (New York 2013).

46. Birth registration is a process that starts as soon as a child is born. It begins with a birth notification transmitted by a hospital, a midwife, a traditional leader, a chief or parent, as the case may be, and the notification is taken by a parent to the civil registry to declare the birth and apply for a birth certificate. In some instances the hospital sends directly the birth notification to the civil registry. The process is generally as follows: Birth – Notification – Declaration – Registration – Issuance of a birth certificate. The Committee encourages States parties to simplify that process in such a way that a birth certificate can be issued in a shortest period of time as possible after declaration and registration of the child.

47. It is also the responsibility of the State to issue a copy of a birth certificate, free of charge, immediately after the registration of birth. In many countries, a birth certificate is provided only upon request and quite often parents have to make separate effort to obtain a certificate, including further visits to registry offices, which entails additional transport costs. The first copy of the extract of the register (abridged birth certificate) should be provided immediately upon registration. It should be possible for either parent or both to register the child, and in the case of orphaned or abandoned infants, legislation should designate alternative authorities who can register the infant.

1.2.2 Features of the right to birth registration

48. Article 6 (2) of the African Children's Charter provides that "[e]very child shall be registered immediately after birth."

49. For the right to birth registration to be effective, the Committee holds that it must be universal, free and accessible and made immediately after the birth of a child. Those three features are discussed in turn in the present General Comment.

1.2.2.1 Universality

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.[20] 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.[21] Children born to foreigners, asylum seekers, refugees and undocumented immigrants qualify equally for birth registration in the same way as those born to citizens.[22]

51. Universality of this right therefore means that no birth of a child should go unregistered irrespective of his/her legal status or that of his/her parents. The Committee emphasizes that children born to vulnerable parents such as those who are nomadic, with disabilities, refugees, asylum seekers, or undocumented immigrants or parents belonging to a certain (targeted or threatened) ethnic group should *a fortiori* benefit from special protection measures including their registration at birth. In this regard the Committee recalls its view that this could be achieved through a universal, well-managed registration system that is based on the principle of non-discrimination and which is accessible to all.[23] The system should be set up and managed in such a way that registry authorities can guarantee confidentially to those in an irregular migrant situation, so as to encourage them to register births: details should not be shared with police and immigration authorities.

20 Henkin, L. 'The Universality of the Concept of Human Rights' (1989) 506 *Annals of the American Academy of Political and Social Science* 10, 11.

21 Elphick, R 'Towards Universal Birth Registration in South Africa: A Briefing Paper Drafted by Lawyers for Human Rights' (LHR 2011) available at *http://www.lhr.org.za/publications/lhr-briefing-paper-towards-universal-birth-registration* accessed 13 September 2013.

22 Elphick, R (2011).

23 Kenyan Nubian Children Case (note 8 above) at footnote 12.

(a) Children with disabilities

52. Children with any form of disability, physical, mental, intellectual or sensory must be registered in order to achieve universal birth registration. The African Commission has emphasised the need to protect the dignity of persons with mental disabilities, and deplored some national legislation that brands these persons as “lunatics”, or “idiots”. These are terms which, without any doubt, dehumanise and deny them any form of dignity in contravention of Article 5 of the African Charter on Human and Peoples’ Rights.[24] The African Commission maintained that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being.[25]

53. The Committee reiterates that persons with disabilities cannot aspire to the above hopes, dreams and goals unless their births have been duly registered. The Committee notes that discriminative and dehumanising laws against persons with disabilities create fears in parents about registering a child born with a disability. Fulfilling the States parties’ obligation not to discriminate against children born with disabilities means that State parties must take special measures aimed at the protection of their rights straight from the start, i.e from their birth, by ensuring that they are duly registered.

54. The Committee notes that registration of children born with disabilities increases their chances of being taken into consideration for specific policies and programmes designed to ensure that they are treated with dignity and harmoniously integrated into their society. Such policies and programmes include packages for education adapted to their condition (such as Braille for the blind, signing language for the deaf, appropriate and adequately

24 *Purohit and Moore v The Gambia,* para 59.

25 *Purohit and Moore v The Gambia*, para 61.

trained teachers capable of using child-centred and individualised teaching strategies, appropriate and acceptable teaching materials, equipment and devices), health care, social developments grants, social security benefits, parental support programmes and so forth.

55. The Committee reminds States parties that all the above actions derive from international obligations in respect with the Convention on the Rights of Persons with Disabilities (see Article 24 (3)). The Committee holds the view that their effective implementation heavily depends on an effective and efficient universal birth registration system that does not discriminate against children with disabilities.

(b) Parents with a disability

56. States parties should take special measures aimed at facilitating the registration of children born to persons (parents) with disabilities. Specific attention should be paid to children born to parents with mental or intellectual disabilities. States parties may envisage using community leaders for the identification and immediate reporting to competent authorities of any child born to a parent with mental or intellectual disabilities. Further, best practice amongst State parties dictates that birth registration information and materials be specially adapted for persons with visual or hearing disabilities, to enable them to optimally participate in registration processes, and that Registry staff be training in sign language and other forms of communication with parents with disabilities seeking to register their children.

c) Birth registration and children born to refugees, internally displaced persons or asylum seekers

57. The Committee notes that refugees, internally displaced persons

(IDPs) and asylum seekers are vulnerable persons and that their children should benefit from the special measures of protection contained in the African Children's Charter. The Committee believes that registration of the birth of refugee children, children born to IDPs, internally displaced children or children who have been separated from their parents or guardians due to persecution or armed conflict, and children born to asylum seekers is one such special measure. As refugees, IDPs and asylum seekers have been forced to leave their homes, often in a rush, they may have left behind most of their belongings and personal identification documents, or the documents may have been destroyed in the process. The Committee is of the view that denying the right to birth registration to children belonging to that category is an act of discrimination against those children and constitutes a violation of their right to non-discrimination embodied in Article 3 of the African Children's Charter and in other international human rights instruments.

58. The Committee underscores the fact that birth registration not only benefits refugees themselves but also facilitates return to their country of origin. It helps them prove their identity and lineage when back in their country of origin for purposes of resettlement on their family lands or when attempting to reclaim land before courts and other authorities. This proof of identity is also crucial for family reunification in situations where family members have been dispersed to various places. For countries of origin, birth registration in the long run aids the voluntary return of the refugees to their home country.

59. Against the foregoing, the Committee reminds States parties of their international obligations relating to the protection of refugees and IDPs. The Committee particularly reminds States Parties of their obligations under Article 5 of the African Union Convention for the Protection and Assistance of IDPs and observes that international law governing refugees imposes upon

host countries the obligation to give refugees at least the minimum standard of treatment available for non-citizens. In this regard, States parties must ensure that they protect the rights of refugee and internally displaced children, particularly the right to birth registration.

60. More importantly States parties with large numbers of refugees and displaced persons are encouraged to bring civil registration services closer to refugee camps and IDP and refugee settlements. This may be done by establishing temporary civil registry offices near camps or by regularly organizing mobile civil registration services targeting refugees and displaced people.

61. The Committee wishes to stress that birth registration and the corresponding issuance of a birth certificate to refugee children and children born to asylum seekers is not tantamount to giving them a nationality. Conditions for acquisition and grant of nationality are separately established in the State Parties' legislation on nationality. Birth registration is simply an act of legal recognition of those children by the host country which enables them to have a legal identity.

62. The Committee wishes however to record that birth registration is in many countries essential to the acquisition of a nationality by any person (including refugees and asylum seekers). Birth registration establishes the place of birth and parental affiliation of a child. Since nationality is generally acquired by *jus sanguinis* (descent) or by *jus soli* (territory of birth), birth registration will play a crucial role as a documentary proof in establishing either of these ways of acquiring a nationality.

63. The Committee notes that while nationality is normally acquired independently and birth registration in and of itself does not normally confer

nationality upon the child concerned, birth registration does constitute a key form of proof of the link between an individual and a State and thereby serves to prevent statelessness.

(d) Birth registration and children of undocumented migration status

64. The Committee considers children of undocumented status to fall in any of (at least) the five groups: undocumented children, children born to undocumented parents, children whose migration status became irregular because their parents or caregivers overstayed their residence visas or permits in a given country, children in regular migration status (without necessarily being documented) but whose parents or caregivers are undocumented, or children born to parents whose deportation has been suspended due to circumstances justifiable under international law or international humanitarian law, but have not been issued any documentation.[26]

65. The Committee observes that children in undocumented status are very vulnerable for at least the following two reasons. On the one hand, their parents or caregivers are likely to remain hidden due to fear of being arrested if the administrative authority discovers their irregular migration status. On the other hand they run the risk of being registered under forged identity details by their parents or caregivers.

66. For the above reasons, the Committee holds that universal birth registration under Article 6 (2) of the African Children's Charter also means that children in undocumented migration status must be registered at birth without discrimination. Proof of parental identity by non-documentary evidence should

26 See Platform for International Cooperation on Undocumented Migrants (PICUM) *Rights of Accompanied Children in an Irregular Situation* (UNICEF 2011) 8 available at http://fra.europa.eu/fraWebsite/frc2011/docs/rights-accompanied-children-irregular-situation-PICUM.pdf accessed 22 September 2013.

be explored by States parties. This will prevent a recurring intergenerational problem from arising, in which generations of non-registered persons exist due to non- registration of their parents and ancestors.

(e) Birth registration and children born to indigenous parents

67. In its advisory opinion to the African Union Member States on the United Nations Declaration on the Rights of Indigenous Peoples, the African Commission drew a number of characteristics with which indigenous people generally identify themselves: Self-identification; a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.[27] The African Commission explained that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and that they need recognition and protection of their basic human rights and fundamental freedoms.[28]

68. The Committee wishes to indicate that the marginalisation of indigenous peoples and lack of recognition of their basic rights impacts negatively on the realisation of their children's rights, including the right to birth registration which is essential to the realisation of other children's and human rights. The Committee notes that the rate of birth registration for children of indigenous parents is worldwide extremely low. Reasons for this state of affairs include the extreme poverty in which indigenous peoples generally live; lack of awareness

27 African Commission on Human and Peoples' Rights *Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples,* May 2007, para 12.

28 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya 276/2003* (4 February 2010), para 148.

of the significance, importance and benefits of birth registration and a birth certificate; reluctance to deal with, and general suspicion of, administrative authorities among indigenous peoples; language barriers sometimes; distance to the office of civil registration; and oftentimes a nomadic lifestyle of some indigenous communities. The Committee wishes to particularly stress the risk of becoming stateless for unregistered children of nomadic indigenous parents who frequently move across the borders of different countries.

69. The obligation to ensure universal and non-discriminatory birth registration of every child born within a State party's territory thus extends to taking all necessary legislative and administrative measures to give effect to the right of indigenous children to birth registration. States parties with indigenous populations must include explicit provisions on actions specifically targeting registration of indigenous children. Their implementation policies and programmes must include campaigns to raise awareness of indigenous populations about the importance and benefits of birth registration through outreach activities. States parties are also under the obligation to put in place birth registration mechanisms that are adapted to the lifestyle of indigenous communities such as mobile registration systems reaching them where they live, and the recruitment of staff who can effectively communicate with the peoples at risk of marginalization.

(f) Birth registration and children of imprisoned mothers

70. Article 30 of the African Children's Charter imposes upon States parties to "undertake to provide special treatment to…mothers of infants and young children who have been accused or found guilty of infringing the penal law." The Committee is aware that there are many infants and children living in prisons with their parent, most often their mother. Children whose parents are detained or imprisoned are an invisible and highly vulnerable group whose

rights and welfare are affected at every stage of criminal proceedings against their parent. This is more so particularly if those children have not been registered at birth.[29]

71. The Committee therefore holds the view that the birth registration of children of imprisoned mothers makes them visible, and their visibility in turn makes protection of their rights such as the right to survival, to education and to health possible. In addition, for an imprisoned mother to invoke her rights under Article 30 referred to above (which are indirectly rights of the child) she must be able to prove her parental ties with her child. This may be difficult if the child has not been registered.

5.2.2.2 Free and accessible

72. Birth registration must be made free by means of universal, accessible, simple, expeditious and effective registration procedures without discrimination of any kind.[30] Late birth registration should be allowed and also made free of charge or done at a low-fee rate.

73. The Committee reiterates its position that the obligation of the State Party under the African Children's Charter to ensure that all children are registered immediately after birth extends to addressing all *de facto* limitations and obstacles to birth registration.[31] The Committee notes that free registration of birth does not simply mean abolition of the fee applicable to registering a child or the cost of obtaining the birth certificate. Free birth registration cannot

29 See General Comment No 1 of the African Committee of Experts on the Rights and Welfare of the Child (Article 30 of the Charter: Children of imprisoned care-givers), available at www.acerwc.org (November 2013).

30 Human Rights Council *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* (22nd Session of 19 March 2013) A/HRC/22/L.14/Rev.1 para 5.

31 Kenyan Nubian Children's case (note 8 above) at para 40.

be effective unless the associated costs are catered for by States parties. These include administrative costs such as civil registration offices, civil registrars' salaries, offices, equipment (computers, sufficient forms, mobile registration equipment to access remote and rural areas…) and sensitization costs. Birth registration cannot be said to be free if one has to pay an onerous transport fee to reach the civil registration office. The Committee therefore interprets free birth registration to also entail accessibility and availability of the birth registration services for users. If transport fees to and from the civil registration office are prohibitive, the abolition of the registration fee will have a very little impact on the efficiency of the system. Since birth registration rates are inevitably lower in rural areas, it is imperative to decentralise birth registration services and provide for mobile registration facilities in remote areas.

74. States parties must additionally devise appropriate alternative mechanisms to ensure that their birth registration systems reach out to the remotest areas of their respective territories. They should envisage using mobile registration or mobile phone registration systems where mobile phone networks cover most of, if not all, the territory and where their use is reasonably extensive amongst the general population. Another alternative mechanism would consist in using existing networks, for instance health workers should be trained to obtain the declaration of birth from parents and transmit this information to the registration centres. This channel could be used for the delivery of the birth certificate. Mobile registration systems can also use local community leaders to collect birth registration data, to mobilize families with non-registered children, as well as for the delivery of birth certificates.

75. The Committee notes that States parties that have set up a birth registration system that uses modern interconnectivity with hospitals, clinics, dispensaries (where necessary), other social services such as education,

health, personal identification and electoral services, as well as with their national bureaus of statistics, have achieved better results regarding birth registration than those which have not. Where digital interconnectivity is not yet available, the Committee encourages national civil registration systems to establish collaboration with hospitals, clinics and dispensaries as well as national statistics offices to ensure prompt exchange of information and maximize chances to retrieve lost or misplaced data.

76. States parties must put in place a legal framework for protection of sensitive personal data that includes birth registration details and other vital statistical data. Protection of sensitive personal data, both where it is computerized or manually held, raises an additional obligation to ensure the integrity, confidentiality and availability of the data. Integrity means that the data must be kept authentic, complete and protected against improper or accidental modification and destruction. Birth certificates should include some security feature or features that enables fraud or alteration to be detected, and as a preventive measure against malpractice.

77. Integrity also refers to the integrity of the computers, networks and software that comprise the civil registration system, which must be secured from unauthorized penetration or the possibility of falsification of data. Confidentiality implies preserving authorized restrictions on access and disclosure including protecting personal privacy and proprietary data. Availability refers to ensuring timely and reliable access to and use of the data, which must available for ease of retrieval when required. Where paper files are used, these must be systematically stored and catalogued for eventual retrieval, modification or updating of data. Back up measures must be in place to ensure that the data is not completely lost in case of destruction of the original information by possible disruptive events such as natural disasters, wars, accidents, power failures, fire or attacks.

78. The legal framework must particularly address issues such as the responsibilities of internal staff that access or process the data on a day to day basis (civil registrars, archivists, cleaners or system administrators), external staff where IT services are outsourced and third party service providers (mobile network operators; internet service providers). Where the civil registration system functions in collaboration with, or is interconnected to, hospitals, clinics, national statistics office and/or other government agencies, the legal framework for protection of personal data must also provide for the responsibilities of those working in those agencies that have access to, or process, the vital information at issue. The legal framework must also provide for the requisite control mechanisms to ensure the data is always safe and prompt action is taken in case of any security threat to it.

5.2.2.3 Registration immediately after birth

79. The Charter provides for registration of every child immediately after birth. The Committee interprets “immediately” to mean as soon as possible, with due regard to cultural and local practice related to maternity and infant rearing. The Committee is of the view that by “immediately” after birth the drafters of the African Children’s Charter intended to make birth registration occur within a few days or weeks after birth and not months or years later. The Committee wishes particularly to bring to the attention of States parties that”immediately after birth” should not be interpreted to mean “within a reasonable period of time after birth”. The above interpretation of the phrase “immediately after birth” should therefore guide national legislation on birth registration which should indicate the number of days within which a child must be registered after birth. Obviously local custom and practice related to the post birth period, such as where mothers remain cloistered for a while, or where naming ceremonies are delayed for a short period, must be taken into account.

80. The Committee holds the view that, in accordance with existing practice, legislation should place the obligation to register a child's birth immediately upon the parents of the child in the first instance. In other words, it should be made compulsory in law for children's birth to be registered. The Committee is aware of the disincentives to birth registration that parents may adduce – including transport and associated costs. The Committee is nevertheless of the view that the impact of disincentives can be mitigated by the removal or abolition of other fees associated with immediate registration, late registration or obtaining certificates or extracts from the birth register.

81. States parties must, in all circumstances, provide for late registration where children's birth has not been registered immediately. The Committee encourages States parties to provide for a short time limit after birth within which a birth should be registered. Late registration should be allowed to occur free of charge within a grace period of one year after birth. Late or delayed registration should, if not free, be able to be effected at a nominal fee. The Committee also encourages States parties to apply variable fees for late registration in rural and urban areas with the understanding that rural areas should benefit from reduced registration fees. States parties should establish birth registration desks at all places where a birth certificate is required for a service, such as upon entry to school, or when registering for social security and poverty alleviation programmes.

82. The Committee notes the practice that details recorded in the birth registry may be more extensive than those provided on the certificate issued to parents and their children. In particular, details that may be prejudicial to the child or lead to stigmatization or discrimination may need to be omitted.

1.3 Right to acquire a nationality: Art 6 (3) and the obligation to prevent statelessness: Art 6 (4)

83. The right to a nationality has a central importance for the recognition and respect for other rights: thus the prevention of statelessness, including the statelessness of children, is a fundamental principle of international human rights law. The Committee of Experts has held that, "One of the main purposes of Article 6, in particular Article 6(4), of the African Children's Charter, is to prevent and/or reduce statelessness." A person who is stateless is a person who is "not considered as a national by any State under the operation of its law": this definition, found in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, has been recognised by the Committee of Experts to constitute part of customary international law.[32]

84. Even if the vast majority of human rights are not formally restricted on the basis of nationality, the lack of a recognised nationality in practice has a profoundly negative impact on respect for and fulfillment of other human rights. The effective proof of nationality (usually through documentation issued by the State) is a necessary foundation not only for the exercise of rights of civic and political participation, but also freedom of movement, participation in the formal economy, and the entitlement to mobilize the protection of the State of nationality when the enjoyment of human rights is endangered or threatened. The Committee of Experts notes that, although the African Charter on Human and Peoples' Rights does not specifically include a provision on the right to a nationality, the African Commission on Human and Peoples' Rights has considered issues touching on the right to a nationality in a large number of communications, underlining the challenges related to nationality in Africa.[33] Highlighting its findings in these cases, the African Commission on Human

32 Kenyan Nubian Children's case(note 8 above), paragraph 44.

33 These cases include: Communication No.97/93, *Modise v. Botswana*; Communication No. 212/98, *Amnesty International v. Zambia*; Communication No.159/96, *Union Interafricaine des Droits de l'Homme and Others v. Angola*; Communications Nos. 27/89, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and Others v. Rwanda*; Communication No.71/92,

and Peoples' Rights adopted a resolution on the right to a nationality in April 2013 stating that:

> "[…] the right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and Peoples' Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter."[34]

85. While the right to a nationality becomes of greater significance as a person approaches and reaches adulthood, it is critical for the right to a nationality to be recognised for children. This is both because 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.

86. It is thus not a coincidence that the first case in which the Committee has ruled on interpretation of the African Children's Charter related to the statelessness of children. In the Kenyan Nubian Children's case), the Committee stated that it :

> [...] cannot overemphasise the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherit an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the State. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in

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Rencontre Africain pour la Défense des Droits de l'Homme v. Zambia; Communication 211/98, *Legal Resources Foundation v. Zambia*; Communication 292/2004, *Institute for Human Rights and Development in Africa v. Angola;* Communication No. 249/02, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*; and Communication No. 246/02, *Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire.*

34 African Commission on Human and Peoples' Rights, *Resolution 234 on the Right to Nationality,* 53rd Ordinary Session, 9- 23 April 2013, Banjul, The Gambia.

the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally an antithesis to the best interests of children.[35]

87. The Committee thus reminds African States that States do not enjoy unfettered discretion in establishing rules for the conferral of their nationality, but must do so in a manner consistent with their international legal obligations. These include those set out in Article 6, paragraphs (3) and (4) of the African Children's Charter, as well as Article 4, which provides that "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration". The Committee also draws States' attention to Article 5(2) of the African Children's Charter, which provides that "States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child", and notes that the possession of a nationality is critical to the ability of a child to access such State protection.

88. Articles 6(3) and (4) of the African Children's Charter reaffirm the established international principle set out in the Universal Declaration of Human Rights Article 15(1) that "Everyone has the right to a nationality". However, the combination of sub-articles (3) and (4) of Article 6 provide a more specific obligation than Article 15(1) of the Universal Declaration of Human Rights. This is because these sub-articles require States "to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born".[36] Article 6(4) of the African Children's Charter strengthens the overarching

35 Kenyan Nubian Children's case, paragraph 46.

36 General Comment No. 17 of the UN Human Rights Committee (1989); *Article 24 : Rights of the Child*,
paragraph 8; see also Kenyan Nubian Children's case (note 8 above), para 42. Cf The Convention on the Rights of the Child which provides in Article 7(2) that "States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under

provision on nationality, and harmonises the Charter with the principle established by the 1961 Convention on the Reduction of Statelessness: that a child who would otherwise be stateless – that is, who does not obtain any other nationality at birth – shall have the nationality of the State in which he or she is born. The African Children's Charter thus reaffirms the specific responsibility of the State where the child is born to confer its nationality upon the child, if that child has no other nationality.

89. Above all, the inclusion of Article 6(4) within the African Children's Charter represents a recognition by African States that the lack of the right to a nationality, and the lack of recognition as a full participant in the political and social life of the country where a person has been born and lived all his or her life, has been at the heart of many of Africa's most intractable political crises and civil conflicts. Ensuring that all children have a nationality from birth is not only in the best interests of the child and future adult, but also of States Parties to the Charter.

90. In considering the significance of the wording of Article 6(3), the Committee of Experts held in the Kenyan Nubian Children's case that:

> The African Committee notes that Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1), that "every child has the right from his birth to acquire a nationality". It only says that "every child has the right to acquire a nationality". Nonetheless, a purposive reading and interpretation of the relevant provision [Article 6(3)] strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the African Children's Charter that requires that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

91. As indicated in that case, because by definition, a child is a person below the age of 18 (Article 2 of the African Children's Charter), any law, policy or practice which

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the relevant international instruments in this field, in particular where the child would otherwise be stateless".

entails that children must wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an adequate effort on the part of the State party to comply with its Charter obligations.[37] Although the Committee accepts that there are a variety of legal systems in place in Africa relating to the acquisition of nationality, and acknowledges the discretion of State parties to adopt rules that conform with their traditions and needs, this discretion is at the same time limited by the principles of international human rights law, including the African Children's Charter. Thus, the Committee believes that States should adopt legal and other measures to ensure that nationality is acquired by a child at birth not only on the basis of descent from a citizen without restrictions (such as limitation of transmission of nationality to one generation only for children born abroad), but also in some circumstances on the basis of birth in the territory of the State. The commitment to reduce the possibility of statelessness is an overarching obligation in the best interests of the child.

92. While the situation of children born in the territory who do not acquire the nationality of another State at birth has already been considered in relation to Article 6(4), the Committee notes that it can be difficult to prove the risk of statelessness: that is, that a person does not have, or is not going to acquire, another nationality. In addition, it may be unreasonable to expect a child who may have a theoretical right to another nationality to take the steps needed to acquire that nationality. Thus, the Committee 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. As already recommended in the Kenyan Nubian Children's case, the Committee also believes that States should adopt provisions giving children born in their territory the right to acquire nationality after a period of residence that does not require the child to wait until majority before nationality can be confirmed. Additionally, a number of African States provide for a child born in the territory of parents who are lawfully and

37 Kenyan Nubian Children's Case, paragraph 42.

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.

93.Although this impacts only on a very small number of children, the Committee suggests that States parties to ensure that their nationality laws provide that children born on a ship or in an aircraft flagged or registered in that State are deemed to have been born in the territory of that State.

Nationality and the Principle of non-discrimination

94. In establishing rules relating to nationality, States must also uphold the principle of non-discrimination set out in Article 3 of the Charter. Specifically, all criteria established by States relating to acquisition of nationality by children must not distinguish on the basis of "the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status". Accordingly, the Committee recommends that those African States that have legal provisions that discriminate on any of these grounds should review them and replace them with non-discriminatory provisions.

Nationality and the gender of the parent

95. In the context of nationality, the most common ground for discrimination relates to the gender of the parent. Over the past two decades, many African countries have amended their laws to remove discrimination in the rights of men and women to transmit their nationality to a child, and the Committee urges those countries that still retain such provisions to do the same.[38] Such reforms should also remove

38 Revised Background Note on Gender Equality, Nationality Laws and Statelessness, UNHCR, 8 March 2013 http://www.refworld.org/docid/4f59bdd92.html

discrimination based on the birth of a child in or out of wedlock (which is usually incorporated within provisions that discriminate on the basis of the gender of a parent, where a father would transmit nationality to a child born in wedlock, and a mother if the child is born out of wedlock).

Nationality and foundlings and abandoned children

96. The Committee of Experts emphasizes the importance of provisions ensuring that children found abandoned in the territory of a State Party (foundlings) acquire the nationality of that State. Such provisions are important to ensure that children abandoned by their parents, or whose parents have died, or who are separated from their parents in case of war or natural disaster, also acquire a nationality. The Committee notes that a number of African nationality laws do not include such provisions, and that in other cases they apply only to infants; it also commends those States that have adopted laws providing for nationality to be conferred under such provisions to much older children. The Committee urges States to, at a minimum, grant nationality to all such children found abandoned, including those who (at the date they were found) were not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth.

Nationality and adopted children and those in similar situations

97. A child whose parentage is established by court order or by similar procedures to adoption should acquire the nationality of the parent concerned, subject only to an administrative procedure established by law. In the case of an adoption of a child where the family relationship with the child's birth family is not completely replaced, States should facilitate the child's acquisition of the nationality of the adoptive parents. The Committee notes that there are many different traditions relating to recognition and adoption of children within African States and that the specific procedures applied in such situations may vary greatly; however, they should comply with the

requirements of Article 24 of the African Children's Charter. The basic principle to be respected in these procedures that it is in the best interests of the child to possess the nationality of the person(s) who is (are) primarily responsible for his or her care, and to retain that nationality if it has been held for a reasonable period, even if the adoptive relationship does not continue.

Nationality of a child in case of change of status of his or her parents

98. In several contexts, the nationality of a child may be impacted by a change in status of his or her parents: in particular in case of marriage, divorce, or change of nationality of a parent. In general, it is in the best interests of the child that, when his or her parent acquires a new nationality through marriage, naturalization or similar procedure, the child also acquires that nationality. However, where a parent loses or is deprived of nationality, that loss or deprivation should not affect the child and in no case may a child lose or deprived of his or her nationality if he or she would be left stateless. In cases where a parent renounces his or her nationality, the State is under a general obligation to ensure that the person obtains another nationality; while a parent may also renounce nationality on behalf of a minor child (subject to the principle that the older a child is, the greater extent his or her own views should be heard and taken into account), the obligation of the State to ensure that another nationality is acquired is particularly important to avoid statelessness for that child.

Article 6(4)

99. Article 6(4) requires States parties: "to ensure that their Constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he[/she] has been born if, at the time of the child's birth, he [/she] is not granted nationality by any other State in accordance with its laws." As noted above, the importance of Article 6(4) is to go beyond a generalized obligation on all states to reduce statelessness among children, and to create a specific obligation for the State where a child is born. Various formulations of this

safeguard are found in a number of other international instruments and form the bedrock of global efforts to prevent statelessness.

100. A determination of whether a child has been granted nationality of another State at birth requires consideration of whether the child has acquired the nationality from either of his or her parents on the basis of descent.[39] This determination must be made on the basis of an analysis of the nationality legislation and its implementation of the parents' State (or States) of nationality. States may also consult the authorities of the parents' country of nationality to establish whether the child is considered a national of that country or countries. States must accept that a child is not a national of another State if the authorities of that State indicate that he or she is not a national. A State can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm the child is a national.[40]

101. When applying Article 6(4), it is necessary to examine the situation of the child. It is not sufficient to examine whether the parents are stateless. In some instances one or both parents may possess a nationality but cannot confer it upon their children, for example due to discrimination against women with regard to conferral of nationality to children or limitations on conferral of nationality to children born abroad. Thus, the Committee of Experts notes that legal provisions for a child born in their territory to acquire the nationality of the State if the parents are stateless do not in themselves fulfill the requirements of Article 6(4).

6. Remedies

102. States parties shall take all necessary measures to ensure that appropriate

39 See UNHCR, *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*, HCR/GS/12/01, 20 February 2012.

40 See UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through*

remedies are available in all cases or allegations of violation of the rights to a name, to birth registration, to acquire a nationality and of the attendant obligation to prevent statelessness. States parties particularly must establish administrative and judicial review mechanisms to enable individuals to appeal any decision denying them any of the rights enshrined in Article 6 of the African Children's Charter. The Committee emphasizes the need to provide for participation of children affected by any such decision in the manner explained earlier in this General Comment.

7. Recommendations

Pro-active role of States in implementation Article 6

103. The primary responsibility to ensure that a child is registered at birth lies with his/her parents or caregiver. Nevertheless, States parties are under an obligation to play an active role in ensuring that education and sensitization campaigns on birth registration are undertaken all over the country and that the message reaches as many people as possible. The obligation to play a pro- active role is justified under Article 20 of the African Children's Charter. The Article provides for parents' responsibilities with regard to the upbringing and development of the child but also imposes on States parties a number of obligations intended to complement the role of parents. In any case, the obligation of to take pro-active steps is required under the broader obligations to take special measures for the child's protection and to ensure that his/her best interests are at all times given due consideration. Pro-active State obligations are also engendered by the primary obligation to establish and maintain decentralized, efficient and effective civil registry systems, so that parents are in fact enabled to register the births of their children. That these must find their basis in well thought through and modern legislation which gives effect to the principles in this General Comment is also indicative of the pro-active obligation upon State parties.

Coordination

104. In addition to legislative measures to ensure that all conditions are in place for a child to enjoy his/her rights to a name, to birth registration and to acquire a nationality, States parties must take all the necessary steps to ensure proper coordination between the central civil registration authority and other civil registration offices across the country. These coordination measures ensure smooth collaboration between all government and private agencies that have access to and process vital statistics data held by the civil registration authority. States parties may consider establishing an inter-agency organ to coordinate the work of all government and private agencies as well as United Nations' agencies involved in the processing of this data.

Sensitization

105. As part of the special measures of protection warranted by the unique status of children, States parties have the responsibility to undertake campaigns to raise awareness amongst all the components of their population on the benefits of birth registration. Particular efforts must be made to reach out the most vulnerable populations and communities whose children otherwise run the risk of becoming stateless or undocumented if they are not register as identified throughout this General Comment.

Capacity building

106. For the birth registration system to function and ensure the right to birth registration is effectively fulfilled and protected, States parties must design continuing training programmes for various stakeholders including civil registrars, legislators, members of the government, law enforcement agencies, health workers and allied personnel,

and the judiciary and all those involved in the processing of vital statistics at all levels. Training of the civil registrars must not only focus on technical skills related to civil registration but also on the human rights dimension of birth registration. This will enhance actor's sense of civic responsibilities relating to the overall significance of birth registration for children and for the country's development at large. The human rights-based approach to birth registration will also keep civil registry personnel alert to the fact that birth registration is a right for all children including migrants, refugee children and children of asylum seekers among others.

107. The Committee notes that in some States parties, the functions of birth registration constitute extra work for staff already overcrowded with their own normal duties. The job of civil registrar should, at certain levels of territorial administration, have a permanent status with all the employee benefits of a full career in the public service.

108. Civil registrars must also be kept updated on all the improvements and modifications made to the civil registration system. User friendly manuals must be developed and distributed at all levels of civil registration across the country. Training must also advocate a customer service orientation, as is expected of civil registrars. They must adopt a friendly attitude towards parents or caregivers who come to register their children, particularly when they are dealing with vulnerable children such as those born to indigenous peoples, refugees, asylum seekers and persons with undocumented status.

109. Capacity building programmes should also target legislators and policy makers with particular focus on both the human –rights approach to birth registration and its significance for the political, social and economic development of the country. An effective fully functioning, universal, free and accessible birth registration system, which is at the same time integrated with other civil registration services and government agencies that use vital statistics, plays an essential role in ensuring

democratic governance in the country. For example, it informs the electoral process as to the numbers of the eligible voting population and those able to stand for elected positions. From a socio-economic point of view, a functioning birth registration system integrated with other civil registration services informs government social services agencies on the details of the current beneficiaries of services as well as on those who no longer qualify for them because they have died or exited the requisite age to benefit from those services. A fully functioning birth registration system contributes to good economic governance of the country as it provides accurate statistical data for planning purposes. This has the advantage of preventing and minimising corrupt and mismanagement practices in public offices where the absence of accurate data leads to unnecessary surveys, use of proxy data, and over or under-evaluation of data. With improved economic governance and an environment conducive to the fulfilment of children's and human rights, the country is better placed to attract foreign investors, which can lead to enhanced job creation and economic growth.

110. Finally, capacity building programmes should also be directed to law enforcement agencies such as the police, prosecutors, regulatory bodies, officials of the ministry of the interior, and members of the judiciary. Since a fully functioning birth registration system offers documented proof of identity, law enforcement agencies should be trained on how to access identity data during investigations, prosecutions and trials.

111. The Committee hereby calls upon States parties to particularly:

a. establish legal frameworks in accordance with, or align them to, this General Comment in all of the respects outlined above;
b. establish a functioning, well managed, resourced, integrated, universal, free and accessible birth registration system;
c. establish an inter-agency coordination unit in charge of the oversight of the

whole integrated civil registration system;

d. put in place policies, programmes, strategies and plans of action for dissemination of information on the importance of birth registration countrywide;
e. put in place policies and programmes for continuing training of various birth registration stakeholders, including: policy makers, legislators, law enforcement agencies, and civil registry staff; and allocate sufficient resources to acquisition of the requisite equipment for civil registration offices;
f. Respect the principle of international law that statelessness shall be avoided; and in particular that, as required by Article 6(4), a child who, at the time of birth, is not granted nationality by any other State in accordance with its laws acquires the nationality of the State in the territory of which he or she has been born.
g. Do not distinguish on the basis of "the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status", including the child's birth in or out of wedlock.
h. Provide that children found abandoned in the territory of a State Party (foundlings) acquire the nationality of that State.
i. Facilitate the acquisition of nationality by children adopted by a national of that State.
j. Provide protections against statelessness for children where the status of one or both parents changes through divorce, marriage, loss, deprivation or renunciation of nationality.
k. Respect the right of children to express their wishes in relation to nationality, as they grow older.

112. The Committee calls on State Parties to the African Children's Charter to cooperate with other States and with international organizations to resolve cases where an individual may have two or more nationalities, and take steps to ensure that at least one nationality is recognized and documentation proving that nationality

is given to the individual concerned.

113. In order to promote international cooperation, the Committee calls upon the international organizations and agencies involved in the promotion and protection of children's rights to extend their collaboration to the States parties in the implementation of laws, policies, programmes and strategies aimed at the realization of the right to birth registration and the acquisition of a nationality.

114. Non-governmental organizations, civil society groups, such as youth groups, faith-based organizations, women's organizations and traditional leaders all have an important role to play in the promotion and dissemination of awareness on the right to birth registration.

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