

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

PREAMBLE

THE STATES PARTIES to the African Charter on Human and Peoples' Rights:

CONSIDERING that Article 66 of the African Charter on Human and Peoples' Rights provides for special protocols or agreements, if necessary, to supplement the provisions of the Charter;

RECALLING the commitment in the 50th Anniversary Solemn Declaration of the Assembly of Heads of State and Government of the African Union to facilitate African citizenship in order to allow free movement of people, and the aspiration of the Agenda 2063 Framework Document for an African citizenship and passport and for the availability of dual citizenship for the African diaspora;

DRAWING INSPIRATION, as required by Article 60 of the African Charter on Human and Peoples' Rights, from the Universal Declaration of Human Rights, of which Article 15 provides that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality;

RECOGNISING that the right to a nationality is a fundamental condition for the protection and effective exercise of the full range of other human rights;

RECALLING the provisions of the Convention Governing the Specific Aspects of Refugee Problems in Africa, the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa and the Convention on the Protection and Assistance of Internally Displaced Persons in Africa;

ALSO RECALLING the pioneering role played by the Regional Economic Communities of the African Union in the evolution of new citizenships at the regional level as a means of accelerating the integration of Africa's peoples;

INFORMED by the decisions and resolutions of the African Commission on Human and Peoples' Rights and of the African Committee of Experts on the Rights and Welfare of the Child recognizing and protecting the right to a nationality and condemning arbitrary deprivation of nationality;

AFFIRMING that statelessness is a violation of the right to human dignity and to legal status enshrined in Article 5 of the African Charter on Human and Peoples' Rights;

MINDFUL that the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child provide that every child has the right to acquire a nationality;

MINDFUL ALSO that the Convention on the Reduction of Statelessness establishes that it is desirable to reduce statelessness by international agreement, and that the Convention Relating to the Status of Stateless Persons and the Convention Relating to the Status of Refugees bind States parties to "as far as possible facilitate the assimilation and naturalisation" of refugees and of stateless persons;

CONSCIOUS that the history of the African continent, especially the initial establishment of borders by colonial powers, has given questions of nationality and statelessness particular characteristics in our States that are not sufficiently taken into account by the existing African and international instruments;

DETERMINED to eradicate statelessness by ensuring that all persons have a nationality, by ending arbitrary deprivation or denial of nationality and by promoting the harmonisation of nationality laws;

RECOGNISING that it is necessary therefore to establish by voluntary agreement standards and procedures for settling questions relating to the specific aspects of the right to a nationality and the eradication of statelessness in Africa:

HAVE AGREED AS FOLLOWS:

ARTICLE 1. Object and Purpose of this Protocol

1. The object and purpose of this Protocol is to establish the obligations and responsibilities of States relative to the specific aspects of the right to a nationality in Africa and to ensure that statelessness is eradicated.
2. The provisions of this Protocol shall be interpreted in light of this object and purpose.

ARTICLE 2. Definitions

For the purpose of this Protocol:

“African Charter” means the African Charter on Human and Peoples’ Rights;

“African Commission” means the African Commission on Human and Peoples’ Rights established under the African Charter;

“African Committee of Experts” means the Committee of Experts established under the African Charter on the Rights and Welfare of the Child;

“African Court” means the African Court on Human and Peoples’ Rights or any successor institution to the Court, including the African Court of Justice and Human Rights;

“Appropriate connection” means a connection by personal or family life to a State and shall, among others, include a connection by one or more of the following attributes: birth in the relevant State, descent from or adoption by a national of the State, habitual residence in the State, marriage to a national of the State, birth of a person’s parent, child or spouse in the State’s territory, the State’s being the location of the person’s family life, or, in the context of succession of States, a legal bond to a territorial unit of a predecessor State which has become territory of the successor State;

“Arbitrary” means action taken in violation of the provisions of the African Charter, in particular Articles 2, 3, 7, and 26, as interpreted by the African Commission or the African Court in accordance with Articles 60 and 61 of the Charter;

“Child” means any person below the age of eighteen;

“Constitutive Act” means the Constitutive Act of the African Union;

“Deprivation of nationality” means withdrawal of nationality initiated by the authorities of the State;

“Habitual residence” shall mean stable factual residence, or the place where a person has established his or her permanent or habitual centre of interests;

“Loss of nationality” means withdrawal of nationality which is automatic, by operation of law;

“National” means a person who has the nationality of the State concerned;

“Nationality” means a legal bond between a person and a State and shall not be understood as a reference to ethnic or racial origin;

“Parent” means the mother or father of a child, including an adoptive mother or father, and any person to whom the status of parent within a child-parent family relationship is established or recognised by law of the State Party concerned;

“Person” refers to a natural person or human being;

“Refugee” means any person who meets the definition of refugee in either the Convention Governing the Specific Problems of Refugees in Africa or the UN Convention Relating to the Status of Refugees;

“Spouse” means a husband or wife as recognised under the laws of the State Party concerned;

“State succession” means the replacement of one State by another in the responsibility for the international relations of a territory;

“Stateless person” means a person who is not considered as a national by any State under the operation of its law, including a person who is unable to establish a nationality.

ARTICLE 3. General Principles

1. Consistent with the provisions of this Protocol and international law, it is for each State Party to determine under its own law who are its nationals.
2. The States Parties agree and recognize that:
 - a. Every person has the right to a nationality;
 - b. No one shall be arbitrarily deprived or denied recognition of his or her nationality nor denied the right to change his or her nationality;
 - c. States have the obligation to act, both alone and in cooperation with each other, to eradicate statelessness and to ensure that every person has the right to the nationality of at least one state where he or she has an appropriate connection.

ARTICLE 4. Non-Discrimination

1. The rules and practices of a State Party on nationality shall not contain distinctions or include any exclusion, or restriction or any different treatment based on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, disability, birth or other status, except for those specifically permitted by this Protocol.

2. A State Party shall grant women and men equal rights to acquire, change or retain their nationality and with respect to the nationality of their children.
3. Notwithstanding the provisions in paragraph 1 of this Article, a State Party may preserve the right to make distinctions among its nationals, if at the time of signature, ratification or accession to this Protocol it specifies its retention of such right, for either of the following purposes, being provisions existing in its national law at that time:
 - a. to limit access to the very highest offices of State to persons who were attributed its nationality at birth or who have exclusive nationality of that State; or
 - b. to provide for different criteria for deprivation of nationality for those who were attributed nationality at birth or who have acquired it later, subject to the provisions of Article 16 of this Protocol.

ARTICLE 5. Attribution of Nationality at Birth

1. A State Party shall, at minimum, attribute nationality by operation of law from the moment of birth to the following persons :
 - a. A child one of whose parents had the nationality of that State at the time of the child's birth, subject to any exceptions which may be provided for by its domestic law as regards children born abroad. A State shall, however, always provide for the attribution of nationality to a child born abroad if:
 - i. either of the child's parents has its nationality and was born in its territory, or
 - ii. the child would otherwise be stateless.
 - b. A child born in the territory of the State of one parent also born there;
 - c. A child born in the territory of the State of parents who are stateless or of unknown nationality or in other circumstances in which the child would otherwise be stateless;
2. A State Party shall also retroactively attribute nationality from the date of birth to:
 - a. A child found in the territory of the State of unknown parents, who shall be considered to have been born within that territory of parents possessing the nationality of that State;
 - b. A person born in the territory of the State who has remained habitually resident there during a period of his or her childhood. Such recognition shall take place at the latest at the person's majority and may be either:
 - i. automatically by operation of law; or
 - ii. by declaration of the child or one of his or her parents;
 - c. A child adopted by a national.

ARTICLE 6. Acquisition of Nationality

1. A State Party may provide in law for the possibility of acquisition of nationality by persons having an appropriate connection to the State.
2. A State Party shall provide in law for the possibility of acquisition of its nationality by persons who are habitually resident in its territory. In establishing the conditions for acquisition, the State Party shall not provide for a period of residence exceeding ten years before the lodging of an application, and other conditions shall be reasonably possible to fulfil.
3. A State Party shall facilitate in law the possibility of acquisition of its nationality by:
 - a. The child of a person who has or who acquires its nationality;
 - b. A child born in the territory of the State to a non-national parent who is habitually resident there;
 - c. A person who was habitually resident in its territory as a child and who remains so resident at majority;
 - d. A child in the care of a national of the State;
 - e. The spouse of a national;
 - f. A stateless person;
 - g. A refugee.
4. A State Party shall not make the renunciation of another nationality a condition for the acquisition of its nationality where such renunciation is not possible or cannot reasonably be required or exposes the person to the risk of statelessness.
5. In cases where a State Party confers its nationality on persons who are not habitually resident in its territory, it should ensure that such a conferral of nationality respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring nationality en masse, even if multiple nationality is allowed by the State of residence.

ARTICLE 7. Habitual Residence

1. In the case where entitlement to nationality or other right under this Protocol depends on habitual residence, a State Party may require that residence to be lawful, unless the person would otherwise be stateless.
2. In the calculation of a necessary period of habitual residence, a State Party [shall] [may] include:
 - a. any period of unlawful residence preceding the regularisation of a person's status;
 - b. any period of residence as a refugee, including the period during which an application was processed.

ARTICLE 8. Nomadic and Cross-border Populations

1. In the case of persons whose habitual residence is in doubt, including persons who follow a pastoralist or nomadic lifestyle and whose migratory routes cross borders, or who live in border regions, a State Party shall:
 - a. Take all appropriate measures to ensure that such a person has the right to the nationality of at least one of the States to which he or she has an appropriate connection;
 - b. Grant or provide proof of nationality to a person on application if that person has an appropriate connection to that State and who is unable to prove that he or she has the nationality of any other State; and
 - c. Recognise as an appropriate connection, in addition to the definition provided in Article 2, any relevant evidence of a connection to the State, including:
 - i. repeated residence in the same location over many years;
 - ii. the presence of family members in that location throughout the year;
 - iii. the cultivation of crops on an annual basis at that location;
 - iv. the burial sites of ancestors;
 - v. the testimony of other members of the community;
 - vi. the expressed will of the person.

ARTICLE 9. Nationality and Marriage

1. A marriage or the dissolution of a marriage between a national and a non-national shall not automatically change the nationality of either spouse nor affect the capacity of the national to transmit his or her nationality to his or her children.
2. The change of nationality of one spouse during marriage shall not automatically affect the nationality of the other spouse or of the children.
3. In determining the nationality of any person, including a child, the law shall not distinguish between children born in and out of wedlock.

ARTICLE 10. Nationality and Children's Rights

1. A State Party shall adopt legislative and other measures to ensure that every child is attributed a nationality at birth and is registered immediately after birth.
2. A State Party shall ensure that, in all actions concerning the nationality of a child undertaken by any person or authority, the best interests of the child shall be the primary consideration; and that in all judicial or administrative proceedings affecting the nationality of a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

ARTICLE 11. Multiple Nationality

1. A State Party may recognise multiple nationality.
2. A State Party shall not prohibit multiple nationality in the case of:
 - a. A child who was attributed multiple nationalities at birth until he or she can opt for one nationality after attaining majority; or
 - b. A national who acquires another nationality automatically through marriage.
3. If a person who is presumed to have two or more nationalities is required to choose between different nationalities after attaining majority, as permitted by paragraph 2(a), this requirement shall be clearly set out in law, and a State Party shall :
 - a. Provide for a reasonable period during which the option may be exercised after majority, and allow for exceptions to any time limit where reasonably required;
 - b. Accept as conclusive a statement from the consular authorities of the other relevant State or States that the person has renounced or has never held the nationality of that State, and presume that the person does not have the nationality of such State if there is no response within a reasonable period.

ARTICLE 12. Evidence of Entitlement to a Nationality

1. A State Party shall provide in law for every person to have the right to official copies of the publicly held documents required to establish entitlement to nationality at birth or the conditions for acquisition of nationality, including but not limited to certificates of birth, adoption, marriage or death.
2. A State Party shall provide in law for proof of the facts establishing entitlement to nationality at birth or the conditions for acquisition of nationality by means of oral testimony and other appropriate means where documentary evidence is not available or cannot [reasonably be demanded] [be obtained within a reasonable period].

ARTICLE 13. Documentation of Nationality

1. A State Party shall provide in law for the right to a certificate of nationality that is conclusive proof of a person's nationality and shall establish accessible procedures to obtain such a certificate.
2. A State Party shall issue to every national on request a national identity card, where such documents are in use, and a passport. Women and men as well as unaccompanied and separated children shall have equal rights to obtain any documents commonly accepted as proof of nationality and shall have the right to have such documentation issued in their own names.
3. A State Party shall prohibit the arbitrary cancellation, non-renewal, confiscation or destruction by any person of the documents referred to in paragraph 2 belonging to any person, whether national or non-national.

4. Where a person holds a document indicating that he or she is the national of a State, the burden shall be on the person that asserts that he or she is not a national to prove that the person does not have the nationality to which he or she claims to be entitled.

ARTICLE 14. Diplomatic Protection and Consular Assistance

1. A State Party shall provide diplomatic protection and consular assistance for all its nationals, according to general rules of international law.
2. A State Party may enter into bi-lateral or multi-lateral agreements enabling the mutual provision of such diplomatic protection and consular assistance to the nationals of other States Parties and generally of Member States of the African Union in countries where the State Party has consular or diplomatic representation, but the State of the person's nationality does not.
3. A State Party [has an obligation] [shall in any event endeavour] to provide diplomatic protection and consular assistance to the nationals of other States Parties in the circumstances envisaged in paragraph 2.

ARTICLE 15. Renunciation of Nationality

1. A State Party shall allow the voluntary renunciation of a person's nationality subject [only] to the condition that such renunciation would not render the person stateless.
2. A State Party shall not authorize a child to renounce his or her nationality if either of his or her parents retains it, unless the child is capable of communicating his or her own views as provided in Article 10(2) of this Protocol and confirms that he or she desires to renounce nationality and it is confirmed that the child has in fact another nationality and that it is not against the best interests of the child to authorise loss of nationality.

ARTICLE 16. Loss or deprivation of nationality

1. A State Party shall not provide for the loss of its nationality [by operation of law].
2. If a State Party does not permit multiple nationality, it may provide for the deprivation of nationality of:
 - a. a national who voluntarily acquires another nationality;
 - b. a national who has been attributed more than one nationality at birth, if the person does not opt for its nationality within a set period after majority, as permitted by Article 11(2);provided that it shall be confirmed that the person does in fact hold another nationality.
3. A State Party may provide for the deprivation of its nationality in cases where recognition or acquisition of its nationality has been obtained by means of fraud or false representation or concealment of any relevant fact attributable to the applicant, unless the fraud or false representation was not material or took place more than ten years earlier or where the effect of deprivation would be disproportionate to the reason for deprivation.

4. A State Party may provide for the deprivation of nationality acquired after birth only under a law of general application and in the following cases:
 - a. Voluntary service in the military forces of another State against the State Party;
 - b. Conviction of a crime that is seriously prejudicial to the vital interests of the State Party.
5. A State Party shall not deprive any person or group of persons of their nationality arbitrarily, including on racial, ethnic, religious or political grounds or on grounds related to exercise of rights established by the African Charter.
6. When a State Party deprives a person of his or her nationality, the decision shall not affect the nationality of the person's spouse or children.
7. A State Party shall in any case not provide for the loss or deprivation of nationality if the person would thereby become stateless.

ARTICLE 17. Recovery of nationality

1. A State Party shall provide in law for the recovery of nationality by its former nationals.
2. A State Party shall permit the recovery of nationality on request, subject only to renunciation of another nationality where the State does not permit multiple nationality, if:
 - a. The person renounced its nationality;
 - b. The person lost its nationality on voluntary acquisition of another nationality;
 - c. The person lost its nationality as a child as a result of a parent's loss or deprivation of nationality; or
 - d. The person has become stateless.

ARTICLE 18. Limitations on Expulsion

1. A State Party shall not expel a person from its territory on the grounds that the person is a non-national, except by a decision taken by a competent authority on an individual basis, subject to appeal on the basis of fact and law to the ordinary courts; and in any event shall not expel such a person without confirmation that he or she both is a non-national and has another nationality, nor while a challenge or review of a decision to deny recognition of or to deprive that person's nationality is pending before a competent administrative or judicial authority.
2. A State Party shall not expel any person in violation of the principles of international human rights or refugee law, including peremptory norms with respect to the protection of persons from exposure to severe violations of their fundamental human rights, such as the prohibition of torture, the application of the death penalty or the risk of statelessness.

ARTICLE 19. Protection of Stateless Persons

1. A State Party shall provide in law for a process to facilitate the recognition or acquisition of its nationality by persons having an appropriate connection to that State whose nationality is in doubt, for the attribution of the status of stateless person if it is determined that the person does not possess the nationality of the State concerned or any other State, and for the facilitation of the acquisition of its nationality by stateless persons as provided in Article 6(3) of this Protocol.
2. A State Party shall accord stateless persons in its territory treatment as favourable as possible and, in any event, not less favourable than that accorded to non-nationals generally in the same circumstances.
3. A State Party shall provide consular and other appropriate assistance, including the issuance of identity and travel documents, to stateless persons in their territory.

ARTICLE 20. Succession of States and Nationality

1. In cases of State succession, States Parties shall endeavour to regulate matters relating to nationality through co-operation and agreement amongst themselves and, where applicable, in their relationships with other States concerned, including through the creation of joint adjudication systems. Such agreements shall respect the principles and rules contained in this Protocol and other applicable sources of international law.
2. A State Party shall individually take all appropriate measures to prevent persons who, at the time of a State succession, had the nationality of a predecessor State, from becoming stateless as a result of the succession.
3. A State Party shall adopt special rules and procedures to facilitate the recognition of nationality of persons who had the nationality of a predecessor State during a transition period following State succession, based on the following principles
 - a. Every person who had the nationality of a predecessor State has the right to nationality of at least one of the successor States;
 - b. Persons having their habitual residence in a territory affected by the succession of States shall be presumed to acquire the nationality of the relevant successor State on the date of such succession;
 - c. Persons who are qualified to acquire the nationality of two or more successor States shall, if not permitted to hold both nationalities, have a right of option.
4. In no case shall a predecessor State withdraw its nationality from an individual before he or she acquires confirmation of the nationality of a successor State.

ARTICLE 21. Rules and Procedures relating to Nationality

1. A State Party shall ensure that the rules governing recognition, acquisition, loss, deprivation, renunciation, recovery or certification of their nationality are clear and accessible, including through the publication in an official journal of the nationality law and any relevant subsidiary legislation, as well as publication of other policies and guidance applied in the determination or withdrawal of nationality.

2. A State Party shall ensure that administrative procedures relating to applications for recognition, acquisition, renunciation, recovery or certification of nationality, and for the issue of identity or nationality documents, are not arbitrary and are processed within a reasonable time and that the fees or other conditions to process the application are reasonable.
3. A State Party shall provide in law that all decisions in relation to the nationality of a person shall be taken on an individual basis by the competent authorities and notified to that person or his or her legal guardian in writing.
4. A State Party shall provide in law that all decisions affecting a person's nationality shall be subject to administrative review where relevant, with the right for the person concerned to make representations, and in all cases to appeal to the ordinary courts responsible for similar matters.

ARTICLE 22. Monitoring and Implementation

1. To facilitate compliance with the provisions of this Protocol and co-operation for this purpose, States Parties agree:
 - a. In accordance with Article 62 of the African Charter and Article 26 of the Protocol to the African Charter on the Rights of Women in Africa, to include within their reports to the African Commission information about their domestic laws and institutional arrangements and procedures in relation to respect for the right to a nationality, including relevant statistics relating to the recognition, grant and withdrawal of nationality, and about their efforts to reduce statelessness;
 - b. For the purpose of ensuring the protection of the rights of children to nationality and in accordance with Article 43 of the African Charter on the Rights and Welfare of the Child, to include within their reports to the African Committee of Experts information on their domestic laws and institutional arrangements and procedures in relation to respect for the rights of children to nationality, including relevant statistics relating to the recognition, grant and withdrawal of nationality.
2. A State Party shall adopt all necessary measures and shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised, including through the establishment of a national mechanism or focal point that is responsible for ensuring the implementation of this Protocol, and shall notify the African Commission of the identity and contact details of such mechanism.
3. The African Commission and the African Court shall be seized with matters of interpretation and the hearing of communications relating to the implementation of this Protocol, as provided by Articles 47 to 59 of the African Charter and Protocol the relevant documents establishing the African Court.

ARTICLE 23. Cooperation among States and with International Agencies

1. States Parties undertake to co-operate with one another, in particular within the framework of the African Union, and to create, where necessary, mechanisms to facilitate

this cooperation in the determination of nationality, eradication of statelessness and harmonisation of the applicable laws and rules relating to nationality.

2. States Parties may enter into arrangements on the basis of reciprocity to share with any other States Parties information on the grant or voluntary acquisition of their nationality.
3. States Parties shall cooperate with relevant African and international agencies, including in particular the UN Office of the High Commissioner for Refugees, that have a mandate relating to the matters considered in this Protocol.

ARTICLE 24. Signature, Ratification, and Accession

1. This Protocol shall be open for signature, ratification and accession by the States Parties to the African Charter, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession shall be deposited with the Chairperson of the Commission of the African Union.

ARTICLE 25. Entry into Force

1. This Protocol shall enter into force thirty (30) days after the deposit of the fifteenth (15) instrument of ratification.
2. For a State Party that accedes to this Protocol after it comes into force, the provisions of the Protocol shall take effect for that State thirty (30) days after the date of deposit of the instrument of accession.
3. The Chairperson of the Commission of the AU shall notify all Member States of the entry into force of this Protocol within fifteen (15) days.

ARTICLE 26. Saving clause

1. None of the provisions of the present Protocol shall affect more favourable provisions for the realization of the right to a nationality contained in the national legislation of States parties or in any other regional, continental or international conventions treaties or agreements applicable in these States parties.

ARTICLE 27. Amendment and Revision

1. Any State Party may submit proposals for the amendment or revision of this Protocol.
2. Proposals for amendment or revision shall be submitted, in writing, to the Chairperson of the Commission of the AU who shall transmit the same to the States Parties, to the African Commission (if not the author of proposals), to the African Committee of Experts and to the AU Commission on International Law within thirty (30) days of receipt thereof.
3. The Assembly, upon advice of the African Commission (if not the author of proposals), the African Committee of Experts and the AU Commission on International Law, shall examine these proposals within a period of one year following notification of States Parties under paragraph 2 of this article.

4. The Assembly may adopt amendments or revisions by a simple majority.
5. The amendment shall come into force for a State Party that has accepted it thirty (30) days after the Chairperson of the Commission of the AU has received notice of the acceptance.

DRAFT