

INTRODUCTORY NOTE TO AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
RESOLUTION 234 ON THE RIGHT TO NATIONALITY
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Introduction

The right to a nationality is well established in international human rights law. In 1954 and 1961, the United Nations adopted the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, respectively. Inspired by Article 15 of the Universal Declaration of Human Rights, the two Conventions provide for a right to nationality and prohibit deprivation or denial of nationality.¹ In 2012, the United Nations Office of the High Commissioner for Refugees (UNHCR) drafted four guidelines on statelessness that expand on provisions of the 1954 and 1961 UN Conventions. They contain guidance sections directed specifically at governments, civil society organizations, legal practitioners, decision-makers and the judiciary as well as UNHCR and other UN agency staff involved in addressing statelessness.²

Unfortunately, however, the right to nationality is still denied across the world. The issue is particularly one of great concern in Africa, where hundreds of thousands are stateless. While the African Charter on Human and Peoples' Rights (the African Charter) imprecisely provides for a right to the "recognition of one's legal status," the 2003 Protocol to the same Charter on the Rights of Women only guarantees both men and women's rights to acquire the nationality of their partner and transmit it to their children. And though the 1999 African Charter on the Rights and Welfare of the Child obligates states of birth to grant nationality, it is the exception amongst the relevant African instruments in explicitly addressing the right to nationality.³ Against this legal background, however, new hopes have been raised by the 2013 adoption of a Resolution on the Right to Nationality in Africa by the African Commission on Human and Peoples' Rights (the African Commission).

Background

From a legal standpoint, two major factors may explain the current statelessness trends in Africa. First, only ten African states have ratified the 1954 Convention on the Reduction of Statelessness since the adoption of the Convention sixty years ago. Second, either existing national legislation is contrary to the UN Conventions or some of the fairly advantageous domestic provisions are not enforced in practice due to discrimination based on religion, ethnicity, origin, or some other grounds that the Conventions prohibit. The lack of awareness among major stakeholders has not helped the situation.

Fortunately, there has been an increased commitment in recent years to address these issues. In 2010, the UN mandated its High Commission for Refugees as the focal agency for issues relating to nationality and statelessness. Celebrations held in 2011 in Dakar, Senegal, around the 50th anniversary of the UN Conventions brought nationality and statelessness back as a priority on the agenda of international human rights protection.⁴ Furthermore, the African Commission, the oldest and one of the most prominent regional human rights institutions in Africa, has also taken advantage of the renewed UN interest in statelessness. Following a series of consultations under the leadership of its Special Rapporteur on Refugees, Asylum Seekers, Migrants and Displaced Persons, the African Commission adopted Resolution 234 on the Right to Nationality in Africa on April 23, 2013, during its 53rd Ordinary Session held in Banjul, The Gambia.⁵

The Legal Value and Impact of Resolution 234

The leading interest of Resolution 234 is to remind states of their commitments under the UN Conventions in light of the limitations of African regional instruments alluded to earlier.⁶ Regarding the legal value and impact of the Resolution, it is important to recall that resolutions adopted by international bodies, mainly UN-Charter-based organs, fall under the normative category of what is called soft law, in opposition to hard and binding law. However, the boundaries between soft and hard, binding and non-binding norms are blurring. The interaction of the two sets of norms is equally increasing and manifold.⁷ Ultimately, the most important factor seems to be whether the duty bearers (States) of a particular norm

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(here, resolutions of the African Commission) should consider its provisions as binding or at least persuasive in all or in full, as well as their possible effect on domestic legislation and implementation.⁸

Although resolutions of the African Commission are not expressly legally binding, Article 45(1)(b) of the African Charter allows the Commission to “lay down[] principles and rules” to solve legal human rights problems in Africa. The Commission infers legal authority from this provision to adopt a category of resolutions called “thematic resolutions.” These resolutions “elaborate[] in greater detail specific human rights themes or a particular substantive right covered in the Charter” as well as define “states’ obligations in respect of such right and describe[] the standards set by the Charter.”⁹

As a thematic resolution, Resolution 234 recalls states’ duty to give effect to the right to nationality, stresses the Commission’s mandate to monitor such implementation, and provides a role for relevant stakeholders, namely states but also civil society actors and the Commission’s Special Rapporteur with a mandate on the relevant issues. It follows that, through Resolution 234, the African Commission opens a new section to monitor state compliance with international commitments on nationality and reduction of statelessness.

Having said that, a main issue with Resolution 234—and more generally with thematic resolutions of the African Commission—is its recommendatory and exhortatory language. Another problem with the Resolution is that it is thematic without fulfilling any interpretative function regarding the terms “nationality” or “statelessness”. It may be argued that such venture was unnecessary since the ultimate purpose of the Resolution has been re-oriented towards the adoption of a specific convention that fills the existing normative gaps.¹⁰

Developments After the Adoption of Resolution of 234

Because Resolution 234 is not expressly binding and considering its substantive focus, strategies to capitalize on the Resolution have primarily called for promotional rather than legislative action. Interestingly, the African Commission made effective use of the recommendation for the competent Special Rapporteur to oversee a study on the issue in order to harness energies towards both advocacy and lawmaking. The ultimate result was to gather information and comparative knowledge towards a specialized African convention on nationality and reduction of statelessness, while advocacy for ratification of all relevant conventions is pursued in parallel. A number of such events occurred in 2013, immediately following the adoption of Resolution 234.

On May 6, 2013, in Addis Ababa, Ethiopia, participants in a meeting of the African Commission’s relevant Working Group on Statelessness and the Right to a Nationality in Africa called for a Protocol and Model Law on Nationality. The Addis Ababa meeting further recommended a thorough study presenting the legislative situation and statutory mapping of statelessness in Africa. A subsequent meeting with a similar purpose was held from October 19 to 20, 2013, in Dakar, Senegal, on the right to nationality in Africa, with civil society multi-sectorial support and attendance as well as the contribution of UNHCR.¹¹

From November 18 to 20, 2013, under the auspices of the West Africa Office of the UNHCR, representatives of regional civil society organizations, governments and parliaments met in Saly, Senegal, to discuss strategies aiming at undertaking advocacy for a greater state adherence to the two UN Conventions on statelessness.¹²

The third regional workshop following the adoption of Resolution 234 was the Round Table held from December 4 to 6, 2013 in Banjul, gathering all African regional bodies with a mandate to protect and promote human rights, including the African Union, the African Court on Human and Peoples’ Rights (African Court), the African Commission, the Court of Justice of the Economic Community of West African States (ECOWAS), and National Human Rights Institutions of the fifteen ECOWAS Member States. Spearheaded by the UNHCR, the meeting issued the Banjul Appeal, a declaration to which recommendations were appended for regional human rights institutions to play a decisive role in reducing statelessness.¹³

In the face of these developments, it appears that Resolution 234 of the African Commission is not only relevant but is yielding impact rapidly. Notwithstanding this fact, the lawmaking ascendance of actions following Resolution 234 begs the question whether and why a new treaty is needed. Of relevance is the idea that a specific treaty on nationality will fill the gaps in or complement the existing regional instruments and help achieve the reduction of statelessness in Africa faster. Moreover, it could help the African Commission better address nationality issues under its contentious mandate, which it struggled to do in the past.¹⁴

Conclusion

Multi-sectorial follow-up in the wake of the African Commission's adoption of Resolution 234 bears some promise of the Resolution's future effectiveness. As an indication, at its 54th Ordinary Session held from October 22 to November 5, 2013 in Banjul, the Commission considered the first draft of the "pre-treaty" study and made a number of recommendations to widen the scope of the research and include further updated information. And finally, another document was considered during the 55th Ordinary Session of the Commission, held from April 28 to May 12 2014 in Luanda, Angola. Following that consideration, the Commission adopted a resolution requesting the Special Rapporteur to lead the work of a drafting committee towards the preparation, within two years, of a Protocol to the African Charter on the Right to Nationality. The current trends suggest a fast completion of the lawmaking process, thus providing an example of how resolutions of the African Commission not only have a potential to carry some legal authority, but also an actual capacity to influence lawmaking and directly contribute to an enhanced legal protection of human rights in Africa.

ENDNOTES

- 1 The United Nations instruments relating to nationality and statelessness include the Convention relating to the Status of Stateless Persons, Sept. 28, 1954, <http://www.unhcr.org/3bbb25729.html>; Convention on the Reduction of Statelessness, Aug. 30, 1961, <http://www.unhcr.org/3bbb286d8.html>; Convention on the Nationality of Married Women arts. 1-3, Feb. 20, 1957, 309 U.N.T.S. 65; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(d)(iii), Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights art. 24(3), Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child art. 7-8, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women art. 9, Dec. 18, 1979, 1249 U.N.T.S. 13.
- 2 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, U.N. Doc. HCR/GS/12/01 (Feb. 20, 2012), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opedocPDFViewer.html?docid=4ffa957b9&query=guidelines%20statelessness>; UNHCR, Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person, U.N. Doc. HCR/GS/12/02 (Apr. 5, 2012), <http://www.refworld.org/docid/4f7dafb52.html>; UNHCR, Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, U.N. Doc. HCR/GS/12/03 (July 17, 2012) <http://www.refworld.org/docid/5005520f2.html>; UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness U.N. Doc. HCR/GS/12/04 (Dec. 21, 2012), <http://www.refworld.org/docid/50d460c72.html>.
- 3 African Charter on the Rights and Welfare of the Child, adopted July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).
- 4 UNHCR, STATELESS PEOPLE (2014), <http://www.unhcr.org/pages/49c3646c155.html>; Press Release, UNHCR, UNHCR Urges More Support for Statelessness Treaty on 50th Anniversary (Aug. 30, 2011), <http://www.unhcr.org/4e5cec7b9.html>.
- 5 African Commission on Human and Peoples' Rights, 234: Resolution on the Right to Nationality (Apr. 23, 2013), <http://www.achpr.org/sessions/53rd/resolutions/234/>.
- 6 African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990).
- 7 See generally Japhet Biegion, Hard law, soft law and the legal significance of the resolutions of the African Commission on Human and Peoples' Rights (2013) (draft L.L.D. thesis chapter, Centre for Human Rights, University of Pretoria) (on file with author).
- 8 See generally Horace Adjolohoun, State Compliance with the Human Rights Jurisprudence of the ECOWAS Court (2012) (draft article) (on file with author).
- 9 African Commission on Human and Peoples' Rights, Resolutions by the African Commission (2014), <http://www.achpr.org/resolutions/about/>.
- 10 In any case, compared with decisions on communications, which are equally non-binding in principle, resolutions of the African Commission should be considered as lawmaking or at least as carrying a persuasive legal authority. Moreover, they could acquire a binding character through *opinio juris communis* if endorsed by policy organs of the African Union and Member States—as illustrated by Resolution 97 of 2006 on States duty to implement decisions on communications—within six months. See African Commission on Human and Peoples' Rights, 97: Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties (Nov. 29, 2006), <http://www.achpr.org/sessions/40th/resolutions/97/>; Rules of Procedure of the African Commission on Human and Peoples' Rights adopted on October 6, 1995, art. 112.
- 11 Working Group on Statelessness and the Right to a Nationality in Africa, Communiqué (2013) (on file with author).
- 12 E-mail correspondence with Mr. Clément Capo-Chichi, Benin Country Director for Amnesty International (on file with author).
- 13 PARTICIPANTS IN THE REGIONAL ROUND TABLE ON STATELESSNESS IN WEST AFRICA, BANJUL APPEAL ON STATELESSNESS (Dec. 6, 2013), <http://www.refworld.org/docid/52f9d6fe4.html>.
- 14 See, e.g., *Modise v. Botswana*, Comm. No. 97/93, 2000 AHRLR 25 (ACHPR 1997); *Amnesty International v. Zambia*, Comm. 212/98, 2000 AHRLR 325 (ACHPR 1999). The same may apply to the newly operating African Court.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS RESOLUTION
234 ON THE RIGHT TO NATIONALITY*

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African Commission on Human and Peoples' Rights

234: Resolution on the Right to Nationality

The African Commission on Human and Peoples' Rights, meeting at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia;

Recalling the provisions of Article 45(1) (b) of the African Charter on Human and Peoples' Rights which provides that the Commission shall "formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation";

Recalling Article 6 of the African Charter on the Rights and Welfare of the Child which provides that every child shall have the right from birth to a name, to be registered immediately after birth and to acquire a nationality, and that State Parties to the Charter shall "undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws";

Noting that the provisions of Article 2 of the African Charter and Article 6 (g) and (h) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa establish the equal right of men and women to acquire their partner's nationality;

Further recalling Article 15 of the Universal Declaration of Human Rights which stipulates 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;

Noting the provisions of other international human rights treaties relating to nationality, including Article 5 (d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 24(3) of the International Covenant on Civil and Political Rights, Articles 7 and 8 of the UN Convention on the Rights of the Child, Articles 1 to 3 of the UN Convention on the Nationality of Married Women, Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, and the UN Convention on the Reduction of Statelessness;

Recalling that persons arbitrarily deprived of nationality are protected by the Convention Governing the Specific Aspects of Refugee Problems in Africa, the UN Convention relating to the Status of Stateless Persons, the UN Convention relating to the Status of Refugees and the Protocol thereto;

Expressing its deep concern at the arbitrary denial or deprivation of the nationality of persons or groups of persons by African states, especially as a result of discrimination on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;

Regretting the failure of African states to ensure that all children are registered at birth;

Convinced that it is in the general interest of the people of Africa for all African States to recognise, guarantee and facilitate the right to nationality of every person on the continent and to ensure that no one is exposed to statelessness;

Reaffirms 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;

Calls upon African States to refrain from taking discriminatory nationality measures and to repeal laws which deny or deprive persons of their nationality on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status, especially if such measures and laws render a person stateless;

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Calls upon African States to observe minimum procedural standards so that decisions concerning the recognition, acquisition, deprivation or change of nationality do not contain any elements of arbitrariness, and are subject to review by an impartial tribunal in accordance with their obligations under Article 7 of the African Charter;

Also calls upon African States to adopt and implement provision in their constitutional and other legislation with a view to preventing and reducing statelessness, consistent with fundamental principles of international law and Article 6 of the African Charter on the Rights and Welfare of the Child, article 6 (g)(h) in particular by:

- a. Recognising that all children have the right to the nationality of the State where they were born if they would otherwise be stateless;
- b. Prohibiting arbitrary denial or deprivation of nationality;
- c. Reaffirming the equal rights of men and women and persons of any race or ethnic group in respect of nationality; and

Calls upon African States to ratify all relevant international and African human rights treaties, including the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness;

Requests African States to take the necessary measures to strengthen civil registration services to ensure the prompt registration of the births of all children on their territory, without discrimination;

Requests African States to include information on the recognition, respect and implementation of the right to nationality in their periodic reports presented to the Commission under Article 62 of the African Charter and Article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;

Considering the necessity to carry out an in-depth research on issues relating to the right to nationality:

- ***Decides*** to assign the task to the Special Rapporteur on Refugees, Asylum seekers; Displaced and Migrants in Africa;
- ***Calls upon*** civil society and other stakeholders to give full support to the mandate of the Special Rapporteur.

Banjul, The Gambia, 23 April 2013