6 A tale on belonging in Africa: An analysis of the African approach to statelessness

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Abstract

The fact that the African Charter on Human and Peoples' Rights (African Charter) lacks an express provision guaranteeing the right to nationality is baffling. However, what is even more baffling is that it has taken the continent this long to address the resultant issues, given the fact that there have been numerous cases on nationality in addition to massive expulsions of aliens, as reported by the African Commission on Human and Peoples' Rights (African Commission). Following two Resolutions on nationality adopted in 2013 and 2014 and the commissioning of a study on nationality in Africa by the African Union, the African Commission, in monitoring compliance with the African Charter adopted a Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa (Draft Protocol). This move could be deemed to have been the first attempt by the continent to combat statelessness from an African standpoint. This chapter therefore seeks to establish whether the Draft Protocol and subsequent debate can be deemed to be a move towards an African approach to international law on statelessness.

1 Introduction

This chapter starts by analysing the extent to which the existence of statelessness on the African continent can be tied directly to the nature of the state.[1] Europe, after all, inspired the concept of 'nation-state'[2] – the

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1 B Manby 'Statelessness in Africa: The scale of the challenges and the opportunities for leadership' 28 October 2015 https://citizenshiprightsafrica.org/statelessness-in-africa-the-scale-of-the-challenge-and-the-opportunities-for-leadership/ (accessed 23 September 2022).

2 Bronwen Manby writes that the concept of a nation-state – 'a state where all citizens are united by a common culture, language and genetic heritage' - greatly inspired African leaders who sought the same for African states despite them largely lacking in the characteristics that made the concept of the nation-state more applicable in European countries. See B Manby *Struggles for citizenship in Africa* (2009) 31.

idea that each 'nation' should have a state to match – and some European countries still resist granting citizenship to those who are not members of that 'nation'.[3] However, how far can this experience relate to that of the African continent, whose states are struggling with the concept of nationhood itself long after the effects of colonial conquest and random boundary-making by European powers?[4]

The authors examine what constitutes statelessness and how, when applied to Africa, it is inextricably linked to the constitution, organisation, and reorganisation of the African state. The following sections unpack the Draft Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa (Draft Protocol), highlighting its salient features and the critique levelled against it before analysing whether or not the provisions in the Draft Protocol can be regarded as an African approach to international law (AAIL).

In this article an AAIL means a comprehensive approach to or perspective on international law which reflects the continent's distinct historical context as posited by Rowland Cole.[5] Underpinning this approach are Africa's history and current reality together with the struggle by a colonised people to realise the political, social, economic, and cultural emancipation of the continent.[6] AAIL is not merely a body of work aimed at acknowledging Africa's contribution to international law or a variation of the interpretation of international law as we currently know it.[7]

It is also imperative to note that the authors, although acknowledging that there are other causes of statelessness, assert that the root cause of statelessness on the African continent is the existence of the African state as currently organised which renders a discussion of the evolution of the African state paramount.

2 The nature of the African state

As stated above, the nature of statelessness in Africa is inextricably linked to the nature of the African state. Consequently, a proper understanding of the former requires an exploration of the latter. This section of the

3 Manby (n 2).

4 As above.

5 R Cole 'Africa's approach to international law: Aspects of the political and economic denominators' (2013) 18 *African Yearbook of International Law* 287 at 288.

6 Cole (n 5) 292.

7 Cole (n 5) 287.

chapter considers the African state in three phases: the pre-colonial state; the colonial state; and the post-colonial state. Defining any concept of 'state' is difficult,[8] but this is compounded when dealing with the 'African' state by multiple perceptions of 'Africanness'[9] and the dependent relation between 'African' state and 'Africanness' and how these interact with colonialism which Kawabata argues lies at the root of the existence of the African state.[10]

2.1 The pre-colonial state

> 'The most distinctive contribution of Africa to human history has been precisely in the civilized art of living reasonably peacefully without a state.'
>
> Jean-Francois Bayart

The existence of a state is conditional on both the existence of a territory and the integrity of its borders.[11] A discussion of the pre-colonial state therefore requires an understanding of the boundaries that existed before the colonial era and how they were transformed by colonialism.

Boundaries have considerable political, social, and strategic significance[12]– they represent a nation's tipping point for the current realities such as war or peace, life or death.[13] But the concept of boundaries was no stranger to pre-colonial Africa which adopted age-old systems of using zones or border marches as buffers between kingdoms.[14] These zones were of varying widths and fall into three distinct categories.

First, frontiers of contact where distinct cultural and political groups lived and operated side-by-side.[15] Politically active African groups such as

8 Kawabata A 'An overview of the debate on the African state' (2006) 15 *Afrasian Centre for Peace and Development Studies Working Paper Series* 1.

9 As Charles Ngwena writes, 'identities do not exist in a pristine and static form and outside of history'. Thus, whether Africanness is defined by the aspects of being and becoming, or nativity to a geospatial area, among other identity markers, we hold the view outlined by Ngwena that Africanness is an 'historically situated but evolving identity'. See C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* 23-30.

10 Kawabata (n 8) 1.

11 Ajala A 'The nature of African boundaries' (1983) 18 *Africa Spectrum* 177 at 179.

12 As above.

13 As above.

14 As above.

15 As above.

the Yoruba states and Dahomey in West Africa, as well as the Buganda and her neighbours in East Africa, had this type of frontier.[16]

Second, are frontiers of separation[17] which separated communities by a buffer zone over which neither side claimed or exercised authority. Semi-arid and arid lands generally provided such frontiers and the states of Central Sudan, including Bornu, Maradi, and the Fulani Empire, had such frontiers. [18]

The third type of traditional frontier existed in regions with considerable overlap of diverse groups which are perhaps better termed enclaves rather than frontiers.[19] A careful consideration of the migratory practices of, for example, the Maasai, the Tuaregs, and similar nomadic groups makes it difficult for one to classify any areas between them and their neighbours as frontiers.[20]

Although there were frontiers in pre-colonial Africa, they were not static.[21] Political boundaries were often blurred and flexibile,[22] and this extended to the identification of tribes. The popular myth that African tribes in pre-colonial times were stable with homogenous culture and unambiguous identities has long been debunked.[23] Research has shown that important twentieth century communities, such as the Shona, had no conscious or institutional pre-colonial existence (although there were large numbers of people related by language and culture who would later come to identify as the Shona).[24] The large states of nineteenth-century Africa were in the main multilingual and multicultural, encompassing diverse communities under political sovereignties.[25] Communities in pre-colonial Africa underwent regular ethno-cultural reconstruction. Ethnicity, if such a concept existed, was a permeable membrane through which passed links

16 Anene J *The international boundaries of Nigeria 1885-1960: The framework of an emergent nation* (1970) 5.

17 Ajala (n 11) 179.

18 As above.

19 As above.

20 As above.

21 As above.

22 C Lentz 'Tribalism and ethnicity in Africa: A review of four decades of Anglophone research' (1995) 31 *Cahiers des sciences humaines* 303 at 316.

23 B Berman 'Ethnicity patronage and the African State: The politics of uncivil nationalism' (1998) 97 *African Affairs* 305 at 311.

24 Berman (n 23) 311.

25 As above.

of marriage, ties to religion, and much more.[26] John Reader posits that ethnicity is not a cultural characteristic deeply rooted in the African past; rather, it is a concisely crafted ideological tradition introduced during the colonial period.[27] Thus, ethnicities – much like boundaries – were rather a European construct of how Africans lived, than a reflection of the reality of pre-colonial Africa.[28]

2.2 The colonial state

The structure of the colonial state, whether in North, South, East or West Africa, was marked by certain fundamental features as its organisation – whether through direct or indirect rule – was in response to indigeneity: Which ethnic groups were indigenous and which not?[29] In other words, the social construction of modern forms of ethnicity in Africa ran parallel to the development of the structure and culture of colonialism.[30]Although indigeneity and indigenous governance existed before colonial rule, they were formalised through legally inscribed identities of 'native' and 'non-native'.[31] Consequently, indigeneity came to be defined along the lines of race and ethnicity.[32] Ethnicity or ethnicities were used when referring to natives, whereas non-natives were identified racially,[33] as, for example, Europeans, Asians and Arabs.

As Mamdani writes, the archetypal colonial state was a federation of ethnicities ruled by the races.[34] Races and ethnicities, the two distinct political identities produced under the colonial project, were governed by two distinct bodies of law.[35] Races were governed by municipal law,[36] while ethnicities were governed by customary laws.[37] These two legal regimes had different effects on their subjects. Through municipal law, 'races' were

26 D Wright '"What do you mean there were no tribes in Africa?": Thoughts on boundaries – and related matters – in pre-colonial Africa' (1999) 26 *History in Africa* 409 at 423.

27 J Reader *Africa: A biography of the continent* (1998) 615.

28 Wright (n 26) 423.

29 M Mamdani *Political identity, citizenship and ethnicity in post-colonial Africa* (2005) 4.

30 Berman (n 23) 312.

31 A Sium, C Desai & E Ritskes 'Towards the "tangible unknown": Decolonization and the indigenous future' (2012) 1 *Decolonization: Indigeneity, Education & Society* I at VI.

32 As above.

33 Mamdani (n 29) 5.

34 Mamdani (n 29) 6.

35 Mamdani (n 29) 4.

36 Municipal law refers to the administrative laws of the colonial powers.

37 Mamdani (n 29) 4.

welcomed into a world of rights from which 'ethnicities' were excluded. On the other hand, ethnicities – the indigenous peoples – were subjected to customary laws which denied them admission into the world of rights enjoyed by races.

Manby writes that the customary laws governing ethnicities were interpreted by colonial courts with the aid of native interlocutors, but with the aim of municipal law overriding customary laws that were deemed repugnant.[38] More often than not, these native interlocutors were persons in whom native authority was vested such as chiefs and headmen. Chiefs and headmen therefore served as an essential link between the colonial state and African societies[39] by being what Francis Deng calls 'extended arms of state control over tribes and communities, who gave the bifurcated system a semblance of legitimacy'.[40]

The effect was that under colonial rule, an individual was either one or the other – either a native or a non-native; either indigenous or non-indigenous. The introduction of ethnicity as an identity saw people's primary identity change over time until, towards the end of colonial rule, ethnicity became the most important identity – the indigeneity question was thus introduced and effectively woven into the fabric of the colonial state.

2.3 The postcolonial state

Francis Deng notes that the process of colonial state formation entailed the bringing together of some ethnic groups and the division of others with no regard to common or distinctive characteristics.[41] The groups were placed in new administrative frameworks and governed by new institutions with non-indigenous people at the helm.[42] Although independence removed the non-indigenous governance, it did not dismantle the frameworks that legitimised and supported non-indigenous rule.

38 Manby (n 2) 26.

39 B Berman 'Structure and process in the bureaucratic states of colonial Africa' (1984) 15 *Institute of Social Studies* 161 at 162. While this may not capture the administrative complexities of the colonial African state, it acknowledges the role chiefs and headmen played in defining local histories and ethnic identifications. See C Boone *Political topographies of the African state: Territorial authority and institutional choice* (2003) 34-36.

40 F Deng 'Ethnicity: An African predicament' (1997) 15 *The Bookings Review* 28.

41 As above.

42 As above.

Many African states retained their colonial boundaries drawn at the Berlin Conference so that the newly independent states accepted these lines as the demarcations between those considered indigenous and those considered non-indigenous. In addition, while the population remained multi-ethnic, the authority, the law, and the definition of rights became mono-ethnic.[43] Newly constituted 'indigenous' governments had consequently to establish authority over geographical territories of vast cultural diversity which had been created without any regard to pre-existing polities.[44] It is arguable that these realities are what hinder the realisation of the nation-state in most postcolonial African states.

This notwithstanding, perhaps the greater injustice occasioned by the postcolonial African state was the retention of indigeneity – the colonial marker of identity. The postcolonial state emphasised origin and indigeneity rather than residence as the yardstick for belonging, and thus the precursor to the realisation of rights within the individual states concerned.[45] With regard, in particular, to citizenship, communities whose ancestral origins lie outside the current borders of the state concerned are treated as non-indigenous and viewed as newcomers who do not belong.[46] Mamdani challenges the purported distinction between indigenous and non-indigenous citizens by asking how such a distinction is possible given the history of migration.[47] 'Have the immigrants of yesterday not become indigenous in that were it not for the form of the state and its definition of indigeneity, yesterday's immigrants would be today's citizens?' he asks.[48] The post-colonial state continues to label perceived non-indigenous people as settlers; even with the colonial power long gone these states continue to label every citizen as either a native or a settler.[49]

The evolution of the African state was marked by unprecedented violence during the colonial era, but the propagation of the colonial state

43 Mamdani (n 29) 11.

44 Manby (n 2) 31.

45 R Olaniyi 'Approaching the study of the Yoruba diaspora in Northern Nigeria' in T Falola & A Genova (eds) *Yoruba identity and power politics* (2006) 234.

46 Manby (n 2) 31.

47 Mamdani (n 29) 10.

48 Mamdani (n 29) 11.

49 Mamdani (n 29) 12.

under the guise of post-independence reform was a new and special kind of violence which added salt to the wounds of colonialism.

2.4 *Uti possidetis juris*

Flowing from the above, it is also important to underscore the role of *uti possidetis juris* and the ramifications of resolution 16(1) of the Organisation of African Unity (OAU) in defining statehood and its subsequent effect on nationality in Africa. Following the OAU's establishment, one of the challenges the leaders faced was to pronounce on borders which they had inherited from the colonial powers. They could either redraw the boundaries as suggested by the All African People's Conference, or maintain the status quo as at independence.[50] Having just attained independence, African leaders were protective of their new gains, and were understandably very preoccupied with the integrity of the sovereignty of their new states.[51] Dugard notes that 'upon the realization that the redrawing of the map of Africa along ethnic lines would destroy the stability of the continent, post-independence African leaders and the Organisation of African Unity invoked the principle of territorial integrity'. [52]

The principle of *uti possidetis juris* was developed as an attempt to prevent territorial disputes by fixing the territorial heritage of new states as at the time of independence and transforming existing lines into internationally recognised borders.[53] It marked the end of the concept of *terra nullius* ('land belonging to no one') by recognising the newly independent states as possessors of all territories presumed to have been possessed by their colonial predecessors.[54] However, the partitioning of the continent paid little attention to the indigenous peoples of the continent, attempting rather to diffuse and avoid conflict among the colonisers themselves. The arbitrary way in which the borders were drawn left the inhabitants of the continent fragmented and disorientated. The borders may have minimised the potential of territorial claims between the colonial powers, but for Africans it was the genesis of many present-day conflicts and virtually insoluble problems on the African continent, statelessness included.

50 FD Mnyongani 'Between a rock and a hard place: The right to self-determination versus *uti possidetis* in Africa' (2008) *Comparative and International Law Journal of Southern Africa* at 466.

51 Mnyongani (n 50) 467.

52 J Dugard 'Secession: Is the case of Yugoslavia a precedent for Africa?' (1993) *African Journal of International and Comparative Law* 163 at 165.

53 Mnyongani (n 50) 467.

54 As above.

The right of a state to its territorial integrity and the right of a people to self-determination present a special difficulty when it comes to the assertion of the rights of individuals within a legal system designed for the needs of the state.[55] The African Charter on Human and Peoples' Rights provides that all peoples have the right to existence. They have the unquestionable and inalienable right to self-determination. They may freely determine their political status and freely pursue their economic and social development.[56] Africa's independence was won through the assertion of the right to self-determination, and once that had been achieved, 'a people' within a territorial state who wished to assert the same right could not do so simply because the authorities wished to maintain territorial unity.[57]

This tension inherent in the rival claims of self-determination and territorial integrity is most apparent in Africa.[58] The existence of stateless communities could, therefore, be seen to be a result of the defence of colonially inherited boundaries and the propagation of the bondage of African boundaries in the interests of redefining Africa.

3 An introduction to statelessness

A stateless person is a person who is not considered a national by any state under the operation of its law.[59] The existence and eventual avoidance of statelessness is commensurate with the enjoyment of the right to a nationality which has been described as a person's most basic right; it is nothing less than the right to have rights.[60] Statelessness can therefore be regarded as a violation of this right and a failure on the part of states to meet their obligation to grant nationality to persons within their territories and prevent statelessness.[61]

It is additionally a recipe for exposure to further human rights abuses. In even the poorest of countries a passport or identity card not only provides the right to travel, but also forms the basis for the right to virtually everything else.[62] Persons not tied to a particular state are unable

55 J Kabbers & R Lefeber 'Africa: Lost between self-determination and *uti possidetis*' (1993) *Peoples and minorities in international law* 36.

56 African Charter on Human and Peoples' Rights art 20.

57 Mnyongani (n 50) 471.

58 Mnyongani (n 50) 475.

59 1954 Convention Relating to the Status of Stateless Persons art 1.

60 D Weissbrodt & C Collins 'The human rights of stateless persons' (2006) 28 *Human Rights Quarterly* 248.

61 1961 Convention on the Reduction of Statelessness arts 1 & 2.

62 B Manby 'Citizenship the most important right of all' *African Arguments,* 12 October

to access healthcare, enrol their children in schools, own property, vote, or even work, thus making stateless communities among the world's most vulnerable populations.

Statelessness generally manifests in two forms: *de jure* and *de facto* statelessness. *De jure* statelessness, succinctly put, is statelessness sanctioned by the law, or its silence, of a particular state. This means, that if after examining the nationality laws and practice of states to which an individual enjoys a relevant link (in particular by birth in the territory, descent, marriage, or habitual residence) – and/or after having checked with those states involved – the individual concerned is not found to have the nationality of any of those states, then he or she should be regards as having satisfied the definition of a 'stateless person' under the operation of the state(s) law.[63] *De facto* stateless persons, on the other hand, are persons outside the country of their nationality who are *unable,* or for valid reasons are *unwilling,* to avail themselves of the protection of that country.[64] There has been considerable debate as to whether *de facto* stateless persons meet the definition of a stateless person as set out in article 1 of the 1954 Convention Relating to the Status of Stateless Persons; they often have a nationality according to the law, but this nationality is not effective or cannot be proven or verified.[65] However, Resolution No I of the Final Act of the Conference that drew up the 1961 Convention on the Reduction of Statelessness, recommends that persons who are *de facto* stateless should as far as possible be treated as being *de jure* stateless in order to enable them to acquire an effective nationality.[66] The term *de facto* stateless is, more often than not, applied to persons who do not enjoy the rights of citizenship enjoyed by other *non-criminal* citizens of the same state. Consequently, most persons who are considered *de facto* stateless are the victims of state repression. Whereas *de jure* statelessness can result simply from the oversight of lawmakers who leave gaps in the law through which persons can fall, *de facto* statelessness typically results from state discrimination.[67] Unresolved situations of *de facto* statelessness spanning two or more

2009 http://africanarguments.org/2009/10/12/citizenship-the-most-important-right-of-all/ (accessed 23 September 2022).

63 UNHCR, 'Expert meeting: The concept of stateless persons under international law – Summary conclusions' May 2010, http://www.refworld.org/docid/4ca1ae002.html (accessed 23 September 2022).

64 As above.

65 H Massey 'UNHCR and *de facto* statelessness' UNHCR Legal and Protection Policy Series, April 2010, LPPR/2010/01 http://www.unhcr.org/4bc2ddeb9.pdf (accessed 23 September 2022).

66 Massey (n 65).

67 UNHCR (n 63).

generations, may eventually lead to *de jure* statelessness and should thus fall under the purview of states' mandate to prevent statelessness.[68]

3.1 A history of statelessness

The origins of statelessness can be traced back to the nation-building process in Europe during the nineteenth century where it was deemed a by-product.[69] After the First and Second World Wars, the nation-building process defined the state as a homogenous entity. Therefore, being part of a state meant having the correct nationality that could, additionally, be verified by proper documentation. Those who had been displaced by war, deportation, or other means during the two wars subsequently lost their formal state affiliation. [70]

In Africa, in particular, statelessness resulted from the creation of independent African states whose formation has been discussed above, as well as the political restructuring that followed independence.[71] The accession of African states to international sovereignty meant that African leaders had to work through not only the nation-building agenda, but had also to determine the content of national laws on citizenship. This was necessary in order to cater for the mixed populations that resulted from large-scale migration and arbitrary border delineation during the colonial period. In addition provision had to be made a legal process that would determine the nationality of persons born after independence.[72] This raised a number of legal problems including deciding who would make up the inhabitants of these successor states and the recognition of persons who lacked a nationality prior to colonial annexation.[73]

In an attempt to revert to the indigeneity of the African society before its disruption by the colonial enterprise, in practice these transitional rules granted nationality automatically to some people, and created rights to opt for nationality for others. Come categories of person, however, had no right to nationality.[74] Certain pieces of legislation were also discriminatory on the basis of ethnic origins, race, descent, and colour and so made it

68 As above.

69 M Rurup *Lives in limbo: Statelessness after two world wars* (2013) 113.

70 As above.

71 B Manby 'Statelessness in Africa: The scale of the challenge and the opportunities for leadership' 28 October 2015 http://www.statelessness.eu/blog/statelessness-africa-scale-challenge-and-opportunities-leadership (accessed 23 September 2022).

72 As above.

73 As above.

74 B Manby *Citizenship law in Africa: A comparative study* (2010) 3.

difficult for certain groups of people to acquire the nationality of a certain country despite having strong ties to it.[75] Bronwen Manby notes, for instance, the extreme examples of Liberia and Sierra Leone which despite being formed by freed slaves, take the position that only those of 'negro descent' can acquire citizenship by birth.[76]

The nature of these newly independent African states is the lens through which we analyse the creation and extent of statelessness in Africa. Despite the high number of stateless persons across the world, the problem is particularly acute in Africa because of its history of the creation of states and borders, border populations, and migration within the continent.[77]

3.2 The state and the African state: Glitter or gold?

The state has been defined as a community which consists of a territory and a population subject to an organised political authority and as such, is characterised by sovereignty.[78] Article 1 of the Montevideo Convention sets out the most widely accepted formulation of the criteria for statehood in international law. It notes that to qualify as an international person, the state should possess the following characteristics: a permanent population; a defined territory; government; and the capacity to enter into relations with other states.[79] Shaw notes that these requirements are neither exhaustive nor immutable and that there are other factors such as self-determination and recognition, while the relative weight given to such criteria in particular situations may very well vary. What is clear, however, is that the relevant framework, in essence, revolves around territorial effectiveness.[80] Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons; they retain their attraction as the primary focus for not only the social activity of humankind but also for international law.

75 Manby (n 71) 3.

76 As above.

77 Minority Rights Group 'Causes of minority statelessness' http://stories.minorityrights.org/statelessness/chapter/causes-of-statelessness/ (accessed 23 September 2022).

78 The Arbitration Commission of the European Conference on Yugoslavia put forth this definition in Opinion 1 made available by the International Crisis Group (ICG) 'Intermediate sovereignty as a basis for resolving the Kosovo crisis' 9 November 1998 http://www.refworld.org/docid/3ae6a6e94.html (accessed 23 September 2022).

79 Montevideo Convention art 1.

80 M Shaw *International law* (2008) 197.

Bearing in mind that the granting of nationality to persons within a territory and consequently the eradication of statelessness is primarily a state's obligation under international law,[81] an understanding of the nature of the modern African state and its relation to the plight of the stateless is crucial. It is not an uncommon error to think that there was no state, or the semblance of it, before the colonial encounter.[82] Colonialism has, however, been the most noticeable factor in the evolution of the modern African state. It undeniably set state boundaries, provided it with a state-like structure, a constitution, governance systems, bureaucracy and linked the continent to the global economy.[83] Colonial rule also determined who formed the human capital in these states.

As *terra nullius* was no longer in issue, the creation of newly independent African states following the attainment of independence required the following: the diminution or disappearance of existing states and the need for careful regulation going forward.[84] However, it has become increasingly clear that the continent's relations with colonialism lie at the heart of the existence of the African state. The colonial state's legacy was never reduced; it was in fact advanced through the structural foundation it laid and the identity it gave to the modern African state.

Post-independence, the newly formed African states were not a restoration of African nations as previously constituted but rather an altogether foreign concept. It is therefore difficult, and increasingly so, to define the concept of the 'true' African state from among the many diverse concepts called to life by political scientists to explain 'Africanness' or what it truly means to be African, concepts constantly being sought in institutions whose succession mirrors the absolutism and arbitrariness of the colonial state.[85]

3.3 The African state as the root cause of statelessness

> *'Start the story with the failure of the African state, and not with the colonial creation of the African state, and you have an entirely different story'*[86]

The modern African state, seeing as its origins were not of its making, was largely informed by the colonial powers and could be said to

81 Convention on the Reduction of Statelessness arts 1 & 2.

82 K Masahisa *An overview of the debate on the African state* (2006) 5.

83 Masahisa (n 82) 3.

84 Shaw (n 80) 198.

85 As above.

86 CN Adichie 'The danger of a single story' TEDGlobal 2009, July 2009, http://www.

fall conveniently within the scope of the statehood criteria set by the Montevideo Convention. However, it is the inadequacy of these characteristics and their disconnect from the history and uniqueness of the continent's experiences, that could be said to create and nurture statelessness.

To begin with, the criteria envision definite territories with permanent populations on a continent whose people could not be more idiosyncratic. In her taxonomy of statelessness, Manby notes that the populations at risk of statelessness include migrants and their descendants (whether forced of voluntary), historical migrants from before independence, contemporary migrants stranded in another country, returnees to a country of origin, refugees, asylum seekers, and former refugees. She also speaks of cross-border populations such as the nomads, ethnic groups divided by international borders, and those formerly in zones where borders changed. Last but not least affected are the vulnerable children who become adults without a nationality.[87] Together, all these groups are proof of the dynamism of the African population during the colonial period. At the time of the imposition of international borders, therefore, any of these groups that fell outside of the demarcations fixed by the colonial powers were automatically excluded – this left a multitude of persons stateless. Legislation stemming from this state creation further ensured that such persons were considered unwelcome, save for in geographical locations to which they could trace their tribal or ethnic origins.[88]

The foreign idea that a state should have a nation to match also ensured that certain groups of people who did not fall under distinct and predominant cultural or ethnic groups were also excluded from the newly independent states,[89] yet the pre-colonial African ethos of citizenship as advanced by Oche Onazi highlights the inclusivity of the African society as well as its desire to focus more on individual humanity or the person in community.[90] Mamdani concludes that the core agenda that African states faced on independence was three-fold: deracialising civil society; detribalizing the Native Authorities; and developing their economies.[91]

ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story.html (accessed 23 September 2022).

87 B Manby *Nationality, migration and statelessness in West Africa* (2005).

88 O Oche 'Beyond rights and responsibilities: An African ethos of citizenship' in O Onazi (ed) *African legal theory and contemporary problems: Critical essays* (2014) 169.

89 As above.

90 As above.

91 M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism,* 1996, 23ff.

The 'new' states were most successful in deracialising civil society, while they were least successful in democratisation. He further points out that without democratisation, civil society was increasingly deracialised and tribalised.[92]

Furthermore, these defined African territories were created by international boundaries which propagated the politics of exclusion. It has since been established that the existing African boundaries emerged from the partitioning of Africa by the European powers. Since Europeans powers did not have sufficient interest in the concerns of the African populace while making these demarcations, many African groups were arbitrarily divided into many territories which were colonised by different European powers. And when these colonies attained independence, they inherited the colonial boundaries.[93] Consequently, some Africans could no longer move freely to areas previously accessed with ease, and if they did, returning was problematic. This affected, largely, communities such as the Maasai who were constantly on the move and those forced to move such as the Nubians in Kenya who have been stateless ever since.[94]

In his discussion of imposed boundaries and the desire of Africans to shift them, Ndii notes that it is precisely because our nation states are artificial that the politics of exclusion are so pervasive. Africans have no 'social contract' with the state.[95] Our understanding of 'social contract' as posited by Ndii is borrowed from Thomas Hobbes's theory of the modern social contract – human beings are naturally self-interested and will pursue whatever they perceive to be in their own individually considered best interests. However, they remain rational and will submit to the authority of a sovereign so as to live in a civil society which is conducive to their own interests.[96]

This willingness to submit to political authority is the social contract that Ndii states is lacking in African states due to the uncanny resemblance of the African state to its colonial predecessor.[97] He goes on to state that

92 As above; also, Masahisa (n 82) 15.

93 A Adekunle *The nature of African boundaries* (1983) 4.

94 David McKenzie, 'Kenya's Nubians: Outsiders in their own country; *CNN Inside Africa,* 4 May 2011, http://edition.cnn.com/2011/WORLD/africa/05/04/kenya.nubian.discrimination/index.html (accessed 23 September 2022).

95 David Ndii 'Letters: Remove Africa's colonial borders' *The Independent* (UK), 12 January 1995 https://www.independent.co.uk/voices/letters-remove-africas-colonial-borders-1567653.html (accessed 23 September 2022).

96 'Thomas Hobbes' *Internet Encyclopedia of Philosophy,* https://www.iep.utm.edu/soc-cont/#H2 (accessed 23 September 2022).

97 Ndii (n 95).

the African state as currently constituted, provides no sense of security and that, ideally, an African identity is one that transcends tribe or ethnic affiliation. He adds that what Africans truly need is the removal of these borders because regional integration in Africa is imperative. First, it will help dissipate the rigid ethnic identities fostered by colonialism and the creation of artificial states. Second, it will weaken the predator state by reducing the attractions of absolute power. Third, interaction through trade and free movement will strengthen African identity.[98]

Despite the high number of stateless persons across the world, this problem is particularly acute in Africa because of the history of the creation of borders, border populations, and migration within the continent. It is further exacerbated by weak capacity of many of today's African states and their inability or failure to respond appropriately to contemporary migration. Statelessness and deprivation of nationality have become the tools of political persecution[99] and a means of exclusion. Ethnicity and race have been expressly introduced as grounds for access to nationality in several countries. This violates all international standards for non-discrimination and threatens Africa's aspiration for a peaceful and an integrated continent.[100]

Third, in their nation-building agenda the successor governments failed to analyse and interpret their colonial history that would inform their citizenship laws. Africa's colonial history meant that the rules governing the transition to independence were particularly sensitive in the case of citizenship law.

Most cases of individuals or groups deprived of citizenship relate to the status of those who were recognised as colonial subjects but whose presence was resented by the original inhabitants of the regions whose borders were altered during the colonial period. These cases include the determination of the status of persons whose parents came from another part of a common colonial territory and migrated as part of colonial policy.[101] An example is the treatment of Asians in Kenya, a community

98 Ndii (n 95).

99 The denial of citizenship by a state results in the existence of persons not tied to a particular state. These persons are unable to access healthcare, enrol their children in schools, own property, vote or even work for the government. It is a denial of the right to have rights in a state-centered society. See Manby (n 62).

100 Minority Rights Group (n 77).

101 B Blitz & M Lynch *Statelessness and citizenship: A comparative study on the benefits of nationality* (2011) 3.

that was stateless until their recognition in 2017.[102] Kenyan Asians were rendered stateless because the post-colonial government of Kenya refused to include communities which had established long-standing ties and attachments to the territory as Kenyan citizens. In its transition from colony to independent state, Kenya adopted the *law of descent* in preference to the *law of the soil* as the principle on which to grant citizenship. This meant that anyone who sought citizenship on the basis of having been born and lived in Kenya, as opposed to kinship ties to the nation, was denied this right. Therefore, communities such as the Kenyan-Asians who could not prove descent from the original ethnic communities in Kenya prior to colonialism, were regarded as foreign and subjected to Kenya's decision to expel all immigrants after its rise to independence. Therefore, the Asians in Kenya were rendered stateless by law – a law that ensured that the Asians present at the time could not prove their descent from a Kenyan in order to be granted nationality.[103]

It is clear from these illustrations that in order to address statelessness on the continent, we must step back and consider the realities of our past. The abandonment of the African ideals of community and the creation of an African state that is largely dependent on a western regime, could easily have situated the state as the root cause of statelessness.

To mould an approach that would eradicate statelessness on the continent would require an understanding of the African state as well as what it means to be an African. Only then, can we begin to correct the failures of the post-colonial state and promote the traditional inclusivity of Africa.

4 Towards an African treaty on statelessness

The African Charter on Human and Peoples' Rights (African or Banjul Charter) makes no express mention of the right to nationality and also has no separate instrument dedicated to matters relating to nationality. The preparatory drafts of the Charter contained a provision on the right to nationality, but the right was omitted from the final draft and from the African Charter. There appears to be no explanation of why the right was excluded. Nonetheless, since then, the African Union's efforts to guarantee and act towards the realisation of this right is noteworthy.[104]

102 S Cosemans 'Undesirable British East African Asians. Nationality, statelessness, and refugeehood after Empire' (2020) 40 *Immigrants & Minorities* 210-239.

103 R Aminzade *Race, nation and citizenship in post-colonial Africa: The case of Tanzania* (2013) 115.

104 See Kéba Mbaye's comments on the draft African Charter on Human and Peoples'

Existing African treaties are also restrictive when it comes to the right to nationality.[105] The African Charter on the Rights and Welfare of the Child, for instance, which has by mid 2022 been ratified by 49 African states, provides for the right to a name at birth and the right to acquire a nationality,[106] but not to the right to a nationality at birth.[107] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa flies in the face of established international norms by failing to mention the right of women to transmit their nationality to their spouses, and further provides for the primacy of national laws over the provisions of treaties on non-discrimination in granting nationality to children.[108]

The litigation on nationality and the massive expulsion of aliens on the continent reported by the African Commission on Human and Peoples' Rights (African Commission),[109] also speak to the importance of problems related to statelessness and the right to nationality. Some noteworthy examples include a case against Rwanda,[110] in which the Commission held that the expulsion of Burundian nationals who had been refugees in Rwanda for years, as presenting a national risk, was illegal especially as they were not permitted to defend themselves in court. The expulsion was also in contravention of the prohibition in the African Charter on expelling persons on grounds of their nationality, race, or ethnic background without a decision taken in accordance with the law.[111] *Amnesty International v Zambia* provided further deliberations on deportations and expulsions.[112] The Commission found that by forcing the complainants to live as stateless persons under degrading conditions,

Rights. The commentary was prepared for the Meeting of Experts in Dakar, Senegal from 28 November to 8 December 1979 by Kéba Mbaye. K Mbaye 'Draft African Charter on Human and Peoples' Rights' reprinted in C Heyns (ed) *Human rights law in Africa* (1999) at 65-77.

105 L van Waas 'A 100-year (hi)story of statelessness' 25 August 2016 https://www.peacepalacelibrary.nl/2016/08/a-100-year-history-of-statelessness/#_ftn3 (accessed 23 September 2022).

106 Department of Political Affairs in the African Union 'The African Union approach to the right to nationality in Africa: Statelessness impact on Africa's development and the need for its eradication' 2016.

107 African Charter on the Rights and Welfare of the Child art 6.

108 As above.

109 As above.

110 *Organisation mondiale contre la torture and others v Rwanda* Communication Nos 27/89, 46/91, 49/91 & 99/93 (1996) African Commission on Human and Peoples' Rights (1996).

111 African Charter on Human and Peoples' Rights art 12(4) and (5).

112 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999).

the Zambian government had violated article 5 of the Banjul Charter on the dignity of a human being. In several cases relating to deportation or denial of citizenship, the Commission has held that the fact that someone is not a citizen does not in itself justify their deportation; there must be a right to challenge expulsion on an individual basis.[113]

The African Commission also found that even without the express mention of the right to nationality, article 5 of the Banjul Charter (right to respect for the inherent dignity of a human being and to the recognition of legal status) applies specifically to attempts to denationalise individuals and render them stateless.[114] This was applied in the long-running case of *John Modise v Botswana.* Modise spent years confined either to the South African 'homeland' of Bophuthatswana or the no-man's land between South Africa and Botswana because of the Botswanan government's refusal to recognise his nationality. The Commission found against the Botswanan government and ruled, that Modise's 'personal suffering and indignity' violated article 5 of the Banjul Charter.[115]

The case of the nationality of the former president of Zambia, Kenneth Kaunda, also greatly influenced the continent's decision to take this fundamental right more seriously. In its amended Constitution of 1996, Zambia provided that anyone wishing to run for the office of the president had to prove that both of his or her parents are/were Zambian by birth or descent.[116] The government was hoping to preserve this office for Zambians with a traceable descent. However, this provision not only prevented Kaunda from contesting the elections, but also disenfranchised 35 per cent of the Zambian electorate.[117] The Commission strongly disapproved of so discriminatory a national policy on the basis that it discriminated on the ground of nationality which was prohibited under the African Charter.[118]

In the *Nubians v Kenya* case, [119] the African Commission asked the government of Kenya to establish objective, transparent, and non-discriminatory criteria and procedures for determining Kenyan citizenship.

113 Manby (n 71) 25.

114 As above.

115 *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

116 Manby (n 71) 25.

117 *Legal Resources Foundation v Zambia* Communication 211/98 African Commission on Human and Peoples' Rights (2001).

118 African Charter on Human and Peoples' Rights arts 2, 3 & 13.

119 *Nubian Community in Kenya v Republic of Kenya*, Communication 317/2006 African Commission on Human and Peoples' Rights (2006).

This was after a group of Nubians, descendants of ex-Sudanese individuals, were treated differently on the basis of their ethnicity and religion. The Commission reiterated that such a tenuous citizenship status placed the Nubians in a dangerous situation as it opened the way for violation of other rights intricately linked to citizenship.[120]

In light of these instances where the right to nationality resulted in litigation, the African Commission adopted a resolution[121] in furtherance of its mandate to formulate principles and rules aimed at resolving legal problems relating to human and peoples' rights and fundamental freedoms, for the use of African governments in formulating legislation.[122] This 2013 resolution expressed its 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. It further expressed regret for the failure of African states to ensure that all children are registered at birth and reiterated 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. The resolution further called upon states to adopt and implement provisions in their constitutions and other legislation to reduce and prevent statelessness. It recognised the need for research on issues relating to the right to nationality and assigned this task to the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons.[123]

The following year, the Commission passed yet another resolution[124] tasking the Special Rapporteur on Refugees, Asylum Seekers, Migrants, and Internally Displaced Persons, with the drafting of a Protocol to the African Charter dealing specifically with the Right to Nationality in Africa, in a bid to respond to the absence of the right in the Banjul

120 As above.

121 African Commission on Human and Peoples' Rights (ACmHPR) res 234 (2013) 'Resolution on the Right to Nationality'.

122 African Charter on Human and Peoples' Rights art 45(1)(b).

123 ACmHPR (n 117).

124 African Commission of Human and Peoples' Rights res 277 (2014) 'Resolution on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the right to nationality in Africa'.

Charter. The resolution noted a pressing need to identify, prevent, and reduce statelessness and to protect the right to nationality.[125]

4.2 Salient features of the Draft Protocol on the Right to Nationality in Africa

Gaps in nationality laws and discriminatory legal provisions in the citizenship laws of many African states revealed that many of these states failed to guarantee the right of every person to a nationality.[126] The time was therefore ripe for a continental instrument advocating the inclusion of the right to nationality in the national laws of African states and creating a framework for national implementation of the fundamental principles of the right to a nationality.

Although still under consideration, the 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' has been hailed as a progressive instrument that would contribute substantially to efforts to eliminate statelessness in Africa. It would also be an effective tool to advance the right to a nationality and to facilitate inclusion, peace, and development in Africa. In discussing its features, we concentrate on the provisions that are most relevant to curbing statelessness occasioned by the establishment of independent African states post-colonialism – the root cause of statelessness on the continent.

The Preamble to the Draft Protocol notes the unique nature of statelessness on the continent by stating, and rightly so, that the history of the African continent and the initial establishment of borders by colonial powers have given questions of nationality and statelessness particular characteristics not addressed by existing African and international treaties. Many of the long-standing populations affected by statelessness are indeed descendants of people who moved – or who were forcibly moved – from one part of Africa to another during the colonial period, or who belong to ethnic groups whose traditional territory has been parcelled off among one or more contemporary states.[127]

125 As above.

126 UNHCR 'African Union and UNHCR push for the right to nationality in Africa' *UNHCR,* 29 January 2015 http://www.unhcr.org/news/press/2015/1/54ca3567f95/african-union-unhcr-push-right-nationality-africa.html (accessed 23 September 2022).

127 Preamble, Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa.

The Draft Protocol is also lauded for providing 'robust' definitions to promote the eradication of statelessness on the continent. Its inclusion of the phrase 'including a person unable to establish a nationality'[128] in the definition of a 'stateless person' – as opposed to the international law stance that a stateless person 'is one not considered a national by any state solely under the operation of its law',[129] ensures that states have regard to the specific situations of statelessness that arise in Africa. The latter definition would require cases to be considered within the confines of existing municipal nationality laws of the state concerned and would exclude those who were rendered stateless without a statutory basis. An example would be the Makonde community in Kenya – the descendants of exiled freedom fighters, refugees fleeing civil war, and labourers recruited by the British during the colonial period to work on sisal farms and sugar plantations across Kenya's coastal province in Kwale, Kilifi and Taita Taveta. After Kenya's independence, they were neither repatriated nor given Kenyan identity; they were held in limbo and unable to claim a nationality despite having lived in Kenya for over half a century.[130] The Draft Protocol's definition caters effectively to situations such as this.

'Habitual residence' as defined by the Draft Protocol means stable factual residence, or the place where a person has established his or her permanent or habitual centre of interest.[131] This is in line with the United Nations High Commissioner for Refugees (UNHCR) Guidelines which provide that the term 'habitual residence' is to be understood as a stable factual residence. This is not a legal or formal residence requirement, and so ensures that such residence is not subject to 'lawfulness'. This is important in that in many African states nationality laws still evidence heavy colonial underpinnings.

Under the Draft Protocol, 'appropriate connection' means a connection through personal or family life to a state and includes a connection evidenced 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 the individual'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

128 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 2.

129 1954 Convention Relating to the Status of Stateless Persons art 1.

130 Modesta Ndubi 'The Makonde: From statelessness to citizenship in Kenya' *UNHCR* 15 March 2017 http://www.unhcr.org/ke/10581-stateless-becoming-kenyan-citizens.html (accessed 23 September 2022).

131 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 2.

state succession, a legal bond to a territorial unit of a predecessor state which has become territory of the successor state.[132] This means that there must be a link between the individuals and the state whose nationality they claim, but that this link must be interpreted more broadly that the traditional 'genuine link'. The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this case, supersedes the strict requirement of an effective nationality.[133] The greater clarity of the terms 'habitual residence' and 'appropriate connection' in the Draft Protocol will promote the acquisition of nationality enshrined in article 6 of the Draft Protocol.

The Draft Protocol goes on to call for agreement and recognition that each person has the right to a nationality[134] as a fundamental prerequisite for the enjoyment and exercise of the human rights recognised by the Banjul Charter and the other African human rights treaties ratified by states.[135] When adopted, the Draft Protocol will be the first instrument to remedy the absence of a specific and express right to a nationality in Banjul Charter. By promoting every individual's right to a nationality and advocating the acquisition of nationality at birth by operation of law,[136] the Draft Protocol seeks to ensure that no persons will be born without a nationality. The provision pays special attention to children by providing that states must automatically grant nationality to children born within their territory; those born within their territory but to stateless parents; and those born under any other circumstance that would result in them being effectively stateless.

Article 6 of the Draft Protocol places a positive obligation on states to provide in their domestic law for the possibility of acquisition of nationality by persons having an appropriate connection to the state. This article further requires a state to put in place qualifications with reasonable thresholds, such as not requiring minimum residency of a period exceeding ten years before an application for acquisition of nationality may be submitted. This provision further bars a state from requiring the renunciation of another nationality as a pre-requisite for the grant of its nationality where such

132 As above.

133 See the commentary on the ILC Draft Articles on Nationality of Natural Persons in relation to the Succession of States paras 9 & 10.

134 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 3.

135 African Commission on Human and Peoples' Rights *The right to nationality in Africa* (2015) 50.

136 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 5.

renunciation would expose the person to statelessness. Moreover, this provision outlines a broad category of persons for whom a state should facilitate the acquisition of nationality through its domestic laws and regulations. These persons include: a child born in territory of the state to a non-national parent who is habitually resident there; the spouse of a national; a stateless person; and a refugee. By this provision, the Draft Protocol seeks not only to do away with administrative frameworks that propagate statelessness, but also to cater for vulnerable groups, such as children born to stateless parents and refugees, who are often overlooked in discussions and policies on statelessness. The Draft Protocol further seeks to eliminate the discriminatory practice of wives not being legally able to pass their citizenship on to their foreign spouses.

The Draft Protocol caters innovatively for both nomadic and cross-border populations,[137] a situation that is specific to the aspects of nationality and statelessness in an African context where millions of people[138] live a nomadic lifestyle, or live in communities divided by colonial borders. This document therefore seeks to ensure that communities constantly on the move are not subjected to the risk of statelessness. The Draft Protocol's explanatory memorandum notes that

> [w]ithin the limits of its legislation on entry and stay of aliens in its territory, each state should take, as far as necessary, appropriate steps to facilitate, in relation to stateless nomads or nomads of undetermined nationality, the establishment of a link with the state concerned,[139]

and provides the criteria for how these links are to be determined.

The Draft Protocol also addresses the possibility of individuals reclaiming nationality lost through the voluntary assumption of a different nationality; the renunciation of nationality; nationality lost as a child as a result of a parent's loss or deprivation; or if a person has become stateless.[140] Of particular interest is the ability to recover lost nationality

137 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 8.

138 It is estimated that the pastoralist population in Africa is 268 million many of whom are also nomadic. See the AU 'Policy framework for pastoralism in Africa' https://au.int/sites/default/files/documents/30240-doc-policy_framework_for_pastoralism.pdf (accessed 23 September 2022).

139 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, Explanatory Memorandum.

140 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 17.

on account of being rendered statelessness. This provision would have been vital for communities such as the previously stateless Nubians in Kenya before their success in *Nubian Community in Kenya v Kenya*.[141] The Nubians in Kenya descended from the Nuba mountains found in what is the present-day Central Sudan and had been conscripted into the colonial British army without being granted British citizenship. Their demands to return to Sudan and regain their Sudanese citizenship went unmet and no provision for resettlement or citizenship was made for them in Kenya.[142]

The Draft Protocol has also reiterated that states should strive to introduce guarantees for the prevention and reduction of statelessness while also providing protection to those already rendered stateless. In the same breath, it limits the discretionary powers of these states by placing limitations on expulsions[143] and requiring states to refrain from providing for the loss of nationality in their municipal law.[144] It also advocates a consistent set of laws, strategies, and regulations governing nationality, possibly to ensure similar application across the continent. Having minimum procedural and legislative standards with which African states are expected to comply guarantees that decisions relating to acquisition, deprivation, or change of nationality are not arbitrary and meet relevant standards established by the Banjul Charter and international human rights law in general.[145]

The Draft Protocol further addresses state succession and nationality[146] which is relevant to Africa with its colonial history. It asks states to endeavour to regulate matters relating to nationality through cooperation and agreement amongst themselves, and where necessary, in their relations with other states concerned.[147] This is important for the African continent in light of the extensive displacement of communities and ethnic groups who were unable to establish their nationality or ties to a state following the exit of the colonial powers.

141 *Nubian Community in Kenya v Republic of Kenya*, Communication 317/2006 African Commission on Human and Peoples' Rights (2006).

142 As above.

143 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 18.

144 Draft Protocol to the African Charter on Human and Peoples' on the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa art 16.

145 African Commission on Human and Peoples' Rights (n 135) 50.

146 As above.

147 As above.

5 Conclusion: Locating the African approach to international law

As was explained above, in this chapter the term 'African approach to international law' (AAIL), denotes a comprehensive approach to international law which reflects its distinct historical context.[148] Based on this understanding of AAIL and a reading of the salient features of the Draft Protocol – in particular the plight of those not recognised as nationals by any state solely on the basis of the states' domestic law – the Draft Protocol can be seen as a step in the right direction as an African approach to statelessness and so slotting into the body of AAIL's approach to human rights.

Starting with its Preamble, the Draft Protocol acknowledges the continent's colonial history and the impact of the establishment of borders on issues of nationality and statelessness. The Preamble further acknowledges the lack of instruments – both regional and international – that sufficiently address questions of nationality and statelessness peculiar to the African continent.

The Draft Protocol signals a much-needed shift from indigeneity to residence as the basis for the granting of citizenship. Because the definition of 'habitual residence' has excluded 'lawfulness' as a requirement for nationality, it evidences a further shift from border policing which serves to exclude marginalised groups and those termed 'non-indigenous'. In keeping with the theme of borders, the Draft Protocol acknowledges the plight of nomadic and cross-border communities and obliges states to cooperate to ensure members of these communities have a right to the nationality of at least one of the states with which they have an appropriate connection.

The Draft Protocol further sets the foundation for ridding the continent of citizenship which favours men over women and children. Although not in the majority, certain African countries continue to bar women from passing on their citizenship to their children if the father is not a citizen of the state concerned. Still more African countries have discriminatory laws to ensure that women do not pass on their citizenship to their foreign spouses. The provisions of the Draft Protocol on women's right to pass their citizenship could be seen as an attempt to embrace many indigenous African traditions of belonging based on matrilineal descent.[149]

148 Cole (n 5) 288.

149 Manby (n 2) 33.

Based on the preceding discussions, we conclude that the 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 embodies an African approach to the international issue of statelessness. The Draft Protocol addresses statelessness from an African perspective, adding to the body of law that caters to the global phenomenon, but also filling the gap where international instruments do not. It further seeks to undo the damage brought by the colonial enterprise and perpetuated by the post-colonial state, by excluding indigeneity as the basis for granting citizenship and recognising residence as a key factor. Residence – as opposed to indigeneity – offers a better response to Africa's reality in that it acknowledges the effect of boundaries, displacement, and migration on the peoples of the continent. Forty-five years after the entry into force of the Convention on the Reduction of Statelessness, Africans have embraced the decolonisation of the global law on citizenship and statelessness by adopting an autochthonous regional legal instrument to address a phenomenon which, in more than one way, is unique to the continent.