

Chapter 7

Article 6

Name and nationality

Rachel Sloth-Nielsen

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. State parties to the present Charter shall undertake to ensure that their constitutional legislation recognise 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.

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1 Introduction

Article 6 of the African Charter on the Rights and Welfare of the Child (African Children's Charter) contains three separate but interconnected rights of the child, namely, the right to a name (article 6(1)); the right to have their birth registered (article 6(2)); and the right to acquire a nationality (article 6(3)). These three rights are crucial to the establishment of the child's identity. Article 6(4) further sets out state obligations in relation to the right to nationality and prevention of statelessness.

The establishment of the child's identity, legal and otherwise, is fundamental for ensuring that they are viewed as a person before the law. A name forms part of child's personal identity, and allows the child to be identified personally, within their family (through a surname) and by the state.¹ A name facilitates the integration of a child into society.² The legal identity of the child is established through birth registration. The child is recognised as a legal person, separate from their family and with their own rights and entitlements. The establishment of legal identity is 'a critical step in ensuring lifelong protection and is a prerequisite for exercising all other rights'.³ Without a legal identity, children face difficulties in accessing basic services, such as education and medical care. They are at greater risk of experiencing harm and exploitation, including trafficking, recruitment into armed forces and

1 S Schmahl *United Nations Convention on the Rights of the Child: Article-by-article commentary* (2021) 136.

2 Schmahl (n 1).

3 UNICEF 'Birth registration for every child by 2030: Are we on track' (2019) 6.

child marriage.⁴ The importance of providing children with a legal identity is acknowledged in the Sustainable Development Goals (SDGs).⁵ SDG 16.9 requires the provision of legal identity for all, including birth registration, by 2030.⁶ It also features in Agenda 2040 of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) as Aspiration 3.⁷ Agenda 2040 elaborates on the vision contained in Agenda 2063 of the African Union (AU) in respect of children, which 'aims at empowering children through the full implementation of the African Children's Charter'. Aspiration 3 is directed at ensuring that 'every child's birth and other vital statistics are registered' by 2040.⁸

However, Africa still lags behind the rest of the world in terms of birth registration. According to the 2022 Statistical Update on Birth Registration in Africa of the United Nations Children's Fund (UNICEF),⁹ there are 91 million African children under the age of five years whose births have not been registered.¹⁰ This amounts to 56 per cent of the total number of unregistered children under the age of five years worldwide. Of this 91 million, 40 per cent reside in East Africa.¹¹ Sixty per cent of children in this age bracket do not possess a birth certificate.¹² Nearly half (21 million) of all infants under the age of one year have not had their births registered,¹³ with 27 million infants not possessing a birth certificate.¹⁴ While birth registration does not establish nationality, it serves as proof thereof and is essential to reducing and preventing statelessness. Thus, the African Children's Committee has noted the 'strong and direct link between birth registration and nationality'.¹⁵ Out of the estimated 4.4 million stateless persons worldwide, over 1 million reside in West Africa, Central Africa, East Africa, the Horn of Africa and the Great Lakes.¹⁶

In February 2024 the African Commission on Human and Peoples' Rights (African Commission) formally adopted its Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to a Nationality and Eradication of Statelessness in Africa (Protocol).¹⁷ The adoption of the Protocol marks the end of a multi-year-long process that sought to implement a continental legal instrument to protect the right to nationality in Africa.¹⁸ According to the draft

4 UNICEF (n 3).

5 United Nations General Assembly 'Transforming our world: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1 (2015).

6 As above.

7 African Children's Committee 'Agenda 2040: 10 Aspirations for an Africa Fit for Children' (2022) 15.

8 African Children's Committee 'Agenda 2040', <https://www.acerwc.africa/en/page/agenda-2040> (accessed 17 October 2023).

9 UNICEF 'A statistical update on birth registration in Africa' (2022).

10 African Children's Committee (n 8) 11.

11 African Children's Committee (n 8) 12. UNICEF notes that the figures are rounded up and do not add up to the total for Africa. They are estimates based on a subset of 48 African countries with data between 2012 and 2021, covering 97 per cent of the population of children under 5.

12 African Children's Committee (n 8) 13. This amounts to 116 million children under the age of 5.

13 African Children's Committee (n 8) 15.

14 African Children's Committee (n 8) 16.

15 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of Children of Nubian Descent in Kenya) v Kenya* Decision 2/Com/002/2009 (2011) AHRLR 181(ACERWC 2011), decided 22 March 2011 (*Children of Nubian Descent*) para 42.

16 UNHCR 'Global Report 2022' (2022) 8-9. No data is available for Southern Africa. North Africa has been excluded as the data provided includes that of the Middle East.

17 B Manby 'A new treaty on statelessness and the right to a nationality in Africa' 6 March 2024, <https://citizenshiprights.africa.org/a-new-treaty-on-statelessness-and-the-right-to-a-nationality-in-africa/> (accessed 29 April 2024).

18 Examples of earlier initiatives in the process include Resolution 234 on the Right to Nationality, African Commission on Human and Peoples' Rights (23 April 2013) AU Doc ACHPR/Res.234(LIII) 2013 (2013) and African Commission (2015).

protocol (the text of the final version was not yet available at the time of writing) the object and purpose of the Protocol are to ‘ensure respect for the right to a nationality in Africa; establish the obligations and responsibilities of states relative to the specific aspects of the right to a nationality in Africa; and ensure that statelessness in Africa is eradicated’.¹⁹ The Protocol requires 15 ratifications to come into force. Furthermore, both statelessness and birth registration fall within the scope of Aspiration 6 of the AU’s Agenda 2063.²⁰

2 Links to other Charter articles

The African Children’s Committee has noted that all the articles in the Children’s Charter are ‘interdependent, indivisible and mutually reinforcing’.²¹ Article 1, which sets out the general nature of state obligations, requires states to adopt legislative and other measures to give effect to the rights in the Charter. This includes civil registration laws and the implementation of effective systems to give effect to the rights enshrined in article 6.²² When implementing the rights contained in article 6, it is necessary to ensure that the following principles are observed: the best interests of the child principle;²³ non-discrimination;²⁴ the child’s survival, development and protection; and the participation of the child.²⁵ Moreover, the African Children’s Committee has highlighted several other examples of how article 6 interacts with other rights in the Charter. This is not an exhaustive list. The Children’s Committee has emphasised that birth registration plays an important role in the realisation of many of the rights in the Charter.²⁶

In General Comment 2 on article 6, the African Children’s Committee notes that birth registration is inherently linked with ensuring that children enjoy their protections under the ‘justice for children’ guidelines in their respective states.²⁷ A birth certificate is primary proof of age, without which it can be difficult to prove whether the child has attained the age of criminal responsibility.²⁸ A child who has not been civilly registered may not be able to invoke the guarantees under articles 5 and 17 of the Charter.²⁹ Birth registration is further linked to the prevention of harmful practices, including sexual exploitation, recruitment into armed forces (article 22), child marriage (article 21(2)), child labour (article 15) and illicit adoption (article 24).³⁰ In the General Comment 2 the African Children’s Committee remarks that it ‘strongly believes that a universal well-functioning birth registration system increases the visibility of the most disadvantaged children and enhances their protection against harmful practices’, as the age of the child cannot be concealed to force them into, for example, marriage.³¹ A birth certificate is further

19 African Union, African Commission on Human and Peoples’ Rights, Draft Protocol to the African Charter on Human and Peoples’ Rights on Certain Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa (drafted 2017, amended 2018).

20 African Union ‘Agenda 2063: The Africa we want’ (2015). Aspiration 6 aims for ‘an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children’.

21 General Comment 2 on article 6 of the African Children’s Charter: ‘The right to a name, registration at birth, and to acquire a nationality’ African Children’s Committee (8 November 2013) ACERWC/GC/02 (2014) para 25.

22 General Comment 2 (n 21) para 11.

23 The best interests principle is enshrined in art 4(1).

24 The right to non-discrimination is found in art 3. A child shall not be deprived of the rights contained in art 6 based on the grounds of discrimination listed in art 3.

25 General Comment 2 (n 21) para 13. These principles not only apply to the implementation of the art 6 rights, but to all children’s rights.

26 General Comment 2 (n 21) para 25.

27 General Comment 2 (n 21) para 26.

28 As above.

29 General Comment 2 (n 21) para 27. Art 5(3) prohibits the death penalty in respect of children found guilty of a crime. Art 17 regulates the administration of juvenile justice.

30 General Comment 2 (n 21) para 30.

31 As above.

required by many African countries for enrolment in school.³² A child who is not civilly registered and thus does not have a birth certificate will not be able to attend school. Article 6 is thus linked with article 11, the right to education. Furthermore, health and social services are less available to non-registered children – thus implicating the right to health (article 14).³³

Article 19(1) gives every child the right to the enjoyment of parental care and the right to reside with their parents wherever possible. The African Children's Committee has observed that birth registration establishes the filiation of a child.³⁴ Birth registration and proof of filiation further contributes to reducing falsification of familial ties, a method used by child traffickers, including in illicit intercountry adoption.³⁵ Further, proof of identity that indicates family and parental ties assists in resolving familial disputes surrounding inheritance of family property.³⁶ Civil registration thus contributes towards the protection of children's inheritance rights. Finally, if a child has not been registered, they will not be able to obtain other forms of official documentation upon adulthood, including an identity document, passport or driver's licence.³⁷ These documents are often required to participate in the economy, and for the enjoyment of many civil and political rights.³⁸

3 Links to other human rights treaties

Article 6 of the African Children's Charter links most directly to article 7 of the Convention on the Rights of the Child (CRC). Article 7 similarly contains the right of the child to a name, to a nationality and to be registered at birth, and places on states an obligation to ensure that the rights contained in article 7 are implemented in accordance with national law and treaties, particularly in situations where the child would otherwise be stateless.³⁹ Article 7 of CRC, however, also contains the right of the child to know and be cared for by their parents, as far as possible. Article 6 contains no such equivalent. Instead, the right to be cared for by one's parents is found in article 19.

Article 6 of the Children's Charter further links to article 8 of CRC. Article 8 provides for the preservation of identity, including nationality, name and family relations.⁴⁰ An effective birth registration system, along with proof of identity, can assist in ensuring that the identity of the child is preserved. While birth registration can contribute to the preservation of a child's identity, the Charter contains no explicit right to preservation of identity and thus does not have a CRC article 8 equivalent. Moreover, the normative content of article 8 of CRC is not covered by any Charter provisions. This means that, unlike under article 8(2) of CRC, no explicit obligation is placed upon states to speedily re-establish the identity of a child illegally deprived thereof. Moreover, both article 6(4) and the 1961 Convention on the Reduction of Statelessness place obligations on contracting states to reduce and prevent statelessness.

32 General Comment 2 (n 21) para 31.

33 General Comment 2 (n 21) para 32.

34 General Comment 2 (n 21) para 34.

35 As above.

36 General Comment 2 (n 21) para 35.

37 African Union (n 20) para 37.

38 As above.

39 Art 7 states: '1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'

40 Art 8 states: '1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'

4 Legal interpretation

4.1 Right to a name (article 6(1))

In General Comment 2 the African Children's Committee clarifies that 'name' in terms of article 6(1) refers to the name, surname and middle name of the child, or whichever is applicable.⁴¹ A name forms part of the identity of the child and can indicate familial, cultural and religious background and belonging.⁴² Although the responsibility to give a child a name lies with the child's parents or guardians, the state has the responsibility of regulating the attribution of names.⁴³ For instance, following indications that children born out of wedlock in Lesotho were being given derogatory and embarrassing names, the African Children's Committee recommended that the state party prohibit such names during the registration process and that society be sensitised so that children are not given such names.⁴⁴ The Children's Committee emphasises that the child's name must not be contrary to his or her current or future best interests.⁴⁵ In this regard, the Children's Committee notes that names falling under the following categories should not be allowed: 'Names that have offensive or obscene references; could incite violence; are typographically unconventional; are bizarre or ridiculous; might defraud or mislead the public; might confuse the public; might interfere with the rights of others; or could be considered contrary to public policy.'⁴⁶

Further, while acknowledging the importance of naming within cultural and ethnic identity, where cultural interests and the best interests of the child conflict, the latter takes precedence.⁴⁷

The African Children's Committee further draws attention to article 6(1) in the context of adoption and *kafala*. Where possible, a child should keep the first name given by their biological parents, especially if the biological parents are known.⁴⁸ However, to avoid social stigma, adoptive parents should give the adoptive child their surname.⁴⁹ In Muslim countries, where *kafala* is the practice in lieu of adoption, the *makfoul* (child raised under the *kafala* regime) should be given the name of the *kafil* (the person raising the child under *kafala*) in instances where neither the child's parents are known or where the child has been abandoned.⁵⁰ However, in accordance with Islamic precepts, where the child's parents are known, the *makfoul* should keep the name they were given by their biological parents.⁵¹

4.2 Right to birth registration (article 6(2))

In General Comment 2 the African Children's Committee defines birth registration as

the official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government. It is a permanent and official record of a child's existence. Ideally, birth

41 General Comment 2 (n 21) para 38.

42 General Comment 2 (n 21) para 39.

43 As above.

44 Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) to the government of Lesotho on its Initial report on the status of the implementation of the African Charter on the Rights and Welfare of the Child (2015) para 22.

45 General Comment 2 (n 21) para 40.

46 As above.

47 As above.

48 General Comment 2 (n 21) para 41.

49 As above.

50 As above.

51 As above.

registration is part of an effective civil registration system that acknowledges the existence of the person before the law establishes the child's family ties and tracks the major events of an individual's life.⁵²

Through birth registration, the state officially acknowledges the child's existence.⁵³ Through this acknowledgment, the legal identity of the child is created.⁵⁴ A child who is not registered at birth has no legal identity, and thus does not legally exist.⁵⁵ A child who has not had their birth registered is at increased risk of having their rights violated, as the child may fall outside the reach of government protection.⁵⁶ Further, the child 'is in danger of being shut out of society – denied the right to an official identity, a recognised name and nationality'.⁵⁷ In General Comment 2 the African Children's Committee highlights the need for a children's rights approach to birth registration.⁵⁸ It is not merely 'a mere bureaucratic and administrative formality', but the means through which a child is able to enjoy and access a multitude of other rights.⁵⁹ For instance, in certain countries, birth registration or civil registry documents such as a birth certificate may be a prerequisite to access essential services such as medical and other services.⁶⁰ Thus, a birth certificate is regarded as an essential element of article 6 as it is required to prove birth registration.⁶¹ The African Children's Committee further points to the need for the registration process to be simplified and streamlined, so that a birth certificate can be issued in the shortest possible time.⁶² Furthermore, a copy of the birth certificate should be issued free of charge, with the first copy being provided immediately upon registration.⁶³ Either parent should be able to register the birth and, in the case of orphaned or abandoned children, legislation must specify the alternative authorities that are authorised to register the child.⁶⁴

As to the features of the right to birth registration, the African Children's Committee stresses that for the right to be effective, birth registration 'must be universal, free and accessible and made immediately after the birth of the child'.⁶⁵ In terms of the universality of the right, this means that it must be afforded to every child, anywhere and at any time.⁶⁶ It must apply without discrimination, including on the basis of the status of the child's parents.⁶⁷ Where the status of the parents – including undocumented migrants, refugees, asylum seekers and those belonging to certain ethnic groups – is such that it places the parents in a vulnerable position, steps must be taken to ensure that the child is

52 General Comment 2 (n 21) para 45.

53 *Children of Nubian Descent* (n 15) para 38.

54 General Comment 2 (n 21) para 43.

55 As above.

56 As above.

57 *Children of Nubian Descent* (n 15) para 38.

58 General Comment 2 (n 21) para 44.

59 As above. See further part 2 above.

60 Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the initial report of the Republic of Benin On the status of the implementation of the African Charter on the Rights and Welfare of the Child (September 2019) para 20; Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the initial report of the Republic of Burundi on the status of the implementation of the African Charter on the Rights and Welfare of the Child para 20.

61 Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the initial report of the Republic of Rwanda on the status of the implementation of the African Charter on the Rights and Welfare of the Child (September 2019) para 21.

62 General Comment 2 (n 21) para 46.

63 General Comment 2 (n 21) para 47.

64 As above.

65 General Comment 2 (n 21) para 49.

66 General Comment 2 (n 21) para 50.

67 As above.

nevertheless registered, including through putting in place special protections and guarantees such as ensuring that information is not shared with police or immigration officials.⁶⁸ In General Comment 2 the African Children's Committee draws attention to six categories of children to whom special attention must be paid, namely, children with disabilities; children born to parents with disabilities; children born to refugees, internally-displaced persons (IDPs) and asylum seekers; children of undocumented migration status; children born to indigenous parents; and children born to incarcerated mothers.

Where states have laws that discriminate against and dehumanise persons with disabilities, this can instil fear around registering children with disabilities.⁶⁹ States must take special measures to ensure that children with disabilities are protected from birth. Where a child is born to a parent with a disability, states must ensure that procedures are in place to facilitate the registration of these children.⁷⁰ This may include employing community leaders to identify and report to authorities children born to parents with intellectual disabilities, as well as ensuring that registration information and material is accessible to those who are visually or hearing impaired.⁷¹

Refugees, IDPs and asylum seekers are vulnerable persons to whom special measures of protection apply. Registering the birth of children born to persons within these vulnerable groups is one such measure of protection.⁷² Birth registration can facilitate the return of refugees to their country of origin by assisting them in proving their identity and lineage for purposes of resettling them back in their family lands and assisting with family reunification.⁷³ The African Children's Committee recommends placing birth registration services in closer proximity to refugee camps and IDP and refugee settlements.⁷⁴ While birth registration does not in itself confer nationality, it does serve to prevent statelessness.

Children of undocumented status⁷⁵ are especially vulnerable, as their parents are likely to hide due to fear of being arrested if their undocumented status becomes known to authorities.⁷⁶ This further means that undocumented children are at risk of being registered under a false identity.⁷⁷ To promote birth registration and avoid non-registration becoming an intergenerational problem, the African Children's Committee encourages states to explore the possibility of non-documentary evidence being accepted as proof of parental identity.⁷⁸

As for children born to indigenous parents, the Children's Committee highlights that indigenous persons are often marginalised and lack recognition of their own basic rights and freedoms.⁷⁹ This

68 General Comment 2 (n 21) para 51.

69 General Comment 2 (n 21) para 53.

70 General Comment 2 (n 21) para 56.

71 As above.

72 General Comment 2 (n 21) para 57.

73 General Comment 2 (n 21) para 58.

74 General Comment 2 (n 21) para 60.

75 The African Children's Committee notes that children of undocumented status fall into at least five categories, namely, 'undocumented children, children born to undocumented parents, children whose migration status became irregular because their parents or caregivers overstayed their residence visas or permits in a given country, children in regular migration status (without necessarily being documented) but whose parents or caregivers are undocumented, or children born to parents whose deportation has been suspended due to circumstances justifiable under international law or international humanitarian law, but have not been issued any documentation'. See General Comment 2 (n 21) para 64.

76 General Comment 2 (n 21) para 65.

77 As above.

78 As above.

79 General Comment 2 (n 21) para 67.

consequently impacts the realisation of their children's rights, including the right to birth registration.⁸⁰ Children born to nomadic indigenous groups who frequently cross state borders are at increased risk of becoming stateless.⁸¹ To ensure the right to birth registration is realised for these children, the African Children's Committee recommends that

state parties with indigenous populations must include explicit provisions on actions specifically targeting registration of indigenous children. Their implementation policies and programmes must include campaigns to raise awareness of indigenous populations about the importance and benefits of birth registration through outreach activities. State parties are also under the obligation to put in place birth registration mechanisms that are adapted to the lifestyle of indigenous communities such as mobile registration systems reaching them where they live, and the recruitment of staff who can effectively communicate with the peoples at risk of marginalisation.⁸²

Children of imprisoned mothers are vulnerable and often invisible.⁸³ This vulnerability and invisibility is heightened if these children are unregistered.⁸⁴ Their rights and welfare have the potential to be affected at every stage of the criminal process against their parents.⁸⁵ Moreover, article 30 of the African Children's Charter places the obligation on states to 'undertake to provide special treatment to ... mothers of infants and young children who have been accused or found guilty of infringing the penal law'. For a mother to invoke her article 30 rights, which indirectly is a right of the child, the mother must be able to adduce proof of parentage, which may be difficult should the child not have been registered.⁸⁶ Birth registration was further highlighted by the Children's Committee as a means to reduce discrimination against children of incarcerated mothers in the General Comment 1 on article 30.⁸⁷ In this regard, the Children's Committee urges that 'where birth occurs in remand or prison facilities, states parties should ensure that they shall be registered in the local birth registration office'.⁸⁸ Furthermore, there must be 'no mention of remand or prison as place of birth on a child's birth records'.⁸⁹ Only the locality where the birth occurred should appear on the child's birth records.⁹⁰

Birth registration must further be free and accessible. This means that state parties must not only implement laws and policies related to birth registration, but also remove 'all *de facto* limitations and obstacles'.⁹¹ Thus, all costs associated with an effective registration system must be borne by the state, including costs associated with offices, equipment and civil service salaries.⁹² The African Children's Committee further notes that birth registration cannot be said to be free where parents incur onerous travel costs in registering the birth of their child.⁹³ Thus, the Children's Committee 'interprets free birth

80 General Comment 2 (n 21) para 68.

81 As above.

82 General Comment 2 (n 21) para 69.

83 General Comment 2 (n 21) para 70.

84 As above.

85 As above.

86 General Comment 2 (n 21) para 71.

87 General Comment 1 on article 30 of the African Children's Charter: 'Children of incarcerated and imprisoned parents and primary caregivers' African Children's Committee (16 April 2014) ACERWC/GC/01 (2013).

88 Para 21.

89 As above.

90 As above.

91 *Children of Nubian Descent* (n 15) para 40; General Comment 2 (n 21) para 73.

92 General Comment 2 (n 21) para 73.

93 As above.

registration to also entail accessibility and availability of the birth registration services for users'.⁹⁴ This means ensuring that registration services are available in remote regions.⁹⁵

Free and accessible registration further extends to ensuring that a legal framework is put in place to protect sensitive information.⁹⁶ This includes the obligation of ensuring the 'integrity, confidentiality and availability of the data'.⁹⁷ The African Children's Committee explains that integrity means that information must be kept 'authentic, complete and protected against improper or accidental modification or destruction' and further that 'birth certificates should include some security feature or features that enables fraud or alteration to be detected, and as a preventive measure against malpractice'.⁹⁸ Integrity further refers to the integrity of all systems used in the registration process. Confidentiality means restricting access to and preventing disclosure of sensitive data and accessibility refers to the 'timely and reliable access' to all data as well as to its availability when needed.⁹⁹

Lastly, birth registration must occur 'immediately' after birth. The African Children's Committee notes that immediately means 'as soon as possible', with due consideration being had for local custom and practices related to the post-birth period.¹⁰⁰ It is emphasised that 'immediately' does not mean 'within a reasonable time'.¹⁰¹ It is thus envisioned that birth registration takes places days or weeks after the birth of a child.¹⁰² It should be compulsory in law for a child's birth to be registered.¹⁰³

The word 'immediately' should inform legislation and policy on birth registration, including through stipulating the number of days within which a birth must be registered.¹⁰⁴ Late registration must be allowed, free of charge or, where not free, with only a nominal charge.¹⁰⁵ In this regard, the African Children's Committee recommends a grace period of a year after birth for late registration to take place.¹⁰⁶ While registration must be encouraged, the Children's Committee has viewed criminalisation of non-registration with concern, noting that criminalisation is a 'disproportionate measure for the enforcement of civil registration'.¹⁰⁷ The use of non-penal measures, such as training of officials and

94 As above.

95 Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the Republic of Congo report on the status of the implementation of the African Charter on the Rights and Welfare of the Child (September 2019) para 23.

96 General Comment 2 (n 21) para 74.

97 As above.

98 As above.

99 General Comment 2 (n 21) para 75.

100 General Comment 2 (n 21) para 79. Local customs and practices include the post-partum cloistering of mothers for a period of time, or where the naming ceremony is delayed.

101 As above.

102 As above.

103 General Comment 2 (n 21) para 80.

104 General Comment 2 (n 21) para 79.

105 General Comment 2 (n 21) para 81. That late registration should be free has been recommended by the African Children's Committee in a number of their Concluding Observations. See eg Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the initial report of the Republic of Angola on the Status of the implementation of the African Charter on the Rights and Welfare of the Child para 20; Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the first periodic report of the Federal Democratic Republic of Ethiopia on the status of the implementation of the African Charter on the Rights and Welfare of the Child (February 2022) para 16.

106 General Comment 2 (n 21) para 79.

107 Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the combined period report of the State of Eritrea on the status of the implementation of the African Charter on the Rights and Welfare of the Child (April 2022) para 19.

increasing awareness, should be preferred to ensure increases in birth registration rates.¹⁰⁸ It is further recommended that birth registration services be set up at all places ‘where a birth certificate is required for a service’.¹⁰⁹ As to the birth certificate, details that are required for registration but which may lead to the child being discriminated against or stigmatised should be omitted from the certificate.¹¹⁰

4.3 The right to acquire a nationality (article 6(3)) and the obligation to prevent statelessness (article 6(4))

In the *Children of Nubian Descent* the African Children’s Committee, drawing on the definition of stateless persons as found in the 1954 Convention Relating to the Status of Stateless Persons and which has been accepted as customary law, defines a stateless child as ‘a child who is not considered as a national by any state under the operation of its laws’.¹¹¹ Lack of nationality impacts on a person’s ability to access and enjoy other fundamental human rights and freedoms.¹¹² Thus, preventing statelessness is ‘a fundamental principle of international human rights law’.¹¹³ Although the African Charter on Human and Peoples’ Rights (African Charter) does not contain a right to nationality, the African Commission has dealt with issues that implicate the right to a nationality.¹¹⁴ The African Court on Human and Peoples’ Rights (African Court) has further ruled on the right to nationality by recognising the Universal Declaration of Human Rights (Universal Declaration), which contains a right to nationality, as forming part of customary international law.¹¹⁵ Furthermore, following the adoption of a resolution explicitly acknowledging that the right to nationality is implicit in article 5 of the African Charter,¹¹⁶ a draft protocol to the Charter on the right to nationality was published in 2017,¹¹⁷ and was adopted in 2024.

For children, specifically, a lack of nationality can impair their right to education, health care and other social services.¹¹⁸ The African Children’s Committee has thus remarked that ‘being stateless as a child is generally antithesis to the best interests of children’.¹¹⁹

Although article 6(3) does not confer the right to a nationality from birth, but rather ‘the right to acquire a nationality’, the African Children’s Committee has made it clear that ‘a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth’.¹²⁰ This interpretation is consistent with article 6(4), which places an obligation on the state where the child is born to grant that child nationality if the child

108 As above.

109 General Comment 2 (n 21) para 81. A birth certificate is, eg, required for entry into school or to register for social security and poverty alleviation programmes.

110 General Comment 2 (n 21) para 82.

111 *Children of Nubian Descent* (n 15) para 44.

112 General Comment 2 (n 21) para 84. See further *African Centre of Justice and Peace Studies and People’s Legal Aid Centre v Sudan*, Communication 5/Com/001/2015, decided May 2018 (*Sudanese Nationality*) para 54.

113 General Comment 2 (n 21) para 83.

114 Including but not limited to *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d’Ivoire* (2008) AHRLR 75 (ACHPR 20081); *Union Inter-Africaine des Droits de l’Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997); *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004).

115 *Anudo Ochieng Anudo v United Republic of Tanzania* App 12/2015, African Court on Human and Peoples’ Rights (2018).

116 Resolution 234 (n 18). Art 5 of the African Charter states that ‘[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status’.

117 Draft Protocol to the African Charter on Human and Peoples’ Rights on Certain Aspects of the Right to a Nationality (n 19).

118 General Comment 2 (n 21) para 84. See also *Children of Nubian Descent* (n 15) para 46.

119 *Children of Nubian Descent* (n 15) para 46.

120 *Children of Nubian Descent* (n 15) para 42.

would otherwise be stateless. Accordingly, the Children's Committee affirmed in their decision on the communication against Sudan that 'the state where the child is born in is the primary bearer of the obligation to grant nationality to the child, particularly in a situation where the child becomes otherwise stateless'.¹²¹ However, this does not mean that other states incur no obligations to prevent statelessness. States with which the child has a relevant link (for instance, parentage or residence) thus also have the responsibility of ensuring a child is granted nationality.¹²² Granting of nationality to a child who would otherwise be stateless can occur automatically at birth, or upon application by the individual at a further date.¹²³ However, to make a child wait until the age of 18 to apply for nationality is not within the best interests of the child, whether the child is stateless or not.¹²⁴ Thus, while states are afforded a discretion as to regulation of the acquisition of nationality,¹²⁵ this discretion is not unfettered. Therefore, those states that do not utilise the *jus soli* approach to acquisition of nationality still have an obligation in terms of the Charter to grant nationality based on birth in that territory where a child would otherwise be stateless.¹²⁶ Moreover, a tentative determination that a child should acquire nationality from another state based on the state's nationality laws is insufficient to discharge the obligation in terms of article 6(4).¹²⁷ Article 6(4) must be implemented 'proactively in cooperation with other states'.¹²⁸ The failure by a state to respond to enquiries about the nationality of a child must be taken as proof that a child is not a national of that state.¹²⁹ Additionally, acknowledging the difficulties in proving statelessness, the Children's Committee urges states to adopt legal provisions facilitating the acquisition of nationality to a child born in that state where that child has strong links to the state or where, although not born in that state, they arrived there as a child and has spent a large portion of their childhood in the state.¹³⁰

Laws that regulate the acquisition of nationality are subject to the principle of non-discrimination. As a result, in the acquisition of nationality, children must not be differentiated against based on 'the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status'.¹³¹ Foundlings should acquire the nationality of the territory where they are found and adopted children should acquire the nationality of their adoptive parent.¹³² Where a parent acquires a new nationality, a child should also acquire that nationality.¹³³ However, the loss of nationality of a parent should not result in the loss of nationality of a child where it would otherwise leave that child stateless.¹³⁴

121 *Sudanese Nationality* (n 112) para 60. See also *Children of Nubian Descent* (n 15) para 50.

122 *Sudanese Nationality* (n 112) para 62.

123 *Sudanese Nationality* (n 112) para 61.

124 *Children of Nubian Descent* (n 15) para 42.

125 A state's legal regime will generally provide for nationality to be acquired on the basis of *jus soli* (acquisition of nationality on the basis of being born in a state), alternatively *jus sanguinis* (nationality by descent, acquired because one's parents are national of a state), or a combination of the two.

126 *Children of Nubian Descent* (n 15) para 50. See also General Comment 2 (n 21) para 91.

127 *Children of Nubian Descent* (n 15) para 51.

128 As above.

129 General Comment 2 (n 21) para 100.

130 General Comment 2 (n 21) para 92.

131 Art 3 of the Charter. See further Concluding Observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on the initial report of the Republic Kingdom of Eswatini on the status of the implementation of the African Charter on the Rights and Welfare of the Child (July 2019) para 25, where the Committee noted that the provisions of the Constitution of Eswatini regulating acquisition of nationality were discriminatory.

132 General Comment 2 (n 21) paras 96-97.

133 General Comment 2 (n 21) para 98.

134 As above.

5 Domestication of this provision in national legal systems, national courts' interpretations, scholarly literature

In *Centre for Child Law v Director-General: Department of Home Affairs*¹³⁵ the Constitutional Court of South Africa held that section 10 of the Births and Deaths Registration Act, which differentiated between married and unmarried fathers for the purposes of conferring their surname to their child during birth registration, was unconstitutional. Unlike in the case of married fathers, an unmarried father could only register the child under their surname if a joint request was made by the mother and the father, or if they had obtained the mother's consent.¹³⁶ This was found to be inconsistent with, among others, the child's right to a name and nationality from birth.¹³⁷

*DGLR v the Minister of Home Affairs*¹³⁸ concerned a child born in South Africa to Cuban parents. The parents' Cuban citizenship had been revoked, and they were deemed permanent emigrants through the embassy. This also meant that their child was stateless. While section 2(2) of the South African Citizenship Act provides for South African citizenship for children who would otherwise be stateless, it was practically impossible to access this provision because the Department of Home Affairs had neither promulgated regulations prescribing the application process, nor had they established a mechanism to determine eligibility. The Court held that it was not in the child's best interests to remain stateless and that she was entitled to citizenship in terms of section 2(2) of the Citizenship Act. The Department was also ordered to promulgate regulations to give effect to section 2(2). At the time of writing, no draft regulations had been published.

6 Conclusion

Birth registration features in both the SDGs and the AU's Agenda 2063. Birth registration is a prerequisite to securing a birth certificate, a legal document often required to access other basic human rights and to prevent human rights abuses.¹³⁹ It is also imperative for ensuring inclusion.¹⁴⁰ Despite this, many African children still do not have their births registered.¹⁴¹ This means that many children on the African continent are without a legal identity. Increased efforts must be made to ensure that all children are registered at birth, not only to meet the SDGs and Agenda 2063, but to guarantee that children have access to all of their fundamental rights.

¹³⁵ *Centre for Child Law v Director-General: Department of Home Affairs and Others* [2021] ZACC 31.

¹³⁶ Para 32.

¹³⁷ Para 79.

¹³⁸ *DGLR v Minister of Home Affairs* (GPJHC) (unreported) Case 38429/13 of 3 July 2014.

¹³⁹ Goal 16 of Agenda 2063 is aimed at empowering the youth. This includes the registration of births.

¹⁴⁰ An inclusive Africa is Aspiration 1 of Agenda 2063.

¹⁴¹ See UNICEF (n 3).