

# Statelessness and Citizenship in the East African Community

A Study by Bronwen Manby for UNHCR

September 2018

Commissioned by



UNHCR Regional Service Centre, Nairobi, Kenya

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## Methodology and acknowledgements

This report was written on the basis of desk and field research conducted from May-August 2016 in the six Partner States of the East African Community (Burundi, Kenya, Rwanda, South Sudan, Tanzania, Uganda), and has been updated to June 2018. The author visited Kenya, Rwanda, Tanzania, and Uganda, and conducted interviews with state officials, relevant staff of UNHCR and other international agencies, national civil society groups, and institutions and organisations (such as children's homes and legal aid clinics) likely to have encountered individuals affected by these problems, as well as representatives of affected communities introduced by these key informants.

The report was presented and debated during a two-day meeting held in Arusha, Tanzania, in March 2017, with the participation of representatives of the Kenyan, Burundian, and South Sudanese governments, and experts from other countries in the region. It was updated to take into account those comments, which were much appreciated. It was discussed again among EAC representatives at the first meeting of government focal points on statelessness in the Member States of the International Conference on the Great Lakes Region held in Naivasha, Kenya, in April 2018; subsequent written comments from the state representatives of Burundi, Rwanda, South Sudan, and Tanzania were incorporated into the final draft.

The research did not include any quantitative survey to establish the extent of statelessness, but sought rather to identify stateless and at-risk groups based on a mix of legal analysis and qualitative field research. The report must be regarded as the foundation for further study of statelessness issues in each country.

The tables comparing provisions of national citizenship laws included throughout the report inevitably involve some simplification of complex provisions, and should not be relied upon for definitive statement of the law: those wishing to understand particular provisions should rather refer to the original texts.

The author would like to thank the staff of UNHCR who provided invaluable logistical support and technical advice, especially: June Munala and Benedicte Voos (succeeding each other in the Regional Support Centre for the East, Central, Horn of Africa and Great Lakes Region), Laura Parker (in the Regional Support Centre, for updating and editing assistance), Wanja Munaita (Kenya), Florian Hoepfner (Rwanda), Godlove Kifikilo (Tanzania), and Umar Yakhyaev (Uganda). In addition, in Kenya, thanks are due to Diana Gichengo of the Kenya Human Rights Commission, Mustafa Mahmoud of Namati, and Phelix Lore of the Haki Centre; in Tanzania, to Professor Bonaventure Rutinwa of the University of Dar es Salaam; and in Uganda, to Hala Al-Karib of the Strategic Initiative for Women in the Horn of Africa (SIHA) and to Marshall Alenyo.

Thanks also to the following people for their comments and contributions to drafts of this report: Olivia Bueno and Lucy Hovil (International Refugee Rights Initiative), Ibrahima Kane (Open Society Foundations), Tamara Keating (IOM), Godlove Kifikilo (UNHCR), Amelia Kuch (University of Edinburgh), Mustafa Mahmoud (Namati), Jonathan Marskell (World Bank), Joe Oloka Onyango (Makerere University), and Jaap van der Straaten. Particular thanks to Marshall Alenyo for contributions to the research based on his encyclopaedic knowledge of citizenship law and its application in Uganda.

The views expressed and any errors are those of the author, and do not necessarily reflect the official view of UNHCR.

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**Dedicated to the memory of Adam Hussein Adam**

**A note on terminology: “nationality”, “citizenship”, and “stateless person”**

In international law, nationality and citizenship are now used as synonyms, to describe a particular legal relationship between the state and the individual; the terms can be used interchangeably, though “nationality” is more commonly used in international treaties. Neither term has any connotation of ethnic or racial content, but is simply the status that gives a person certain rights and obligations in relation to a particular state.

Other disciplines, such as political science or sociology, have different ways of using the terms in other contexts. And even in law, different languages have different nuances, and different legal traditions have different usages at national level. In national law, “citizenship” is the term used by lawyers in the British common law tradition to describe this legal bond, and the rules adopted at the country level by which it is decided whether a person does or does not have the right to legal membership of that state and the status of a person who is a member. Nationality can be used in the same sense, but tends to be more restricted to international law contexts. In the French and Belgian civil law tradition, meanwhile, *nationalité* is the term used at both international and national levels to describe the legal bond between a person and a political entity, and the rules for membership of the community.

This report will use citizenship and nationality according to the terms used in the national context, and nationality at the international level.

The 1954 Convention relating to the Status of Stateless Persons provides the international definition of “stateless person”: “a person who is not considered as a national by any state under the operation of its law” (Article 1(1)). (In its discussions around the development of a 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, the African Commission on Human and Peoples’ Rights proposed clarifying this definition to confirm that the definition includes a person who is unable to establish a nationality in practice.)

## Acronyms

ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
BOC	British Overseas Citizen
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CPA	Comprehensive Peace Agreement (Sudan)
CTD	Convention travel document
CUF	Civic United Front (Zanzibar)
DRC	Democratic Republic of Congo
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICGLR	International Conference on the Great Lakes Region
IOM	International Organisation for Migration
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
NGO	Non-governmental organisation
NIRA	National Identification and Registration Agency (Uganda)
NRB	National Registration Bureau (Kenya)
ONPRA	Office National pour la Protection des Réfugiés et des Apatrides (Burundi)
SILABU	Sisal Labour Bureau (Tanzania)
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
UNHCR	UN High Commissioner for Refugees



## Key findings and recommendations

### Extent of statelessness

It is not possible to establish the number of stateless persons in the Partner States of the East African Community (EAC), but it is clear that there are tens of thousands of people at risk of statelessness, among them many who are actually stateless. Those who are stateless or at risk include descendants of people who have migrated from another place, often many years ago, and their children; members of cross-border populations, and children unable to establish rights derived from their parents. Many of these people are only now finding out that their citizenship is doubtful, as new identity cards are being introduced, or old systems upgraded.

### The impact of statelessness

Statelessness and discrimination in access to citizenship and identity documents has a strong negative impact on the ability of individuals and groups to enjoy respect for their basic human rights and to participate fully in the economic, social and political life of a country.

### Legal frameworks

Only Rwanda has a legal framework for nationality administration that generally complies with the international and African norms on the prevention and reduction of statelessness. Most importantly, none of the other five countries has the protections against statelessness among children required by the African Charter on the Rights and Welfare of the Child (ACRWC). While most have a founding provision, there are few safeguard clauses for children who would otherwise be stateless. Laws that are based purely on descent in attribution of nationality at birth, and that restrict access to naturalisation in practice, place significant numbers at risk of statelessness. This is exacerbated where the law is not clear or different laws contradict each other, which is the case in Burundi and Tanzania. Although Partner States of the EAC host many hundreds of thousands of nomadic pastoralists, nationality laws are very poorly adapted to provide for those who do not live a settled existence.

### Due process and transparency

Excessive executive discretion in deciding questions of nationality creates major risks of statelessness and violations of other rights.

### Regional cooperation and efforts to reduce statelessness

There have been important efforts by Partner States of the EAC to try to resolve questions of statelessness. These efforts could be greatly strengthened through regional cooperation mechanisms, led by regional institutions such as the International Conference on the Great Lakes Region (ICGLR). In October 2017, the 12 Member States of the ICGLR (which include all Partner States of the EAC) adopted the Brazzaville Declaration and Regional Action Plan to eradicate statelessness.

**Priorities for action**

In order to strengthen nationality systems and address the risk of statelessness caused by historical and contemporary migration, the priorities for action by the EAC and its Partner States, collectively and on their own account, should be:

- The removal of provisions in the law and requirements in administrative procedures that discriminate on the grounds of sex or birth in or out of wedlock.
- The review of provisions in the law that discriminate on the grounds of race, religion, ethnicity or belonging to an indigenous group, to ensure that they are in compliance with international and African standards on non-discrimination.
- Accession to the international and African conventions on the right to a nationality; the prevention and reduction of statelessness, and the protection of stateless persons.
- The incorporation of the measures for the prevention and reduction of statelessness contained in these treaties into their national laws, especially attribution of the nationality of the country of birth to a child who is otherwise stateless.
- The establishment of procedures within countries and in collaboration between countries to identify populations at risk of statelessness; to determine the nationality of individuals where their status is in doubt; to provide, as an interim measure, a status of “stateless person” where an existing nationality cannot be determined, and to facilitate naturalisation for those who are stateless.
- The reform of nationality laws to create in all states at least some basic rights to nationality that derive from birth and residence as a child in that country: that is, to create a way in which the children of migrants may be integrated into the national community (even if the parents are not naturalised).
- The reform of naturalisation procedures to make them accessible to a far wider number of people, and in particular to the nationals of other EAC Partner States, including refugees and former refugees.
- The achievement of universal birth registration for all children born in the territory of a state.

## 1. Summary

The Partner States of the East African Community (EAC) host significant populations of people that are stateless or at risk of statelessness. That is, of people for whom there is a possibility or probability that they are “not considered as a national by any state under the operation of its law”, the international law definition of a stateless person. It is not possible to put a number on the total population, nor on the smaller but still significant number of people who are in fact stateless.

It is, however, possible to identify the groups most at risk of statelessness, which are similar to those in the rest of the African continent. They fall into four main groups: migrants—historical or contemporary—and their descendants; refugees and former refugees, as well as those “returned” to a country of origin where they have few current links; border populations, including nomadic and pastoralist ethnic groups who regularly cross borders, as well as those affected by border disputes or transfers of territory; and orphans and other vulnerable children, including those trafficked for various purposes.

The reasons why a significant number of people are at risk of statelessness in the region relate to the colonial history of Africa and arbitrary delineation of borders which divided many ethnic groups between two or more countries, as well as the challenges created by conflict and forced displacement. All six countries either host significant populations of long-term refugees or have been the source of refugees fleeing to neighbouring countries; sometimes both. Civil registration and identification systems bequeathed by the colonial powers were weak and centred on control of the “native” population rather than the effective administration of the state to ensure the rights of all.

The EAC common market protocol provides for standardisation of identification and travel documents. A new passport format was introduced from January 2017, and national identity cards will be accepted travel documents among the countries of the region. In line with these commitments, and with long-standing national legislation, Tanzania and Uganda have both recently introduced a requirement that adult nationals carry a national identity card recording their legal status in the country. South Sudan, which joined the EAC in 2016, introduced a national identity card from January 2012, six months after it gained independence from Sudan.

The extent of the problem of statelessness is, paradoxically, in some ways being revealed by efforts to strengthen administrative systems and ensure universal birth registration and access to identity documents. Many people are only now finding, as registration processes are implemented for these new national identity cards, that they are in fact not considered as nationals of these three countries. Appeal and review processes are not yet sufficiently tested to know if this will be a permanent problem.

The impact of lack of recognition as a national can be severe. The most serious risk is arbitrary detention and expulsion, which has been practised by several EAC countries, and has impacted not only people who are foreigners (although long-term residents), but also people who may in fact be nationals or entitled to acquire nationality. Where the requirement to hold a national identity card has been in place since independence (in Kenya, Rwanda and Burundi), lack of an identity card can lead to complete exclusion from public and private benefits, including not only the possibility of obtaining a passport for international travel, or the right to vote or stand for public office, but also a job in the formal sector; the ability to complete school leaving exams; access to health care and financial services, or any number of other entitlements. In Tanzania and Uganda, until recently nobody has been required to hold identification papers, and access to services has not therefore depended on a national identity card. But this is changing.

Historically, it has been possible for a peasant farmer in a remote area or a nomad moving seasonally with the cattle and remaining entirely in the informal sector to avoid the need for documentation, even in countries where an ID card has been required. But requirements to have identity documents are becoming ever more pervasive. Even a person from the most remote community will interact with the modern state at some point, and therefore will require a document showing who the person is and, in most cases, to which state or states he or she belongs. The rules governing automatic attribution or voluntary acquisition of nationality, and the issue of identity documents recognising nationality, are thus ever more critical.

## Overview of the report

This study seeks to provide a comparative analysis of nationality law and its implementation in Partner States of the EAC and highlight the gaps that allow statelessness; to identify the populations that may be stateless or at risk of statelessness and the reasons why statelessness remains prevalent; and to make recommendations for the remedies that may address the problem both at national and regional level. These recommendations are directed to actions that may be taken by the institutions of the EAC; by Partner States acting in cooperation and individually, and by other regional institutions whose mandates cover statelessness-related issues, such as the ICGLR.

Gaps in nationality laws that leave some people without recognition of the nationality of any country include racial, ethnic, religious and gender discrimination, especially in law but also in practice; the almost exclusively descent-based nationality law in most EAC Partner States, even for children who cannot obtain the nationality of their parents; the inaccessibility of naturalisation procedures; the lack of an effective framework to regulate the nationality of those persons following a nomadic lifestyle, and the absence of national and regional procedures for the identification and protection of stateless persons. In addition, the failure to acknowledge significant colonial-era population transfers and to grant nationality systematically to the populations resident in EAC Partner States at the time of transition to independence still has consequences today. The result is that nationality laws and administration in the region do not effectively provide the possibility of integration as nationals of a new country to migrants and their descendants, leaving a significant number with no recognition of nationality where they live, but also no real connections to a country “of origin” enabling them to claim nationality there.

Underlying these problems is the weakness of civil registration systems. Only Burundi has a birth registration rate of more than 80 percent; in Kenya it is 67 percent and in Rwanda 56 percent, while in South Sudan, Tanzania and Uganda, the latest reported rates are 35 percent, 26 percent and 32 percent, respectively – among the lowest in Africa. Even fewer hold birth certificates evidencing their registration. Birth registration does not grant nationality, but it is evidence of the elements that must be proven to show that a person is entitled to nationality. Without registration at birth, a person will often need to provide witnesses and other evidence of his or her situation, and is likely to undergo more onerous bureaucratic procedures before nationality is recognised. Civil registration systems become the more important as population mobility increases, and those most at risk of not being registered—the poor and marginalised; the nomadic; members of minority ethnic groups living in remote areas; migrants, refugees and asylum-seekers—are those most in need of proof of the facts of their birth so that they can establish a nationality.

Section 2 of this report summarises the history of nationality law in EAC Partner States during the colonial period. Section 3 sets out the comparative provisions of nationality law today, and the gaps in the law that contribute to the risk of statelessness. Section 4 looks at nationality administration in practice today, including birth registration and issuance of national identity cards and naturalisation certificates, and identifies some of the major blockages. Section 5 describes the groups most at risk of statelessness common to all EAC countries, and identifies individual examples of such groups in each of the six Partner States. Section 6 outlines international and African standards on nationality and statelessness, and the jurisprudence of the African human rights institutions. Section 7 describes the EAC treaty regime relating to free movement, highlighting the absence of any framework to manage statelessness and recognition of nationality, while noting that EAC Partner States are also members of the ICGLR, which has recently adopted strengthened commitments to eradicate statelessness. Section 8 summarises high-level conclusions from the research for this report. A comprehensive set of recommendations is provided in section 9.

## Key recommendations

In order to strengthen nationality systems and address the risk of statelessness caused by historical and contemporary migration, the priorities for action by EAC and its Partner States, as well as other sub-regional bodies, collectively and on their own account, should be:

- The removal of provisions in the law and requirements in administrative procedures that discriminate on the grounds of sex or birth in or out of wedlock.
- The review of provisions in the law that discriminate on the grounds of race, religion or ethnicity to ensure that they are in compliance with international and African standards of non-discrimination.
- Accession to the international conventions to prevent and reduce statelessness and protect stateless persons, and the implementation of the safeguards against statelessness contained in these treaties into their national laws, especially the attribution of the nationality of the country of birth to a child who would otherwise be stateless.
- The establishment of procedures within countries and in collaboration between countries to identify populations at risk of statelessness; determine the nationality of individuals where their status is in doubt, and, in those cases where no existing nationality can be determined, to provide an interim status of “stateless person”, and facilitate their acquisition of nationality.
- The reform of nationality laws to create in all states at least some basic rights to nationality that derive from birth and residence as a child in that country: that is, to create a way in which the children of migrants may be integrated into the national community (even if the parents are not naturalised).
- The reform of naturalisation procedures to make them accessible to a far wider number of people, and in particular to the nationals of other EAC states, including refugees and former refugees.
- The achievement of universal birth registration for all children born in the territory.

Minimum standards for the content of nationality laws are already established by the UN human rights treaties, including the Convention on the Rights of the Child, as well as the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. UNHCR has published a Handbook on Protection of Stateless Persons and guidelines on prevention of childhood statelessness that provide authoritative interpretation of the obligations under these treaties.<sup>1</sup> In addition, the African Charter on the Rights and Welfare of the Child provides in its Article 6 for every child to have the right to a name, to be registered at birth and to a nationality; the Committee of Experts responsible for the treaty has recently adopted a General Comment on states’ obligations under this article. The African Commission on Human and Peoples’ Rights has also initiated a process to draft a protocol on the right to a nationality in Africa. The EAC and its Partner States, as well as the wider ICGLR membership, should both learn from and contribute to the African Union processes, as they develop their own norms and best practices within the sub-region.

Currently, the approach of those involved in identity management systems and their reform is usually to focus on preventing the fraudulent acquisition of documents by those who are not entitled to them. This is important. Successful measures to end statelessness will require an equal focus on ensuring that every person has a nationality and effective access to proof of that nationality. In addition to efforts at national level, measures to address statelessness could be greatly strengthened through coordination among EAC Partner States, and among the region’s international partners, including the agencies of the United Nations (UN).

The laws governing access to recognition as a national of the state are profoundly political and can be controversial anywhere in the world, especially when rates of migration are high or where a state does not have a long history of strong and trusted national institutions for management of these rules. Partner

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<sup>1</sup> These and other resources are available at the Refworld website’s thematic page on statelessness: <http://www.refworld.org/statelessness.html>.

States of the EAC share the challenges of the entire African continent in this respect. Providing access to nationality to those who do not currently have recognition as nationals can be criticised by some as creating access to power and resources (especially land) for those who should not have the right to do so. However, failing to provide effective systems by which migrants and their descendants can obtain the nationality of the country where they now live has long term negative consequences, not just for the individuals concerned, but also for peace, security and development. Ensuring the right to a nationality provides not only the most basic guarantee of other rights due to a national, but also the foundation of the security of the state itself, both by removing causes of grievance and by strengthening state administrative structures.

### **Steps already taken**

East Africa has undertaken significant efforts to address the challenges of integrating populations whose nationality is in doubt, as highlighted in section 7. These steps include the progress towards gender equality in transmission of citizenship, which now leaves only Burundi and Tanzania with discriminatory provisions; reforms introduced in Kenya's 2010 Constitution and 2011 legislation to provide access to citizenship for children of unknown parents and long-term resident populations; Tanzania's proactive efforts to naturalise certain long-term refugees and their children; Rwanda's almost comprehensive legislative protection against statelessness; and Uganda's efforts to provide access to acquisition of citizenship by registration for those eligible through the registration process for its national identity card.

### **The role of the EAC**

The EAC Treaty commits Partner States to adopt measures to achieve free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community. Implementation of these agreements remains incomplete, although some law reforms have been adopted.

The EAC Treaty also commits Partner States to adhere to "the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".

Both the free movement agenda and the obligation of EAC Partner States to respect human rights imply the need to eradicate statelessness and respect the right to a nationality. Without recognition of nationality, residents of the EAC Partner States will enjoy neither their rights to free movement nor respect for their human rights more generally. Moreover, both the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child have developed strong interpretations of the right to a nationality under the two treaties.

The EAC as an institution and Partner States can individually and collectively build on the positive steps already taken in order to reduce and ultimately eradicate statelessness in the region. This will not be achieved in a few months or even years, but should be a long-term objective, to ensure not only respect of the rights of the individuals concerned, but also the economic development and peace and security of the societies as a whole.

## 2. Nationality under colonial rule and the transition to independence

The states making up the EAC derive their nationality laws from two main legal traditions: the Belgian civil law and the British common law (as influenced by Sudanese law in South Sudan). Although the laws adopted at independence have been amended several times in five of the six countries (with the exception of newly independent South Sudan), the institutional and procedural framework is still based on these systems.

Uganda, Tanzania and Kenya were all British territories, though with differences in status. Tanzania's federal structure today reflects the fact that the mainland, Tanganyika, became a German colony, while the islands of Zanzibar (Unguja and Pemba) remained under the internal control of the Sultan of Zanzibar (a branch of the Omani royal family), as a British protectorate.<sup>2</sup> The strip of territory on the mainland controlled by the Sultan was partially incorporated by Germany into Tanganyika, while the northern part fell under British control. After the German defeat in 1918, Tanganyika became a British League of Nations Mandate and subsequently UN Trust Territory, gaining independence in 1961. Today's Kenya was administered by the British, but divided in two parts: the formerly Zanzibari coastal strip, stretching from the Tanganyika border up to Lamu, was governed as a protectorate, notionally remaining under the Sultan's administration for internal matters. The remainder of what became Kenya, however, was designated a colony, and came under direct rule from London.<sup>3</sup>

Tanganyika gained independence in 1961; Zanzibar in 1963. The Kenyan colony and the northern part of the Zanzibari coastal strip were merged by agreement, and became independent simultaneously in 1963. Uganda was a British protectorate, and gained independence in 1962.

A decree on Zanzibari nationality was adopted as early as 1911. The decree provided that "Zanzibari" shall mean one of our [i.e. the Sultan's] subjects" and that a person was Zanzibari by birth if born (anywhere) of a Zanzibari father born in Zanzibar, or if born in Zanzibar of an alien father also born in Zanzibar; a child born in Zanzibar had the right to apply to become a subject if born and resident in Zanzibar until majority, and naturalisation was also possible based on long residence. In 1952, this was replaced with a decree that provided for nationality to be attributed on the basis of birth in the Sultan's dominions (with exclusions for those who were subjects or citizens of certain listed states, including France, Belgium, and Portugal), as well as for nationality by descent through the father for those born outside.<sup>4</sup> The independence constitution of Zanzibar, which took effect in December of 1963, provided for nationality based on birth in Zanzibar before or after independence. The Sultan was overthrown and a new revolutionary government established in Zanzibar just one month later. The new government then agreed the merger of Zanzibar with Tanganyika, to create the United Republic of Tanzania in 1964. The provisions of Tanganyikan citizenship law were extended to apply in Zanzibar.

Kenya, Uganda and Tanganyika shared the same transitional framework on nationality at independence, included in the independence constitutions negotiated with Britain. These constitutions established three ways of becoming a citizen of the new states on transfer of sovereignty: some became citizens automatically; some became entitled to citizenship and could register as of right; while others who were potential citizens could apply to naturalise, a discretionary process. Those who became citizens automatically were: firstly, persons born in the country before the date of independence who were at that time "citizens of the United Kingdom and colonies" or "British protected persons" (statuses defined in British law) and who had at least one parent also born in the territory; and secondly, persons born

<sup>2</sup> However, Zanzibar was treated as a "protected state" for nationality purposes, a somewhat different status (analogous to that of the Gulf States), thanks to its independent nationality law.

<sup>3</sup> For this history, see Bronwen Manby, *Citizenship in Africa: The Law of Belonging*, Hart Publishing, 2018; for the British territories, see Laurie Fransman, *Fransman's British Nationality Law, Third Edition*, Bloomsbury Professional, 2011, Chapter 3 and catalogue entries on Commonwealth countries.

<sup>4</sup> Zanzibar Nationality and Naturalization Decree 1911; Zanzibar Nationality Decree 1952. In 1954 the Zanzibar Immigration Control Decree restricted the entry of persons from the East African mainland to Zanzibar.

outside the country whose fathers became citizens in accordance with the previous provision. Those persons born in the country whose parents were both born outside the country were entitled to citizenship by way of registration, as were other British protected persons or citizens of the UK and colonies ordinarily resident in the country—a category extended by legislation to people originating from other African states in all three countries of East Africa. Others could be naturalised on a discretionary basis, based on long residence and other conditions that equally applied to those acquiring citizenship after the standard two-year transitional period. Provisions relating to married women made them dependent on their husband's status. These transitional rules remain relevant today to the determination of who is a citizen of the three countries.

For those born after independence, the initial rule included in the constitutions for all the British territories was for *jus soli* automatic attribution of citizenship to everyone born in the territory, with limited exceptions relating to the children of diplomats and “enemy aliens”. Citizenship acts provided additional detail on acquisition by naturalisation and on loss and deprivation of citizenship. These laws have been replaced in all three countries, and the laws now governing citizenship in the three countries are the 1995 Citizenship Act in Tanzania, which applies equally in the mainland and Zanzibar (with no provisions currently in the constitution); the 2010 Constitution and 2011 Citizenship and Immigration Act in Kenya; and the 1995 Constitution and 1999 Citizenship and Immigration Control Act in Uganda, as amended in 2005 and 2009 respectively.

Rwanda and Burundi were both once German territories, mandated to Belgium by the League of Nations in 1922, then becoming UN Trust Territories. There were no negotiated transitional rules on nationality on the departure of Belgium, which simply abandoned its Central African territories with no legal framework in place. Rwanda adopted a nationality law in 1963, within one year of independence; but Burundi not until 1971, nine years later. Neither law provided for acquisition of nationality by those resident in the country on the date of independence. For those born after the laws came into effect, the basic model was a descent-based system through the father, with very limited rights for transmission of nationality from mother to child. The current laws governing citizenship are, in Burundi, the 2005 Constitution and the revised nationality code adopted in 2000, and in Rwanda, the 2003 Constitution (as amended most recently in 2015) and the 2008 Law relating to Rwandan Nationality.

South Sudan seceded from Sudan in 2011. During the colonial period, Sudan was governed as one of two provinces falling under the British-Egyptian condominium imposed in 1899. Independence was hastily granted to Sudan in 1956 without a formally negotiated rule on attribution of citizenship on transfer of sovereignty, and the first post-independence nationality law was adopted in 1957. At the time of the secession of South Sudan, the law in force dated from 1994, as amended in 2005 following the Comprehensive Peace Agreement (CPA) that ultimately led to independence. The Transitional Constitution of South Sudan that came into force after secession did not include transitional provisions relating to nationality, but repeated the wording of the 1998 and 2005 constitutions of the Republic of Sudan, that: “Every person born to a South Sudanese mother or father shall have an inalienable right to enjoy South Sudanese citizenship and nationality”, and explicitly permitted dual nationality. A South Sudanese Nationality Act was adopted in June 2011, just before the secession, and provided additional detail. The 1994 law of Sudan had some influence on this text, but it was mainly drafted anew.



### 3. Nationality laws of EAC Partner States today

The nationality laws of Partner States of the EAC have, with the exception of Tanzania, been substantially modified since independence. Nonetheless, they all still show their institutional and conceptual origins in the common law or civil law system, and there are some broad distinctions that can be made between the three original EAC members and Rwanda and Burundi, and then South Sudan as a separate case. In particular, the civil law systems establish a framework in which questions related to nationality, so fundamental to other rights, are subject to adjudication by a court; whereas the common law countries, especially Tanzania, allow for more executive discretion.

Burundi, Kenya, South Sudan and Uganda provide for an almost exclusively descent-based system in law; Tanzania's law provides, on a strict reading of the law, for citizenship based on birth in Tanzania, but in practice is interpreted by the authorities to be based on descent. Rwanda also favours a descent-based rule, but is the only country to provide some rights to a child based on birth in the territory. All EAC members have highly discretionary systems for naturalisation.

#### The right to a nationality

The Kenyan constitution provides for every child to have the right to a name and nationality, and the Rwandan constitution for every person to have the right to a nationality.<sup>5</sup> Kenya, South Sudan, and Tanzania also provide for every child to have the right to a nationality in specific legislation relating to children's rights.<sup>6</sup> However, the nationality codes themselves do not necessarily ensure that this promise is fulfilled.

#### Nationality based on birth in the territory

The countries with the strongest protections against statelessness for children born on their territory are those that follow a *jus soli* rule, granting nationality automatically to any child born on their soil.

On the face of it, Tanzania's Citizenship Act establishes *jus soli* as the basic principle for attribution of Tanzanian citizenship. While the 1995 Act made some changes to the 1961 constitutional provisions, section 5 is still based on the standard language of the Commonwealth independence constitutions, providing that a person born in Tanzania becomes a citizen at birth, unless "neither of his parents is or was a citizen of the United Republic and his father possesses the immunity from suit and legal process which is accorded to an envoy of a foreign sovereign power accredited to the United Republic" (section 5(2)(a)). Although confusing in the way it is written, with conditions to a condition, the clear meaning of this subsection, common to all the British-model laws of the 1960s, is that a child born in Tanzania is a citizen even if both parents are foreigners, unless the father is a diplomat; and even if the father is a diplomat, the child is a citizen if the mother is a citizen.

This, however, is not how the Immigration Services Department interprets the law; nor most lawyers in Tanzania. The opinion of the Ministry of Justice and Constitutional Affairs is that citizenship is based only on descent: that is, as if the proviso in section 5(2)(a) ended after "neither of his parents is or was a citizen of the United Republic" without any of the language following. This interpretation is reportedly based on the intentions of parliament revealed by Hansard debates at the time the laws were adopted.<sup>7</sup> Former Tanzanian Prime Minister and Attorney-General, and judge of the East African Court of Justice Joseph Warioba, however, is reported to have affirmed the interpretation that under the law any person who is

<sup>5</sup> Kenya Constitution 2010, Article 53; Rwanda Constitution 2003, revised 2015, Article 25.

<sup>6</sup> Kenya Children Act No. 8 of 2001, Section 11; South Sudan Child Act No 10 of 2008, Section 10; Tanzania Law of the Child Act 2009, Section 6.

<sup>7</sup> Interviews, Department of Immigration Services, Dar es Salaam, July 2016; unpublished letter from the Ministry of Justice and Constitutional Affairs to the Commissioner-General of Immigration, 9 March 2000.

born in Tanzania automatically becomes a citizen, except children of diplomats.<sup>8</sup> A draft new constitution proposed in 2014, but shelved on change of government, would have removed the *jus soli* provision to replace it with an explicitly descent-based system.<sup>9</sup>

Uganda amended its independence constitution in 1967 to remove the *jus soli* provision; a partial version was restored by the 1995 constitution, but only for “indigenous communities”. The constitution attributes citizenship from birth to every person born in Uganda “one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926”. The third schedule to the constitution lists these groups; this list was supplemented in amendments to the constitution in 2005.<sup>10</sup>

In Kenya, the *jus soli* provision remained in effect until 1985, but was then removed—with retroactive effect to independence—to put in place a purely descent-based citizenship law.<sup>11</sup>

Rwanda allows a child born in the territory of non-national parents to apply for nationality at majority.<sup>12</sup> Burundi, on the other hand, provides no rights based on birth in the territory.

South Sudan’s law does not provide any rights based on birth in South Sudan for a child born there him or herself, but it does create rights for those with a parent, grandparent or great-grandparent born there.<sup>13</sup>

#### Children of stateless parents or who would otherwise be stateless

Article 6(4) of the African Charter on the Rights and Welfare of the Child, to which all EAC states are party, requires states to provide in law for children born on their territory who would otherwise be stateless to have the right to the nationality of the state of birth. The 1961 Convention on the Reduction of Statelessness includes a similar provision, but only Rwanda is a party to this treaty, acceding in 2006. Burundi’s accession, however, is imminent, following the National Assembly’s unanimous votes to accede to both UN conventions on statelessness in September 2018.

Rwanda is also the only one among the East African Community states that incorporates this provision into national law, providing that “Any child born in Rwanda from unknown or stateless parents or who cannot acquire the nationality of one of his or her parents shall be Rwandan.”<sup>14</sup>

The African Committee of Experts on the Rights and Welfare of the Child ruled against Kenya in 2011 for its failure to protect Kenyan Nubian children born in the country against statelessness. The decision noted that the reforms enacted by the 2010 constitution had not brought Kenyan law in line with the provisions of the African Charter on the Rights and Welfare of the Child.<sup>15</sup>

<sup>8</sup> Faustine Kapama, “Statements on Mkapa’s citizenship misplaced”, *Daily News* (Dar es Salaam), 11 August 2002.

<sup>9</sup> Constitutional Review Commission draft of September 2014, available at International IDEA ConstitutionNet website: <http://www.constitutionnet.org/country/tanzania-country-constitutional-profile>.

<sup>10</sup> Uganda Constitution 1995, Article 10 and schedule 3, as amended by the Uganda Constitution Amendment Act, No. 11 of 2005. The third schedule uses the term “ethnic communities” and lists 65, as amended in 2005 (in the 1995 version, there were 56).

<sup>11</sup> Constitution of Kenya Amendment Act No. 6 of 1985.

<sup>12</sup> Organic Law No. 30/2008 of 25/07/2008 relating to Rwandan nationality, Article 8.

<sup>13</sup> South Sudan Nationality Act 2011, Section 8 (1) “A person born before or after this Act has entered into force shall be considered a South Sudanese National by birth if such person meets any of the following requirements—(a) any Parents, grandparents or great-grandparents of such a person, on the male or female line, were born in South Sudan; or (b) such person belongs to one of the indigenous ethnic communities of South Sudan.” See also footnote 239.

<sup>14</sup> Organic Law, 2008, Article 9.

<sup>15</sup> Communication No. 002/2009, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. Kenya*, African Committee of Experts on the Rights and Welfare of the Child, 22 March 2011 (the Kenyan Nubian children’s case).

### Foundlings or children of unknown parents

Protections in international law for the right to nationality for children of unknown parents, known as “foundlings”, are amongst the longest standing requirements of international law on nationality.<sup>16</sup> UNHCR recommends that provisions on foundlings should “apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth.”<sup>17</sup>

The Kenyan constitution of 2010 introduced for the first time a presumption of citizenship in favour of children of unknown parents, applying the presumption to a child who appears to be under the age of eight at the age found; Uganda’s 1995 constitution creates the presumption for a child up to the age of five; South Sudan, however, only provides for abandoned infants. Rwanda provides in the same article for nationality to be attributed to children of unknown or stateless parents and for abandoned infants to be presumed born in Rwanda,<sup>18</sup> while Burundi creates a presumption of nationality in favour of abandoned infants and children of parents who are “legally unknown”.<sup>19</sup>

Tanzania is one of a minority of African countries that do not have a provision relating to foundlings or children of unknown parents.<sup>20</sup>

**Table 1:** Right to nationality based on birth in the territory

COUNTRY	Birth in country	Birth and one parent also born	Birth and resident at majority	Child otherwise stateless (os)	Parents stateless (s) or unknown (u)	Abandoned infants	Relevant legal provision (most recent amendment in brackets)
Burundi					u	x	L2000 Art3
Kenya					u	x	C2010 Art14(4) L2011 Sec9
Rwanda			(JS)	os	s + u	x	L2008 Arts8-9
South Sudan		JS/2^~				x	L2011 Sec8
Tanzania <sup>a</sup>	JS						L1995 Sec5
Uganda	JS~					x	C1995(2005) Arts10-11 L1999(2009) Secs12-14
JS <i>jus soli</i> attribution: a child born in the country is a citizen (with exclusions for children of diplomats and some other categories).							
(JS) child born in country of non-citizens is eligible to apply for citizenship at majority.							
JS/2 double <i>jus soli</i> attribution: child born in country of one parent also born in the country is a citizen.							
^ A person born in or outside of South Sudan is South Sudanese if any parent, grandparent or great-grandparent was born in South Sudan.							
~ racial, ethnic or religious discrimination in law impacts on <i>jus soli</i> rights (in Uganda, the <i>jus soli</i> provision applies only to those who are members of an “indigenous community”).							
a The law in Tanzania provides for <i>jus soli</i> , and this is recorded here. A descent-based system is applied in practice.							

<sup>16</sup> Included in The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, Article 14.

<sup>17</sup> UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, HCR/GS/12/04, 21 December 2012, paragraph 58.

<sup>18</sup> The law governing persons and the family adopted in 2016 (Law No. 32/2016 of 28/08/2016) also provides in article 102 that “Any person who finds an abandoned new-born child whose father and mother are unknown, is bound to register its birth within thirty (30) days with the civil registrar of the place where the child was found, who issues a provisional birth record.”

<sup>19</sup> Kenya Constitution 2010, Article 14(4) and Citizenship and Immigration Act 2011, Section 9; Uganda Constitution 1995, Article 11; South Sudan Nationality Act 2011, Section 8(4); Burundi *Code de la nationalité* 2000, Article 3. The meaning of “legally unknown” (*légalement inconnus*) is not clear: the term is not used in the Burundian family code, and it appears to come from Belgian law in force before 1984, and now-obsolete provisions in the Belgian family code, email communication from Prof. Patrick Wautelet, University of Liège, 29 August 2016.

<sup>20</sup> The proposed draft new Tanzanian constitution of September 2014 would adopt the same wording as in Kenya.

## Nationality based on descent

East Africa has followed the Africa-wide trend towards greater gender equality in nationality law. All the EAC countries, except for Burundi, provide for gender equality in transmission of nationality from parent to a child.

Although the 2005 constitution of Burundi provides that both mothers and fathers have the same right to transmit nationality to their children, the nationality code of 2000 still restricts automatic attribution of nationality of origin to those born of a Burundian father, unless the child is born out of wedlock and not recognised by the father, although children born of a Burundian mother have the right to acquire nationality “by declaration”.<sup>21</sup> A draft law to remove gender discrimination, among other aspects, has been prepared but is not yet before the Council of Ministers.<sup>22</sup>

Tanzania, reflecting a rule derived from the *jus soli* regime of British law, restricts the transmission of citizenship outside the country: a national from birth who is born in the country can transmit his or her nationality to a foreign-born child, but that child cannot pass his or her nationality on to a child also born outside Tanzania. The child born abroad of a Tanzanian father who was also born abroad (i.e. the child of a father who is a “citizen by descent”) has easier access to naturalisation, but the child born abroad of a mother who is a “citizen by descent” has no greater access than any other foreigner<sup>23</sup> In line with the *jus soli* framework provided for citizenship to be attributed to those born in the country, the law does not explicitly provide for citizenship by descent in relation to the child of a citizen born in the country, although the interpretation applied by the authorities is for the child of a mother or father who is a citizen by birth to acquire citizenship wherever the child is born.

Both South Sudan and Uganda provide rights to nationality that derive from a grandparent, and in the case of South Sudan, from a great-grandparent. Both, however, also create conditions for access to citizenship based on ethnicity.

A person is attributed South Sudanese citizenship whether born before or after independence, and whether or not the person him or herself was born in or outside of South Sudan if the person is a member of one of the “indigenous ethnic communities of South Sudan” (unlike in Uganda, these are not listed). In addition, however, there is the possibility of acquiring citizenship from an ancestor born in South Sudan (see above), while “A person born after the commencement of this Act shall be a South Sudanese National by birth if his or her father or mother was a South Sudanese National by birth or naturalization at the time of the birth of such a person.”<sup>24</sup>

Uganda’s constitutional provisions on citizenship are highly unusual in restricting transmission of citizenship from parent to child to parents who are citizens by birth, even in the case of a child born in the country. A person is a citizen by birth whether born in or outside Uganda if one parent or grandparent was at the time of birth of that person a citizen of Uganda by birth; that is, people who acquired citizenship after birth (by registration or naturalisation) cannot transmit citizenship to their children. The effect is that transmission of citizenship from parent to child is limited to members of the “indigenous communities” of Uganda listed in the third schedule to the constitution.

<sup>21</sup> Constitution of Burundi 2005, Article 12; *Loi No. 1-013 du 18 juillet 2000 portant réforme du code de la nationalité burundaise*, Articles 2, 4 and 5. Nationality of origin (*nationalité d’origine*) is the term used in the French and Belgian civil law system to mean nationality that a person has from birth as a matter of right, as opposed to nationality that is acquired later on the basis of an application.

<sup>22</sup> *Bureau du point focal national sur l’apatridie, “Note sur les contributions du Burundi par rapport au projet d’étude sur l’apatridie et la citoyenneté dans les six pays de la Communauté des Etats de l’Afrique de l’Est”, 9 June 2018.*

<sup>23</sup> Tanzania Citizenship Act 1995, Section 6.

<sup>24</sup> South Sudan Nationality Act 2011, Section 8.

**Table 2:** Right to nationality based on descent

COUNTRY	BORN IN COUNTRY				BORN ABROAD				Legal Provision	Date Gender equality achieved
	In wedlock + Father (F) &/or Mother (M) is a national		Out of wedlock + Father (F) &/or Mother (M) is a national		In wedlock + Father (F) &/or Mother (M) is a national		Out of wedlock + Father (F) &/or Mother (M) is a national			
	F	M	F	M	F	M	F	M		
Burundi !!	R	C*	C	C*	R	C*	C	C*	C2005 Art12 L2000 Art2	-
Kenya	R	R	R	R	R	R	R	R	C2010 Art14 L2011 Secs6-7	2010
Rwanda	R	R	R	R	R	R	R	R	L2008 Art6	2004
South Sudan	R^	R^	R^	R^	R^	R^	R^	R^	C2011 Art45(1) L2011 Sec8(3)	2011
Tanzania <sup>a</sup>	-	-	-	-	Rx1	Rx1	Rx1	Rx1	L1995 Secs5-6	1995
Uganda ~	R^	R^	R^	R^	R^	R^	R^	R^	C1995(2005) Art10 L1999(2009) Sec12	1967
n/a not available.										
!! Conflict between the law and the constitution and/or other legislation—the constitutional provisions are noted here unless they provide only general principles and the detailed rules are established by legislation.										
R child is citizen from birth as of right.										
C can claim citizenship following an administrative process (including compulsory birth registration, establishing parentage, or registration with consular authorities).										
* mother passes citizenship automatically only if father of unknown nationality or stateless or if father does not claim.										
Rx1 child born outside country is citizen as of right only if one parent both a citizen and born in country.										
^ Rights to citizenship from grandparents: if born in or outside the country and one grandparent is a citizen (Uganda) or one great-grandparent was born in South Sudan (South Sudan).										
~ racial, religious or ethnic discrimination in citizenship law. In Uganda, a child is not a citizen if born in the country unless the parent is citizen by birth – requiring membership of one of the indigenous communities listed in the 3rd schedule to the constitution.										
<sup>a</sup> In Tanzania, jus soli applies, thus the law does not explicitly provide for citizenship based on descent for those born in the territory; however, the interpretation is that a child born in Tanzania with one parent who is a citizen is also a citizen.										

## Adopted children

Children adopted from another country can be at risk of statelessness if there is no legal provision for them to acquire citizenship. This is the case in both South Sudan and Tanzania, where there are no provisions in the nationality law relating to the acquisition of citizenship by adopted children (although in Tanzania there is the possibility for naturalisation of the “minor child” of a citizen, which could be used to cover adopted children<sup>25</sup>). In Burundi, Kenya and Uganda, there is provision for acquisition on application;<sup>26</sup> while in Rwanda acquisition of nationality is automatic, subject to completion of the legal adoption process.<sup>27</sup> In Uganda, the law appears to create a procedural blockage to acquisition of citizenship, since the process of registration requires an oath of allegiance, which a child is not legally competent to give; regulations, however, exempt children from the oath.<sup>28</sup> Many children adopted by another family in the region are likely not to go through the formal adoption procedures, but to be accommodated within an extended family. In most cases, this will not currently cause problems for their

<sup>25</sup> Tanzania Citizenship Act 1995, Section 10.

<sup>26</sup> Burundi Nationality Code 2000, Article 5; Kenya Citizenship and Immigration Act 2011, Section 14; Uganda Constitution 1995, Article 11 and Citizenship and Immigration Control Act 1999, Section 13(2).

<sup>27</sup> Organic Law 2008, Article 12.

<sup>28</sup> Uganda Citizenship and Immigration Control Act 1999, Section 15; Uganda Citizenship Regulations 2009, Section 4.

papers on reaching adulthood; however, it is important that with increasing formalisation of identification requirements (including efforts to create complete population registries) their situation is accommodated and processes created to ensure these children do not face the risk of statelessness and lack of identification.

### Nationality based on marriage

The most common ground for acquiring nationality as an adult is on the basis of marriage. In most countries, marriage to a national allows the spouse to acquire nationality either automatically or on the more favourable terms of registration (in common law countries) or option/declaration (in civil law countries). In East Africa, Burundi and Tanzania still do not allow women to pass their nationality to their non-national spouses, while Kenya is unusual in applying conditions to the acquisition of nationality by marriage beyond the fact of marriage and a residence period. Although the law is now non-discriminatory, in practice Kenya still applies higher vetting standards to the acquisition of citizenship by the husbands of Kenyan women than the wives of Kenyan men.<sup>29</sup> Most laws apply these rules also to those whose spouses have died while the marriage was still in effect.

**Table 3:** Right to transmit nationality to a spouse

COUNTRY	Nationality by marriage	Res. period (if any)*	Marriage period (if any)	Level of discretion	Relevant legal provision(s)	Year of equality
Burundi	w			By declaration	L2000 Arts4,10-12	-
Kenya	=		7 yrs	On application, subject to conditions including clean criminal record	C2010 Art15(1) L2011 Secs11-12	2010
Rwanda	=		3 yrs	On application may acquire	L2008 Art11	2004
South Sudan	=	5 yrs		On application may acquire	L2011 Sec13	2011
Tanzania	w			On application shall be entitled	L1995 Sec11	-
Uganda	=		5 yrs	On application shall be registered	C1995(2005) Art12(2)(a) L1999(2009) Sec14(2)(a)	1995
* If residence period noted then residence is after marriage.						
= Equal rights for men and women to pass citizenship.						
w Only a foreign woman can acquire nationality on basis of marriage to a national man.						

### Dual nationality

Dual nationality is allowed under the law in most circumstances in Burundi (since 2000), Kenya (since 2010), Rwanda (since 2003), South Sudan (since 2011), and Uganda (since 2009). In Uganda, however, dual nationality is permitted only with the permission of the authorities, whilst in Kenya failure to disclose dual citizenship to the authorities is an offence punishable by imprisonment and/or a fine.

Dual citizenship is not permitted for adults in Tanzania; recent constitutional debates rejected the inclusion of this change in a proposed new draft constitution, but the issue remains under discussion.

<sup>29</sup> Input at Arusha workshop, 20 March 2017.

Uganda's dual citizenship provisions, as amended in 2009, are very complex and create significant conditions to be able to hold dual citizenship. It is not permitted to hold three citizenships, and the other country must permit dual citizenship. Uganda is also unusual in providing that dual citizenship is only allowed for adults, not for children; even a child born and resident in Uganda until majority who has another citizenship has to apply for Ugandan citizenship as an adult as would be the case for any other foreigner.<sup>30</sup> (The more usual provision where dual nationality is prohibited, as in Tanzania, is for children to be permitted to hold two nationalities until they reach majority, when there is a period during which they must opt for one or the other.) The law provides additional conditions that apply to people seeking to naturalise who wish to retain their other nationality, that are not applied to those have been Ugandan citizens from birth but naturalise in another country.<sup>31</sup> The amendments established a list of public offices that cannot be held by dual citizens.

Kenya's 2010 constitution similarly introduced, at the same time as the general prohibition on dual citizenship was lifted, a ban on state officers, including the President and Deputy President, being dual nationals.<sup>32</sup> In practice, Kenya requires the other country to permit dual nationality before permitting it, although this is not stated in the legislation.<sup>33</sup>

**Table 4:** Countries permitting and prohibiting dual nationality for adults

COUNTRY	Dual nationality permitted for adults?			Restrictions on public office	Relevant legal provisions
	Yes	With permission	No		
Burundi	x				L2000 Art21
Kenya		x		State officer or a member of the defence forces shall not hold dual citizenship; President and Deputy President shall not owe allegiance to a foreign state	C2010 Arts15(4),16,78,99,137&148 L2011 Sec8
Rwanda	x			The President, President of Senate, Speaker of the Chamber of Deputies, President of Supreme Court must not hold any other nationality	C2003(2015) Arts 25,66,99&153 L2008 Art3
South Sudan	x				C2011 Art45(5)&(6) L2011 Secs10&15
Tanzania			x		L1995 Sec7
Uganda		x		List of posts for which cannot be dual national, including President, Vice-President, Prime Minister, Cabinet Ministers, heads of security services	C1995(2005) Art15 L1999(2009) Secs15-19,19A-G & Schedule 5

<sup>30</sup> The provisions permitting dual citizenship relate to a person who has voluntarily acquired another citizenship, not to a person who is born with two citizenships.

<sup>31</sup> Citizenship and Immigration Control Act 1999, amended 2009, Section 19 A-G.

<sup>32</sup> Constitution of Kenya 2010, Articles 78 and 137.

<sup>33</sup> Input at Arusha workshop, 20 March 2017.

## Naturalisation based on long-term residence

All the EAC countries permit, in principle, the acquisition of nationality by decision of the public authority, on application by a person who is a long-term resident of the country and has fulfilled other conditions. The period of residence required varies from five years in Rwanda (the most common period in other African countries) to 20 years in Uganda (ten years for spouses and some others); however, the other conditions applied may be more significant than the length of residence.

In the Commonwealth countries there was initially a distinction between acquisition of citizenship by registration, which a person fulfilling the conditions could acquire as a matter of right on application, and acquisition by naturalisation, which was at the discretion of the authorities.

This distinction still exists in Uganda, where the constitution provides that there are four categories of person who shall be registered on application: those born in Uganda and resident since 1962, provided the parents were neither refugees nor diplomats; spouses of citizens; those who have “legally and voluntarily migrated to Uganda” and who have been living in Uganda for at least 10 years (or “such other period prescribed by Parliament”: between 1999 and 2009 the law provided for 20 years, then reduced the period again to 10 years); and “every person who, on the commencement of this Constitution, has lived in Uganda for at least twenty years”.<sup>34</sup> The constitution also empowers parliament to establish rules on naturalisation, and the Citizenship and Immigration Control Act of 1999 (amended most recently in 2009) establishes conditions to do so, based on 20 years residence and fulfilment of other conditions.<sup>35</sup> The period of residence must be achieved while the person is an adult,<sup>36</sup> a significant limitation for children of registered or naturalised parents (who do not acquire citizenship through that process or automatically at birth), who therefore must wait until they are at least 38 before they can even apply for Ugandan citizenship. Registrations and naturalisations in Uganda are determined by the National Citizenship and Immigration Board appointed by the President, at their discretion but on the basis of files submitted by the Department of Immigration.<sup>37</sup>

In Kenya and Tanzania this distinction between registration and naturalisation has been removed. Confusingly, any acquisition after birth is known as registration in Kenya, whatever the level of discretion. A person may apply to be registered as a citizen by the Cabinet Secretary, based on seven years’ residence and fulfilment of a range of other conditions.<sup>38</sup> In Tanzania, meanwhile, naturalisation is the only term used in the law, even for acquisition by right by a foreign woman on marriage to a Tanzanian man; acquisition by naturalisation other than through marriage is based on eight years’ residence and fulfilment of other conditions, and is at the discretion of the Minister of Internal Affairs.

In South Sudan and Burundi, naturalisation—based on ten years’ residence in each case, as well as other conditions—is at the discretion of the President. In Rwanda, an application can be made after five years’ residence, and grant is the decision of the Director-General of the government department responsible for immigration.

There are usually other conditions for acquisition of nationality, including “good conduct” and a clean criminal record; knowledge of a national language; ability to make a contribution to society, and health or financial requirements (see Table 5). These leave a large margin of discretion in the process of deciding if a person fulfils the requirements. Requirements relating to health, sometimes phrased as requiring the

<sup>34</sup> Uganda Constitution 1995, Article 12.

<sup>35</sup> Uganda Citizenship and Immigration Control Act 1999, amended 2009, Sections 16 and 25.

<sup>36</sup> Residence in Uganda as a dependent or student does not count towards period of residence for registration or naturalisation. Citizenship and Immigration Control Act 1999, Section 25.

<sup>37</sup> Uganda Constitution 1995, Article 16.

<sup>38</sup> Constitution of Kenya, 2010, Articles 15 and 18; Kenya Citizenship and Immigration Act No. 12 2011, Section 15, where the conditions include “has been a resident under the authority of a valid permit” and “has been determined, through an objective criteria, and the justification made, in writing, that he or she has made or is capable of making a substantive contribution to the progress or advancement in any area of national development within Kenya”.



applicant not to be a “burden” on the country in question, are generally in violation of the UN Convention on the Rights of Persons with Disabilities.

Some countries also place restrictions on the role of dual or naturalised citizens in public life (see the second to last column in Table 5: ). Nationality laws in Burundi and Kenya impose a waiting period of 10 years before naturalised citizens can hold a range of offices. Constitutional prohibitions on naturalised citizens holding the presidency exist in all six countries. In Rwanda, a requirement that at least one parent of the President must also have nationality of origin was removed in 2015 amendments to the constitution; at the same time, requirements for nationality of origin were introduced for the President of the Senate, Speaker of the Chamber of Deputies and President of the Supreme Court.

### Naturalisation of refugees

In the language of UNHCR, there are three “durable solutions” to the situation of individuals who have crossed an international border seeking refuge from persecution or from civil war: voluntary repatriation, local integration in the country of first asylum, or resettlement in a third country. Although voluntary repatriation to their home country has generally been viewed by national and international agencies as the best outcome for refugees, the reality is that for many refugees, repatriation may not be possible because of continued insecurity in their home countries. Resettlement in a third country is only ever going to be possible for a small minority of those affected.

The 1951 UN Convention Relating to the Status of Refugees provides that states parties “shall as far as possible facilitate the assimilation and naturalisation of refugees,” by such measures as expediting proceedings and reducing the costs of naturalisation (Article 34). The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa does not include a similar provision on naturalisation, though its requirement (Article II.1) that countries of asylum should use their best endeavours to “secure the settlement” of refugees who are unable to return home could be interpreted in the same way. Both conventions require countries of asylum to issue travel documents to refugees. All EAC countries are parties to the African Refugee Convention, and all but South Sudan are parties to the UN Refugee Convention (its accession was imminent at the time of publication).

There are many tens of thousands of people living in EAC countries in protracted refugee situations—defined by UNHCR to mean those who have been in their country of asylum for more than five years<sup>39</sup>—without immediate prospects for implementation of durable solutions. In practice, although there are exceptions, such as Tanzania’s offer to naturalise long-term Burundian refugees (see box pp. 66–67), there is often no possibility of converting refugee status into a more permanent legal status, whether that of permanent residence or nationality.

Uganda’s 1995 constitution excludes refugees from the easier process of registration as a citizen otherwise open to those resident in the country since before independence; it also limits applications for non-discretionary citizenship by registration based on ten years’ residence to those who “legally and voluntarily” migrated to Uganda after that date. The constitution delegates the establishment of rules on discretionary naturalisation based on long term residence to legislation.<sup>40</sup> The Refugee Act of 2006 states that the normal law applies to the naturalisation of a refugee, a change from the 1960 Control of Alien Refugees Act which had excluded any period spent in Uganda as a refugee from counting as residence for the purposes of naturalisation.<sup>41</sup> Nevertheless, some remaining ambiguities have led Ugandan officials to interpret the law to mean that refugees may not naturalise. Indeed in 2011, the forms and procedures in

<sup>39</sup> Protracted Refugee Situations, Executive Committee of the High Commissioner’s Programme, EC/54/SC/CRP.14, 10 June 2004; Conclusion on Protracted Refugee Situations, No. 109 (LXI) – 2009, UNHCR ExCom Conclusions, 8 December 2009.

<sup>40</sup> Uganda Constitution 1995, Article 12(1), 12(2)(b) and 13.

<sup>41</sup> Control of Alien Refugees Act 1960, Article 18; Refugee Act, 2006 Article 45.

**Table 5:** Right to acquire nationality by naturalisation

COUNTRY	Res. period	Language / cultural requirements	Character	Renounce other nat.	Health / income	Other <sup>1</sup>	Minor children included?	Limits on rights for naturalised <sup>2</sup>	Legal provision
Burundi	10 yrs / 5 yrs for husband	Attachment to Burundi and "assimilation with Burundian citizens"	Good conduct and morals; no convictions for any "crime" or "délit"	No	-	Exception to residency period can be made in cases of "exceptional service" to Burundi	Yes, automatically	President must be national from birth; otherwise 10 yrs before can be elected	C2005 Art97 L2000 Arts3&7-9
Kenya	7 yrs	"Adequate knowledge of Kenya and of the duties and rights of citizens"; able to understand and speak Kiswahili or a local dialect	No convictions more than 3 years prison	No	"Understands the nature of the application"; not judged bankrupt	Has been determined to be "capable of making a substantive contribution to the progress or advancement in any area of national development within Kenya"	Yes, on application	President & Deputy President must be citizen by birth; otherwise 10 yrs before can be elected as MP	C2010 Arts99&137 L2011 Secs13&22
Rwanda	5 yrs	Respect Rwandan culture and be patriotic	Good behaviour and morals; no convictions more than 6 months prison	No	Not a burden on the state	The owner of "sustainable activities in Rwanda"; not implicated in the ideology of genocide; conditions can be waived for a person "of interest" to Rwanda	Yes, automatically	The President, President of Senate, Speaker of the Chamber of Deputies, President of Supreme Court must be of Rwandan nationality by origin	C2003(2015) Arts 25,66,99&153 L2008 Arts5&13-17
South Sudan	10 yrs	-	Not convicted of an offence related to honesty and moral turpitude	-	Sound mind (if of unsound mind, parent or guardian may apply)	Conditions may be waived if individual has served in the national interest	Yes, on application	President must be citizen by birth	C2011 Art98 L2011 Secs10-11
Tanzania	8 yrs	Adequate knowledge of Kiswahili or English	Good character	Yes	-	In terms of potential contribution, would be a suitable citizen. Child born outside country of father who was citizen by descent may naturalise without other conditions	On separate application	President must be citizen by birth	C1977(1995) Art39 L1995 Secs8-10, & 2 <sup>nd</sup> Schedule
Uganda <sup>a</sup>	10 yrs Registration: if "legal and voluntary"	-	-	In some circumstances	-	Significant additional conditions apply if wishes to hold dual nationality.	No	President must be citizen by birth	C1995(2005) Art12(2)(b)&102 L1999(2009) Secs14(2)(b),15,19,19B &19C
	20 yrs Naturalisation: if not "legal and voluntary"	Adequate knowledge of "a prescribed vernacular language" or English	Good character	In some circumstances	-	May be refused if "immigration file contains substantial inconsistencies as to put his or her demeanour in issue". Significant additional conditions apply if wishes to hold dual nationality.			C1995(2005) Art13 L1999(2009) Secs16&19,19A,19C
1. Most countries require the person to be adult; currently and legally resident, and to intend to remain so if they wish to naturalise; these provisions are not included here.									
2. Provisions in the nationality law and constitution (not including electoral code).									
<sup>a</sup> Uganda has particularly complex distinctions between registration and naturalisation which are hard to represent in table form; significant additional conditions apply if the person wishes to have dual citizenship. The 1995 Constitution provides for 10 years' residence to acquire citizenship by registration, "or such other period prescribed by Parliament"; since 2009 the legislation has also required 10 years' residence.									

use still referred to the long-repealed 1964 Citizenship Act, though these are now phased out.<sup>42</sup> In 2015, the Constitutional Court confirmed the interpretation that refugees were not eligible for the easier process of registration, though it stated (but for technical reasons did not give a formal declaration) that it considered they were eligible for naturalisation.<sup>43</sup>

In Kenya, a Refugee Act adopted in 2006 brought Kenyan law largely into line with international standards of refugee protection: although the act did not explicitly give refugees the right to work, they are able to apply for work permits in practice. The act did not contain any explicit provision in relation to naturalisation of refugees.<sup>44</sup> The 2010 Constitution and 2011 Citizenship and Immigration Act placed no barriers in principle on access to citizenship for refugees. In practice, however, the formal naturalisation processes are not accessible.

In Tanzania, the Refugees Act (No. 9 of 1998) does not specifically provide for naturalisation, but there is no exclusion for refugees in the 1995 Citizenship Act.

#### Special temporary procedures for naturalisation in Kenya

Kenya's 2011 Citizenship and Immigration Act, adopted in compliance with the requirements of the 2010 constitution, also provided for special temporary procedures to allow people resident in Kenya since 1963, and their descendants, to register as citizens.

Sections 15, 16 and 17 of the act provided for persons living in Kenya for a continuous period since 12th December 1963 to be deemed to be lawful residents and to be eligible on application to be registered as citizens. Although the act drew a distinction between "stateless persons" (described as those without "an enforceable claim to the citizenship of any recognized state") and "migrants" (those "who voluntarily migrated into Kenya before the 12th December 1963"), there was no real distinction between the two categories. Even "migrants" are only eligible if they do not hold a passport or an identification document of any other country; while both categories were made subject to the same conditions, including "adequate knowledge of Kiswahili or a local dialect" and a clean criminal record. Registration is discretionary and not a right. Adult children of those eligible to register under these provisions are also eligible for registration if born and resident in Kenya and without identification documents from any other country, subject to the same conditions as the parents.

These procedures were put in place for five years (expiring at the end of August 2016), with the possibility of extension for a further three years; this extension was granted in October 2016, until August 2019 (see further below, under heading on Kenya, in particular in relation to the Makonde).<sup>45</sup> Amendments adopted in 2012 allowed the Cabinet Secretary, "for sufficient reason", to waive the requirements that applicants do not hold documentation from any other country and had arrived in the country before 1963, if they satisfy the other conditions.<sup>46</sup>

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<sup>42</sup> Samuel G Walker, *From refugee to citizen? Obstacles to the Naturalisation of Refugees in Uganda*, Kampala: Refugee Law Project, 2011.

<sup>43</sup> *Centre for Public Interest Law Ltd and Salima Namusobya v. Attorney General*, Constitutional Petition No. 34 of 2010, Judgement of 6 October 2015. The Constitutional Court is mandated to interpret the Constitution, and thus stated that it did not have the mandate to interpret the act where the naturalisation provisions are included.

<sup>44</sup> Refugee Act No. 13 of 2006.

<sup>45</sup> Legal Notice 178, Kenya Citizenship and Immigration Act: Extension of Time, 4 October 2016.

<sup>46</sup> Citizenship and Immigration Control Act 2011, Sections 15, 16 and 17, as amended by the Statute Law (Miscellaneous Amendments) Act No. 12 of 2012; see also Kenya Citizenship and Immigration (Amendment) Regulations 2016.

## Loss and deprivation of nationality

Burundi, Kenya, Rwanda, Tanzania and Uganda all forbid deprivation of nationality from a national from birth against the person's will, whether or not the person would become stateless. Tanzania, however, provides for automatic loss of birth nationality in case of acquisition of another.<sup>47</sup> South Sudan is the only one of the six countries that provides for deprivation of nationality from a citizen from birth, if that person "has enlisted to serve or continues in the service of a foreign enemy country". This provision in the legislation conflicts with the transitional constitution, which indicates that only naturalised citizens may be deprived of citizenship.<sup>48</sup>

Deprivation of nationality from a person who has naturalised is usually far easier under the law. All six EAC countries provide for deprivation of a person who has acquired nationality as an adult under some circumstances, such as a conviction on charges of treason or a similar crime against the state; a conviction on charges of less serious crimes, or a finding that nationality was acquired by fraud or false representation. Tanzania and Uganda add a "catch all" provision allowing for deprivation on the grounds of "disloyalty" or the "public good". Tanzania also has a provision based on Article 7 of the Convention on the Reduction of Statelessness (and British law at the time of independence in the 1960s) allowing for deprivation of nationality from an individual who has naturalised if he or she stays outside the country for an extended period (Tanzania states five years, although the Convention provides seven years) without notifying the authorities of an intention to retain citizenship.<sup>49</sup>

No EAC Partner State provides for protection against statelessness in deprivation cases. Rwanda provides partial protection, only allowing statelessness to result if citizenship is annulled because it was acquired fraudulently.<sup>50</sup>

It is more common for government authorities to refuse to issue or renew, or to cancel a passport or other identity document, than to undertake the formal procedures for deprivation of citizenship. The legal status of a person whose passport has been cancelled is often unclear.

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<sup>47</sup> Tanzania Citizenship Act 1995, Section 7.

<sup>48</sup> South Sudan Nationality Act, Section 15. The Transitional Constitution, Article 45(4), states: "The law shall regulate citizenship and naturalization; no naturalized citizen shall be deprived of his or her acquired citizenship except in accordance with the law". The implication is that only naturalised citizens may have be deprived of citizenship.

<sup>49</sup> Tanzania Citizenship Act 1995, Section 15(2)(d)

<sup>50</sup> Rwanda Organic Law 2008, Article 19.

**Table 6:** Conditions for loss or deprivation of nationality

COUNTRY	Dual cit.	Citizenship from birth		Citizenship by naturalisation							Protection vs statelessness	Relevant legal provisions
	Acquires another citizenship	Work for / act like national of another state	Crime vs state	Work for foreign state (incl. army)	Fraud / misrep.	Crime vs state	Ordinary crime	Disloyal behaviour	Residence out of country	Time limit for deprivation		
Burundi				x	x							L2000 Art30-34
Kenya	(x)				x	x	x					C2010 Art17 L2011 Secs19(4)&21
Rwanda					x	x						C2003(2015) Art25 L2008 Arts18-21
South Sudan !!		x		x	x	x						C2011 Art45 L2011 Sec15
Tanzania	x*	x			x	x	x	x	x			L1995 Secs7,13-17
Uganda	(x)			x	x	x	x	x				C1995(2005) Arts14-15 L1999(2009) Secs17-20
(x) Permission of government required for dual citizenship.												
* Dual citizenship is permitted for children who have two citizenships from birth												
!! Legislation and constitution conflict.												
Shaded area Citizen from birth cannot lose citizenship.												

## Renunciation and reacquisition

While all the nationality laws of the EAC countries include provisions allowing a person to renounce his or her nationality, the level of discretion given to the executive to refuse renunciation varies considerably. The inability to renounce nationality may prevent a person from acquiring another nationality where they have stronger ties. In Kenya, Tanzania and Uganda permission may be refused in some circumstances; in South Sudan, renunciation is completed only by presidential order.

It is important that renunciation provisions provide protection against statelessness, so that a person cannot renounce in order to acquire another nationality and then be left stateless if naturalisation elsewhere is refused. There are no such protections in South Sudan and Tanzania, which compound the problem by also having no provisions for reacquisition of nationality (except in the case of Tanzania for a woman who has divorced her foreign husband).

**Table 7:** Renunciation and reacquisition

COUNTRY	Renunciation		Reacquisition	Relevant legal provisions
	Conditions applied	Protection vs statelessness		
Burundi	By declaration	Yes	If lost because of dual nationality	L2000 Arts30-32&38-41
Kenya	By registration, Cabinet Secretary may withhold when Kenya is at war with another country, or if not in the interests of Kenya to do so	Yes	If lost because of dual nationality; on application	L2011(2014) Secs10&19
Rwanda	Shall inform Director-General; shall not compromise laws of Rwanda or for purpose of seeking refugee status	Yes	If deprived because of dual nationality, not if deprived as naturalised citizen or if expelled as security threat	L2008 Arts18,22-24
South Sudan	By presidential order	No	No provision	L2011 Sec15
Tanzania	By registration; Minister may withhold if during war or contrary to public policy	No	No provision	L1995 Sec13
Uganda	By registration; may be withheld if acquires nationality of country with which at war or contrary to public policy	Yes	If lost because of dual nationality and no adverse effect to public order and security	L1999(2009) Secs19G&20

Most rules on reacquisition have exemptions for “exceptional circumstances”, which are not noted here.

## Procedures

The differences among the six EAC Partner States are perhaps most marked in relation to the procedures relating to acquisition and deprivation of citizenship. The nationality codes of Rwanda and Burundi, in line with their civil law heritage, provide for questions related to nationality to be adjudicated by the courts and establish the procedures for such claims. In the Rwandan case, in a procedure that should be regarded as best practice, it is additionally provided that deprivation of nationality shall be decided by a court on application by the state prosecutor.<sup>51</sup>

In the three former British protectorates or colonies, by contrast, the executive discretion surrounding access to citizenship that historically existed in Britain has continued to provide the basic framing for the law. Only Uganda has moved somewhat away from this discretion, by establishing a Citizenship and Immigration Board that is responsible for registration and naturalisation; even so, the appeal from the Board’s decision is to the Minister, and only following this can subsequent appeals go to the High Court.<sup>52</sup> Under the constitution, however, an application for judicial review could be made at any stage in relation to a decision that is unfair or unjust.<sup>53</sup>

In Kenya, the 2010 constitution and 2011 legislation provide greater due process protections than was previously the case—in particular by stating that the Cabinet Secretary’s decision to deprive a person of citizenship shall be reasoned and appealable to the High Court—but the basic framework remains highly discretionary. A proposal to establish a dedicated “Kenya Citizens and Foreign Nationals Management

<sup>51</sup> Burundi Nationality Code 2000, Chapter VI; Rwanda Organic Law 2008, Article 20 and Title VIII.

<sup>52</sup> Citizenship and Immigration Control Act 1999, Sections 7, 10 and 16.

<sup>53</sup> Constitution of Uganda 1995, Article 42 “Right to just and fair treatment in administrative decisions”.

Appeals Tribunal”, included in initial drafts, was not adopted in the final version of the Citizenship and Immigration Act.<sup>54</sup>

In Tanzania, the Citizenship Act states that “The Minister shall not be required to assign any reason for the grant or refusal to grant any application under this Act and the decision of the Minister on any application under this Act shall not be subject to appeal to or review in any court.”<sup>55</sup> These provisions were found to be in violation of human rights standards by the African Court on Human and Peoples’ Rights in its March 2018 judgement in the case of *Anudo Ochieng Anudo v. Tanzania*.<sup>56</sup>

South Sudan also establishes a highly discretionary framework, although with the ability to appeal the Minister’s decisions to a “competent court”.<sup>57</sup>

### **Identification and protection of stateless persons**

Only Uganda and Rwanda are parties to the 1954 Convention relating to the Status of Stateless Persons, acceding in 1965 and 2006 respectively. On 19 September 2018, as this report went to print, Burundi’s National Assembly unanimously adopted a bill authorising accession to both the 1954 Convention and the 1961 Convention on the Reduction of Statelessness.<sup>58</sup>

None of the EAC countries have in place a procedure for the identification and provision of protection to stateless migrants through grant of the status of stateless person.

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<sup>54</sup> Draft on file with author.

<sup>55</sup> Tanzania Citizenship Act 1995, Section 23. The Act does provide for a person deprived of citizenship to appeal to a committee of inquiry, but the members of the committee are appointed by the Minister responsible for citizenship matters.

<sup>56</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania*, App. No. 012/2015, African Court of Human and Peoples’ Rights, Judgment of 22 March 2018, discussed below in section on jurisprudence of the African human rights bodies.

<sup>57</sup> South Sudan Nationality Act, Section 26.

<sup>58</sup> “*Le Burundi adhère aux conventions relatives à l’apatridie*”, Radio Télévision Nationale du Burundi, 20 September 2018.

### **Gaps in nationality laws contributing to statelessness**

- **Gender discrimination**

Where women cannot transmit their nationality to their children, those who have children with a father of another nationality (or who is stateless or of unknown nationality); who have children out of wedlock, or with a father who abandons a child or who dies without leaving nationality documentation or obtaining nationality documents for his children, face a real risk that their children will be stateless, especially if they do not live in the country of the father.

- **Racial and ethnic discrimination**

Racial and ethnic discrimination in the law leaves those who are not perceived to be of the “right” racial or ethnic group at risk of statelessness, especially where combined with discrimination on the basis of sex and where the father is from the excluded group.

- **Weak rights attached to birth in the country**

Countries which provide very limited rights based on birth in the country – in particular, those which do not provide protections for children of unknown parents, or for children whose parents cannot transmit their nationality to their children, or who are stateless or of unknown nationality – leave many children at risk of statelessness. In general, states which provide no access to nationality even if successive generations are born in the country, and no rights based on birth in the country and residence during childhood (enabling automatic or optional access to nationality at majority), tend to have large populations of stateless persons.

- **Dual nationality rules hard to interpret**

Where dual nationality is prohibited or rules are complex and inconsistently applied, some can be left at risk of statelessness, especially those who under the law might have the right to two nationalities from birth, but have documents from neither country.

- **Provisions on state successions have created statelessness**

Many countries face continuing problems related to poor management of nationality in the transitional provisions of the laws adopted at independence.

- **Non-existent systems for the protection of stateless persons**

No Partner State of the EAC has a legal framework in place to identify and provide an interim protective status for stateless migrants and facilitate their acquisition of a nationality.



## 4. Nationality administration in practice

The administration of nationality law—including the rules establishing the evidence that must be provided to claim nationality from birth; be issued a document recognising nationality, or acquire nationality as an adult—is in practice often as important as the substantive provisions of the law in ensuring respect for the right to a nationality. Where nationality administration is ineffective, corrupt, or discriminatory then the fact that a person actually fulfils the conditions laid down in law to be a citizen or to acquire citizenship may be irrelevant to their ability to claim that right. In some cases, a person may first discover that he or she is not considered to be a national when facing expulsion as a foreigner. It goes without saying that the poor and illiterate are the most vulnerable.

### Birth registration

Although a birth certificate does not usually serve as proof of nationality (there are exceptions, including Rwanda, which provides that a birth certificate is proof of nationality of origin<sup>59</sup>), the importance of birth registration for the right to acquire a nationality is recognised by the inclusion of both rights within the same article of both the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.<sup>60</sup> This significance has been reaffirmed by the African Committee of Experts on the Rights and Welfare of the Child in a decision criticising Kenya for its failure to ensure respect for both rights.<sup>61</sup> Birth registration is critical to establishing in legal terms the place of birth and parental affiliation, which in turn underpins the right to attribution or acquisition of the parents' nationality or the nationality of the state where the child is born.

There is only poor recognition of the critical importance of birth registration in the national laws of the EAC countries. While the laws commonly provide that registration of births is compulsory, none of the constitutions express this in the form of a right for every child—although Uganda's constitution does provide that "The State shall register every birth, marriage and death occurring in Uganda".<sup>62</sup> Only in South Sudan does the Child Act of 2008 provide that every child has the right to be registered.<sup>63</sup> While the Kenyan Citizenship and Immigration Act 2011 provides for the right to a birth certificate, this applies only to citizens and not all children; the Births and Deaths Registration Act enables birth registration to be made compulsory, but does not make it a right.<sup>64</sup>

The general legal framework for civil registration is still established by laws dating from the 1920s in Kenya and Tanzania, though repeatedly amended: the initial framework of these laws made registration compulsory only for "Europeans and Asiatics". Universal birth registration in Kenya was only introduced after independence, covering the whole country from 1971; in Tanzania birth registration of Africans began in 1950, and, as in Kenya, was gradually made compulsory across the country after independence. Uganda's 1904 ordinance (which similarly provided initially for compulsory registration only for "Europeans and Asiatics") is no longer in force.<sup>65</sup> Birth registration was made compulsory for all by the 1970 Births and Deaths

<sup>59</sup> Organic Law 2008, Article 25. See also Presidential Order No. 21/01 of 27 May 2009 establishing the procedure for the application and acquisition of Rwandan nationality, and footnote 234.

<sup>60</sup> Convention on the Rights of the Child, Article 7; African Charter on the Rights and Welfare of the Child, Article 6.

<sup>61</sup> Kenyan Nubian Children's case, paragraph 42.

<sup>62</sup> Constitution of Uganda 1995, Article 18.

<sup>63</sup> Child Act 2008, Section 11 (Laws of Southern Sudan, adopted under the Interim Constitution of Southern Sudan, before the secession).

<sup>64</sup> Kenyan Citizenship and Immigration Act 2011, Section 22(1)(g); Births and Deaths Registration Act No. 2 of 1928, as amended (Cap. 149 Laws of Kenya 2012), Section 9.

<sup>65</sup> Very unusually among the British territories, the Buganda kingdom also adopted a Law for the Registration of Births and Deaths in 1904, making registration of all births within the kingdom compulsory; similar rules appear to have been adopted in Busago, Bunyoro, Ankole and Toro districts. R. R. Kuczynski, *A Demographic Survey of the British Colonial Empire*, Vol. II. South Africa High

Registration Act (entry into force in 1973), and in 2015 new legislation merged civil registration and identification functions. In Rwanda, a new law on persons and the family adopted in 2016 created a consolidated legal framework for civil registration for the first time.<sup>66</sup> Burundi's 1993 family code also establishes a comprehensive system of civil registration. In January 2018, South Sudan's parliament adopted a law establishing a system of civil registration, combined with statutory authority for a national identification card; this act had not yet received presidential assent at the time this report was finalised.<sup>67</sup>

**Table 8:** Birth registration rates and legislation

COUNTRY	Birth registration / possession of birth certificate (% children under 5) <sup>68</sup>	Legislation <sup>69</sup>
Burundi	84 / 66 (2016-17)	<i>Décret-Loi No. 1/024 28 avril 1993 portant réforme du Code des personnes et de la famille</i>
Kenya	67 / 24 (2014)	Births and Deaths Registration Act 1928
Rwanda	56 / 3 (2014-15)	Law No. 14/2008 of 04/6/2008 Governing Registration of the Population and Issuance of the National Identity Card Law No. 32/2016 of 28/08/2016 Governing Persons and Family
South Sudan	35 / 10 (2010) <sup>70</sup>	[Child Act 2008] <sup>71</sup>
Tanzania	26 / 14 (2015-16)	Births and Deaths Registration Act 1920
Uganda	32 / 20 (2016)	Registration of Persons Act 2015

Rates of birth registration in EAC Partner States are generally poor. According to the Demographic and Health Surveys (DHS) for each country, the highest rate of registration is in fact in conflict-affected Burundi, and the lowest in Tanzania (one of the lowest rates in Africa), suggesting that poor implementation of birth registration is more due to lack of will than lack of capacity. Even children whose births are registered may still be disadvantaged if they are not issued a birth certificate, due to high fees or a lack of legal entitlement to proof of registration.<sup>72</sup>

In Kenya, major efforts have been made to improve birth registration, which now stands at a national average of 67 percent of under-fives; but the rate is still less than 20 percent in Wajir and Turkana, and less than 30

Commission Territories, East Africa, Mauritius, Seychelles, Oxford University Press, 1949, pp. 265-266. Thanks to Jaap van der Straaten for this point, and for his comments on this section in general.

<sup>66</sup> Law No. 32/2016 of 28/08/2016 governing persons and the family, Articles 61-112 (repealing and replacing *Loi No. 42/1988 du 27 Octobre 1988 instituant le titre préliminaire et le livre premier des « Personnes et de la Famille » du Code Civil*).

<sup>67</sup> Civil Registry Act 2018.

<sup>68</sup> As reported in the Demographic and Health Surveys (DHS) for the year indicated for each country (except for South Sudan), downloadable at: <https://dhsprogram.com/where-we-work/Country-Main.cfm>. See also UNICEF "Information by country", available at: <http://www.unicef.org/infobycountry/>.

<sup>69</sup> Original texts, amended several times, especially for Kenya and Tanzania.

<sup>70</sup> MICS Household Health Survey, UNICEF, 2010. The survey reports that 29% of those registered have birth certificates.

<sup>71</sup> The Child Act provides for a right to birth registration, but establishes no modalities for this to take place. Legislation to do so was pending in September 2018.

<sup>72</sup> For administrative purposes, some governments (including Rwanda and Tanzania) also rely on parallel family registration systems.

percent in another five counties.<sup>73</sup> The barriers to registration in Tanzania, with the lowest rates, include the costs of registration (currently a TSh3,500 fee, plus high transport costs to reach the relatively few centres of registration), and the fact that birth registration is often not perceived as useful by the parents of the children whose births should be reported. Law reform and new efforts supported by UNICEF are attempting to change this situation.<sup>74</sup> Uganda had a relatively developed birth registration system at the date of independence, but rates of registration then declined sharply.<sup>75</sup> The birth registration rate has improved somewhat, but remains low. Moreover, registration is free, but a birth certificate costs USh5,000 plus USh2,500 in bank charges, and until recently could only be obtained in Kampala.<sup>76</sup> The transfer of authority for registration of births and deaths from January 2016 to a new agency created transitional capacity problems, threatening improvements in birth registration rates.<sup>77</sup>

In Rwanda, birth registration rates improved rapidly under the current government – though only one in 10 children under five have a document proving that registration – but fell from 63 to 56 percent from 2010 to 2015; efforts are being made to reverse this, including allowing birth registration via a web-based system.<sup>78</sup> In 2016, the new family law increased the deadline to register a birth from 15 to 30 days (cultural norms require at least eight days before a child is named); the law also removed the requirement for more onerous procedures for late registration (though a fee may apply).<sup>79</sup>

The UN Committee on the Rights of the Child has expressed concern about the rates of birth registration in all five countries that it has reviewed (South Sudan has not yet been reviewed by any UN human rights treaty body).<sup>80</sup> In Kenya, for example, the committee regretted in 2016 that progress in improving rates of birth registration had stagnated, and that many births are not registered, especially in rural areas and especially among certain population groups, including “refugee children, children of Nubian descent, Makonde children, indigenous Somali children in Kenya, children with mothers in custody and intersex children, [who] face difficulty in obtaining birth registration”.<sup>81</sup>

Access to late registration of births is a challenge in all countries. In Kenya, late registrations are permissible with “the written authority of the Principal Registrar”.<sup>82</sup> Applicants are instructed that “as many of the following documents as possible MUST be produced: Municipal notification of birth; certificate of doctor or midwife who attended the birth; baptismal certificate; school-leaving certificate; identity card or passport”

<sup>73</sup> *Kenya Vital Statistics Report 2014*, Ministry of Interior and Coordination of National Government, Civil Registration Services, August 2015. The data relied on may have been older than the information from the 2014 Kenya DHS.

<sup>74</sup> “The Government of Tanzania launches a new national birth registration system set to massively accelerate the number of children under 5 with birth certificates”, UNICEF, 23 July 2013.

<sup>75</sup> Shane Doyle, “Parish Baptism Registers, Vital Registration and Fixing Identities in Uganda” in Keith Breckenridge and Simon Szreter (eds.), *Registration and Recognition: Documenting the Person in World History*, (Oxford: Published for the British Academy by Oxford University Press, 2012); “Revitalization of Birth Registration in Uganda: Country Paper”, Ministry of Gender, Labour and Social Welfare, Ministry of Justice and Constitutional Affairs, Uganda Bureau of Statistics, Population Secretariat, and UNICEF Kampala, presentation to Anglophone Africa Workshop on Birth Registration, 21-24 October 2002, Kampala, Uganda, available with other papers at: <https://unstats.un.org/unsd/vitalstatkb/KnowledgebaseArticle50865.aspx>.

<sup>76</sup> The Registration of Persons Act of 2015 for the first time permits birth certificates to be issued in all registration areas.

<sup>77</sup> Interview, UNICEF Kampala, August 2016.

<sup>78</sup> Rwanda DHS 2014-15; interview, UNICEF Rwanda, Kigali, 27 July 2016; Rwanda government focal point on statelessness, “Comments on the Draft Study on Citizenship and Statelessness in EAC”, April 2018.

<sup>79</sup> Law No. 32/2016 of 28/08/2016 Governing Persons and the Family, Section 100.

<sup>80</sup> UN Committee on the Rights of the Child, Concluding observations: Burundi, 19 October 2010 (CRC/C/BDI/CO/2); Kenya, 21 March 2016 (CRC/C/KEN/CO/3-5); Rwanda, 14 June 2013 (CRC/C/RWA/CO/3-4); Tanzania, 3 March 2015 (CRC/C/TZA/CO/3-5), and Uganda, 23 November 2005 (CRC/C/UGA/CO/2).

<sup>81</sup> UN Committee on the Rights of the Child, Concluding observations: Kenya, CRC/C/KEN/CO/3-5, 21 March 2016, paragraphs 29-30. On intersex children, see Baby ‘A’ (Suing through her mother, E.A.) and Another, vs. Attorney General and Others, Constitutional Petition No. 266 of 2013 [2014] eKLR (Kenya).

<sup>82</sup> Births and Deaths Registration Act, section 8.

as well as “any other document or [...] any certificate that the Registrar may in his sole discretion require”.<sup>83</sup> In practice, a birth cannot be registered late unless the parent (or the person him/herself, if over 18) has an ID card, meaning that the births of those who do not have proof of Kenyan citizenship are not registered if not carried out within the six month statutory time limit. Moreover, an ID card cannot now be obtained without a birth registration. The department aims to make late registration of births more difficult to access, after an effort to provide late registration for those not currently registered, in order to close off what is seen to be an avenue for fraud.<sup>84</sup>

Obtaining birth registration was for many years a major struggle even for orphans of parents known to be Kenyan, whose Kenyan citizenship should not have been in doubt. This situation improved after a campaign led by groups working with AIDS orphans, with the 2008 issue of a directive from the Department of Civil Registration aiming to facilitate late registration by orphans and vulnerable children.<sup>85</sup> However, difficulties remain. Among groups that have had difficulty registering births are children born out of wedlock, especially where the father did not recognise the child. In June 2016 the High Court ruled that fathers’ names must be included in birth registration records, and a certificate issued, even if born out of wedlock.<sup>86</sup>

Children of refugee parents may face particular difficulties in accessing birth registration, although UNHCR will seek where possible to work with the authorities to facilitate civil registration for refugees. Where this is successful it may even be the case that rates of birth registration among refugees are higher than for the surrounding population.<sup>87</sup> Birth registration for the children of IDPs may be even more challenging, since the support of international agencies tends to be less available.

## National identity cards

The EAC treaty framework provides for all Partner States of the EAC to have a common form of national identity document (see below, heading on the EAC). In line with this requirement, national identity cards are being upgraded to include biometric identification features in Kenya, Rwanda and Burundi, and are being introduced for the first time in Uganda and Tanzania, as well as in South Sudan.<sup>88</sup>

Although a national identity card is not usually formal proof of nationality, it functions as such for day-to-day purposes. Once an identity system is implemented, access to all government services, employment and benefits, financial services and employment in the formal economy, and ownership of real property typically depend on holding an identity card; and some of them depend on that card confirming citizenship.<sup>89</sup>

Given that identity card applications are usually treated in the first instance by quite low-ranking civil servants, this gives the power to determine someone’s right to proof of nationality—for practical if not legal purposes—to a person who is almost certainly not trained in nationality law, although doubtful cases are often referred to committees for approval. Complaints mechanisms may exist within the identity card management system for those whose applications are wrongfully rejected, but they are often quite

<sup>83</sup> As detailed in Form No. I. G.P. 138 A, available at: <http://www.immigration.go.ke/downloads/GP138A-Application%20for%20Registration%20of%20a%20Late%20Birth.pdf>.

<sup>84</sup> Interview, Director of Civil Registration, Nairobi, 14 June 2016.

<sup>85</sup> “Issuance of birth certificates for children in SOS and charitable children’s institution”, Department of Civil Registration, letter addressed to the Director, Children’s Services, Nairobi, 8 May 2008.

<sup>86</sup> See commentary by Samantha Oswago and Wangari Karige, “Must a Father’s Name be on the Birth Certificate of a Child?”, *Kituo Cha Sheria*, 6 June 2016, available at: <https://kituochasheria.wordpress.com/2016/06/06/must-a-fathers-name-be-on-the-birth-certificate-of-a-child/>.

<sup>87</sup> For general information, and the example of Kenya, see “Child Protection Issue Brief: Birth Registration”, UNHCR, August 2013, available at: <http://www.refworld.org/pdfid/523fe9214.pdf>.

<sup>88</sup> See *Study of Options for Mutual Recognition of National IDs in the East African Community*, World Bank and EAC Secretariat, 2018.

<sup>89</sup> See Bronwen Manby, *Citizenship in Africa: The Law of Belonging*, Hart Publishing, 2018, Chapters 6 and 10.

inaccessible unless the person is connected or has some legal assistance. Court review may be expensive and difficult to access and in some cases is completely excluded.

Rwanda and Burundi, with their civil law tradition, have had identity card requirements since independence. The current laws in force governing identification are Law No. 14/2008 in Rwanda, the same law that regulates birth registration, as well as the civil code of 1988; and *Ordonnance No. 530/060* of 27 March 1978 in Burundi. The Rwandan cards are already machine-readable and the plan is to upgrade them to include biometric data with an embedded SIM card.<sup>90</sup> UNDP supported a major effort to distribute national identity cards in Burundi in advance of the 2010 elections, when presentation of an ID card became for the first time a requirement to vote. More than one million cards were issued. A pilot project to issue national ID smartcards was launched in 2013, and a biometric voters' card was introduced for use in the 2015 elections,<sup>91</sup> however, the national identity card in use remains a card photo ID.

Kenya's first law on registration was proposed in 1915, and implemented by the British colonial authorities after World War I for the control of the "native" population; the current legislation originated as the 1947 Registration of Persons Ordinance, incorporated into the laws of independent Kenya as the Registration of Persons Act. The ordinance initially applied to all men over the age of 16 (previously it had applied to Africans only); women were included within the registration requirements from 1978; and the age of compulsory registration was raised to 18 years in 1980.<sup>92</sup> Since 1995, the national identity card has been machine-readable, and a biometric card is now being introduced. The Registration of Persons Act remains in force, although a Registration and Identification of Persons Bill that would repeal and replace both the Registration of Persons Act and the Births and Deaths Registration Act has been before parliament since 2014.<sup>93</sup>

Although both Uganda and Tanzania were subjected to similar types of control over the "native" population, with requirements to carry passes imposed for the purposes of controlling movement and ensuring tax collection, these measures never penetrated as deeply as in Kenya, and they were abandoned on independence. In the absence of a national identity card, a range of other documents were used for proof of identity, including voters' cards, party membership cards, tax receipts, driving licences, and letters issued by employers or local authorities.<sup>94</sup> Both Tanzania and Uganda adopted legislation to allow for the issue of ID cards many years ago—Tanzania in 1986<sup>95</sup>, and Uganda in 1999<sup>96</sup>—but they only took action to implement these laws and the requirement to hold a national identity card decades later. Uganda adopted a new Registration of Persons Act in 2015, consolidating, amending and replacing the existing laws on registration of births and deaths and national identity cards.

South Sudan also introduced a national identity card from January 2012, under authority of the Nationality

<sup>90</sup> Joseph Atick, *The Identity Ecosystem of Rwanda: A Case Study of a Performant ID System in an African Development Context*, ID4Africa, May 2016; visit to Rwandan identification authority during ID4Africa conference, Kigali, May 2016.

<sup>91</sup> UNDP, "Project Document: Emergency Support to the Burundi Electoral Process, UN Peacebuilding Fund Immediate Response Facility", 2010; FIDH, "Burundi Elections 2010: An opportunity not to be missed to consolidate peace", November 2010, pp. 30-31, available at: <https://www.fidh.org/IMG/pdf/BurundianOpportunity.pdf>; Burundi: The requirements and procedures to obtain a national identity card; description of the national identity card [BDI104778.FE], Immigration and Refugee Board of Canada, 11 March 2014.

<sup>92</sup> History outlined in *An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya*, Kenya National Commission on Human Rights (KNCHR), 2007; see also Samantha Balaton-Chrimes "Statelessness, identity cards and citizenship as status in the case of the Nubians of Kenya", *Citizenship Studies*, Vol. 18, No. 1 (2014), pp. 15-28.

<sup>93</sup> Registration and Identification of Persons Bill, 2014, Kenya Gazette Supplement No. 153 (Senate Bills No. 39); See also Kenya Human Rights Commission, *Memorandum on the Registration and Identification of Persons Bill, 2014*.

<sup>94</sup> See, for example, "Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda", International Criminal Court Victims Participation and Reparations Section, 12 October 2007.

<sup>95</sup> Registration and Identification of Persons Act No. 11 of 1986.

<sup>96</sup> Citizenship and Immigration Control Act 1999, Part IV, provided for "Registration of citizens and issue of national identification numbers and national identity cards."

Act.<sup>97</sup> In January 2018, a Civil Registry Bill was adopted by parliament which would create specific statutory authority for a national identity card, linked to the civil registration system; however it had not yet entered into force at the time of publication.<sup>98</sup>

The administration of Kenya's Registration of Persons Act has been subject to extensive criticism from its own constitutional oversight bodies and national courts, as well as human rights groups and treaty monitoring bodies (see box pp. 32–33). In Burundi, there were also allegations of politicisation of the issue of national identity cards in advance of both the 2010 and 2015 elections.<sup>99</sup>

It is early to identify patterns in the issue of national identity cards in Tanzania and Uganda, where they are being issued for the first time; however, there are initial reports that do raise concerns. In both countries there are many tens of thousands of residents whose nationality is not clear. Their files are being referred to the Department of Immigration for adjudication, but there is no independent oversight of this process, and limited rights of appeal against a decision that a person is not a citizen (none at all in the case of Tanzania, where the legislation excludes court review).

In Uganda, there are allegations of discrimination on the grounds of ethnicity against internal migrants as well as people perceived to be foreign. This was the case, for example in Buliisa in Western Uganda, in the zone where oil exploitation has begun, where the "indigenous" population has concerns over in-migration and control of local institutions. There have also been more general issues around lack of interpretation for local languages, meaning that older or illiterate people were not assisted to apply for their cards, or were issued cards with misspellings; there were even some cards issued with incorrect photographs. In some cases, people were charged for the application, which was supposed to be a free process.<sup>100</sup> It is important that these problems are cleared up as the identification process becomes more routine.

In Tanzania, the record of management of the system of identification in Zanzibar, important for rules of property ownership and voter registration on the islands, raises concerns that should be systematically addressed as identification becomes a national obligation. The Zanzibari Act of 1985 establishes rules on who is defined as a Zanzibari or can acquire that status. Since 2005, every Zanzibari who is resident in Zanzibar has been required to obtain a Zanzibar identity card (ZanID) on reaching majority.<sup>101</sup> A ZanID is required to vote in Zanzibar, and there is extensive reporting that people known to be affiliated with the opposition Civic United Front (CUF) have been denied ID cards.<sup>102</sup>

Some Ugandans and mainland Tanzanians are for the first time finding themselves excluded from access to government and private services because they have not been able to enrol for the new cards: this includes not only people whose eligibility for citizenship may be doubtful, but also those for whom there is no doubt, but who either missed registration or who were rejected for some impermissible reason (such as lack of knowledge of date or place of birth) or whose card was issued with mistaken details.

<sup>97</sup> "South Sudan launches passports and national ID cards", Sudan Tribune, 5 January 2012. It appears that this document was issued under authority of section 9 of the South Sudan Nationality Act 2011 providing for a "certificate of nationality", according to procedures elaborated in Chapter 6 of the Nationality Regulations 2011. The Regulations also refer to the inclusion of "National identity cards and any other appropriate documentation" as among the "exclusive legislative and executive powers of the national government" listed in Schedule A of the transitional constitution.

<sup>98</sup> Civil Registry Bill 2018; not yet entered into force when this report was finalised.

<sup>99</sup> See for example, Eva Palmans "Burundi's 2010 Elections: Democracy and Peace at Risk?" European Centre for Electoral Support and African Research and Resource Forum, 2012.

<sup>100</sup> Interviews, Hoima and Masindi, 4 and 5 August 2016; Focus group at the offices of SIHA, Kampala, 8 August 2016.

<sup>101</sup> Zanzibari Act No. 5 of 1985; Registration of Zanzibari Residents Act No. 7 of 2005. Both laws were adopted by the government of Zanzibar.

<sup>102</sup> See election monitoring reports from the Tanzania Election Monitoring Committee; also Mohammed Bakari and Alexander Makulilo "Beyond polarity in Zanzibar? The 'silent' referendum and the government of national unity", *Journal of Contemporary African Studies*, Vol. 30, No. 2, (2012), pp. 195-218; Ben Rawlence, "Briefing: The Zanzibar Election" *African Affairs*, Vol. 104, No. 416 (July 2005), pp. 515-523.

Despite the concerns around discrimination and administrative problems, the implementation of Uganda's identity card deserves further examination for positive lessons for other countries. The initial mass registration phase was carried out under existing legislation, the Citizenship and Immigration Control Act 1999, on a project basis which allowed for the participation of many government departments in the process. In particular, the Directorate of Citizenship and Immigration was fully involved, which facilitated verification of citizenship; and also, during a second phase of registration, there was the possibility of registering eligible people *as citizens*, as well as registration for the purposes of issuing an identity card.<sup>103</sup> In zones where there were significant numbers of people whose citizenship status was questioned, many applications were referred to Kampala for control and final decision.<sup>104</sup> Unfortunately, there was no possibility for these cases to be heard in person, with decisions made only on the basis of documents.

From January 2016, population registration moved away from this joint project structure and onto a more regular footing, with the entry into force of new legislation, the Registration of Persons Act 2015, and the establishment of a new agency, the National Identification and Registration Authority (NIRA) to be responsible for its implementation. Registration or naturalisation for citizenship returned to its usual procedures; however, there remained some confusion over the relationship between the National Citizenship and Immigration Board created by the constitution (Article 19) and the board of NIRA established under the 2015 legislation (Section 9).<sup>105</sup>

In South Sudan, early reports indicate significant problems in the administration of the national identity card for members of cross-border ethnic groups, and for those unable to provide acceptable witnesses to their identity. The Regulations require that a person must satisfy the authorities of the facts related to their application, including a general requirement to provide witnesses "believed to be elders and next of kin" and additional witnesses in absence of documentary evidence.<sup>106</sup> Some of those administering the provisions have interpreted the general provision to be a requirement that the witness be older than the applicant. In practice, acceptable next of kin witnesses are only male relatives, including father, uncle, brother, a male cousin; or in the absence of these, a chief.<sup>107</sup>

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<sup>103</sup> Brief to Parliament on the On-Going Mass Registration of Citizens Exercise under the National Security Information System (NSIS) Project, by The Hon. Minister of Internal Affairs, 29th July 2014.

<sup>104</sup> Interviews, NIRA, Directorate of Citizenship, 10 August 2016; input at Arusha workshop 20 March 2017; Sam Waswa, "Foreigners to Apply for Ugandan Citizenship", ChimpReports, 18 January 2015; "Government Starts Naturalizing Foreign Nationals", Uganda Radio Network, 19 January 2015.

<sup>105</sup> In September 2018, as this report was finalised, the Ugandan government announced the dissolution of a number of agencies, including NIRA, and the return of their functions to the relevant ministries. "Dozens of Uganda parastatals targeted in reforms", *The East African*, 11 September 2018.

<sup>106</sup> In addition, where documentary evidence is not available, witnesses of facts could include "Community leaders, Traditional authorities, Church and/or religious leaders, County, Payam, and/or Boma officials, Chiefs and/or sub-chiefs from the applicant's local indigenous group; Relations of the applicant, or Any other persons of good standing who has own first-hand knowledge of the identity of the applicant." Nationality Regulations 2011, paragraphs 25-26.

<sup>107</sup> Input at Arusha workshop, 20 March 2017.

### Identity ‘vetting’ in Kenya

Kenya’s administration of identification has faced much criticism from African and international human rights institutions and from Kenya’s own human rights institutions and civil society organisations. Among Kenya’s own constitutional and other official government bodies, discrimination, corruption and inefficiency in the administration of national identity cards have been condemned by the Truth, Justice and Reconciliation Commission (TJRC); the Kenya National Commission on Human Rights; the Commission on the Administration of Justice (Ombudsperson), and the Ethics and Anti-Corruption Commission.<sup>108</sup> The TJRC report of 2013, for example, recorded “evidence demonstrating that communities in North Eastern and Upper Eastern regions of the country and Muslims in general have suffered discrimination for decades in relation to their right to citizenship and associated identity documents.” Moreover, “Even Somalis who have for decades lived outside Northern Kenya face similar challenges of accessing national identity cards.”<sup>109</sup> The TJRC also reported the conclusions of a committee appointed in 2007 by President Mwai Kibaki to look into concerns of the Muslim community, which made robust findings and recommendations on discriminatory practices in the issue of national identity cards and passports.<sup>110</sup>

The Registration of Persons Act 1947 has been amended many times, but has not been replaced and retains its original framework of control of persons. Section 5 of the current version of the Act requires people to declare their “race or tribe” in order to obtain an ID card; Section 8 empowers registration officials to require a person to furnish “documentary or other evidence of the truth” of any information provided.

Vetting committees are established to verify citizenship before an ID card will be issued in border regions (including the Indian Ocean coast), or in neighbourhoods known to host people of foreign origin, such as Kibera in Nairobi (serving the Nubian community), or people belonging to communities which exist on both sides of one of Kenya’s borders. These committees consist of the Deputy County Commissioner (who chairs the meeting), County Registration Officer (who acts as secretary), representatives of the civil registration authority, of the police and intelligence agencies, and of the Immigration Department (in areas where they are present), and the chief of that location (a national government administrative officer appointed by the Public Service Commission<sup>111</sup>). In addition, the vetting committees include elders of the local community, to confirm an individual’s membership of that community.<sup>112</sup> There is no independent judicial element. However, a rejection can be administratively appealed to the County Commissioner and then to the Director of the National Registration Bureau (NRB). Since the adoption of the 2010 Constitution, which provides that every citizen has the right to an identity card (Article 12(1)(b)), decisions of this type are subject to judicial review by the High Court.

Vetting procedures were established administratively until amendments to the Registration of Persons Act adopted in 2014 provided for “identification committees [...] to assist in the authentication of information furnished by a parent or guardian”. The same amendments gave powers to the NRB Director to cancel identity cards in a range of circumstances, with a right to administrative and judicial appeal.<sup>113</sup>

<sup>108</sup> Ethics and Anti-Corruption Commission, *Examination Report on the Systems, Policies, Procedures and Practices of the Ministry of Immigration and Registration Services*, April 2006; Kenya National Commission on Human Rights (KNCHR), *An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya*, 2007; KNCHR, *Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, 2010; *Final Report of the Truth, Justice & Reconciliation Commission of Kenya* (2013), Volume IIC, Chapter 3; Kenya Commission on Administrative Justice (Office of the Ombudsperson) *Stateless In Kenya: An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya*, 2015.

<sup>109</sup> TJRC Report, Vol. IIC, Chapter 3.

<sup>110</sup> The report of the committee was not officially published, but a leaked copy of the report, dated 31 March 2008, forms an appendix to Chapter 3 of the TJRC Report Vol. IIC.

<sup>111</sup> National Government Coordination Act No. 1 of 2013, Section 15(2).

<sup>112</sup> Interview, National Registration Bureau, 20 March 2017.

<sup>113</sup> Security Laws Amendment Act 2014, Section 23, amending the Registration of Persons Act, Section 8.



The Registration of Persons Act does not specify what documentation shall be produced to prove citizenship and the practice varies quite widely.<sup>114</sup> People living in areas where vetting applies have to produce additional documentation, even if applying for an identity card with a birth certificate identifying a parent and that parent's identity card. In 2011, the High Court found that a requirement established by a circular issued by the National Registration Bureau for "Asians and Arabs" to produce their parents' and grandparents' birth certificates was unconstitutional, and ordered the NRB to cease applying these requirements.<sup>115</sup> The Director of the NRB states that this has been done, and the circular withdrawn.<sup>116</sup>

There have been recent efforts by the NRB to ensure greater access to identity documents in the counties of the former North Eastern Province, especially to facilitate cash transfers as part of the national Hunger Safety Net Programme, and many more cards have been issued.<sup>117</sup> Nonetheless, many people in the border zones entitled to Kenyan citizenship remain without national identity cards.<sup>118</sup>

Critics of the vetting process do not object in principle to the idea of vetting a person's eligibility for citizenship where that may be in doubt, but rather to the ways in which vetting is carried out. Those subject to vetting do not understand why they must face additional vetting even if they have all the official documents normally required; nor why vetting is applied only to people filling particular profiles, rather than to anyone who does not have existing documents recognising citizenship or providing proof of the relevant facts. There are concerns that the standards applied vary across the country, since there are no set criteria for what constitutes acceptable proof of citizenship, a vagueness that also allows for discriminatory application of the law in practice. For example, although vetting does not in principle apply to renewal of a document, this does not appear to be always the case. While senior officials responsible for the process are clear that the vetting procedures are about ensuring the integrity of citizenship administration, not about good character, there is also the danger that in some cases people may be rejected for a national identity card not because they are not Kenyan but because they are in trouble with the local authorities in some way.

## Proof of nationality

A national ID card will usually indicate nationality as one of the pieces of information shown on the face of the card. National identity cards have, however, different levels of evidentiary value in law, and in most countries are not legally proof of nationality, even in those countries where an identity card is mandatory only for nationals and is commonly taken to form such proof.

In line with the usual system in civil law countries, the nationality codes in both Rwanda and Burundi provide within the text of the law for the courts to decide questions related to nationality and for the relevant procedures. The Rwandan law also establishes that a Rwandan birth certificate is proof of nationality of origin, and more generally that an identity card, passport, or citizenship certificate are proof of Rwandan nationality; while the burden of proof of Rwandan nationality lies with a person whose nationality is contested, the burden of proof is reversed if that person already holds a Rwandan identity document.<sup>119</sup> The

<sup>114</sup> Interviews, Nairobi, June 2016.

<sup>115</sup> *MUHURI and Another v. Registrar of Persons and others*, Constitutional Petition No. 1 of 2011, High Court at Mombasa, 18 February 2011.

<sup>116</sup> Interview, Nairobi, 2 June 2016.

<sup>117</sup> Managed by the National Drought Management Authority (NDMA) under the Ministry of Devolution, with financial support from DFID and Australian Aid. See "ID Registration for Safety Net Cash Transfers: HSNP experience in facilitating national ID card registration", 23 June 2015; updated data available at: <http://hsnp.or.ke/index.php/dashboards/at-a-glance>.

<sup>118</sup> Interviews, Nairobi and by phone, June 2016.

<sup>119</sup> Organic Law Relating to Rwandan Nationality No. 30 of 2008, Sections 25-28.

Burundian nationality code provides in addition to the court procedures that the Minister of Justice can issue a nationality certificate, though upon request only to a person whose nationality is not doubtful.<sup>120</sup>

In the Commonwealth countries, while a naturalisation certificate forms proof of nationality for those who acquire nationality as an adult, there is no similar document available to those who are citizens from birth. Although there may be the theoretical provision for the issue of a certificate of nationality by the executive in cases of doubt, this is effectively unknown in practice. For example, Tanzania provides that the Minister can “in such cases as he thinks fit” issue a certificate confirming that a person is a citizen, and such a certificate is conclusive evidence that the person was a citizen on that date.<sup>121</sup> However, the laws in Kenya and Uganda have no such provision.<sup>122</sup> Thus, there is no single document that provides conclusive proof of nationality: while the passport has highest status (Kenya and Tanzania, for example, provide that a passport is *prima facie* evidence of nationality; while Uganda does the same for national identity cards),<sup>123</sup> most people do not have or require an international passport. In practice, a variety of documents may be accepted as proof of nationality, depending on the circumstances.

One circumstance in which nationality may be challenged is when a person has no documents confirming nationality in the country of residence, and is accused of being a national of another country of which they also hold no documents. Even if dual nationality is permitted, this may be sufficient to cast doubt on the person’s entitlement to the nationality of the country of residence. Tanzania does not permit dual nationality for adults, but, in positive contrast to some other African countries, the Tanzanian practice has been to disregard other potential citizenships if a person has one Tanzanian parent and one foreign parent but was born in Tanzania and has never sought to claim the other citizenship. If asked, the Immigration Department will provide a letter confirming that a person is Tanzanian in these cases, without requiring any formal renunciation of a potential other nationality; this is not, however, the certificate of nationality provided for under the legislation.<sup>124</sup>

## The right to a passport

Only a small percentage of citizens require access to a passport: those intending international travel outside the region. Even before the decision to allow travel within the EAC on the basis of a national identity card (see below under heading on the EAC), local borders could usually be crossed without an international passport, including through use of an EAC laissez passer document. The Mecca pilgrimage, perhaps the most common international travel for the Muslim population in the region, can usually be completed on the basis of a single-use travel document.

Overtaking a long history in which access to passports was regarded as discretionary,<sup>125</sup> the 2010 Kenya constitution provides that “Every citizen is entitled to a Kenyan passport and to any document of registration

<sup>120</sup> Article 46, *Code de la nationalité burundaise*: “Le Ministre de la justice peut délivrer un certificat de nationalité à tout burundais qui en fait la demande et dont la nationalité n’est pas contestable.”

<sup>121</sup> Tanzania Citizenship Act 1995, Section 21.

<sup>122</sup> Although the Uganda Citizenship and Immigration Control Act 1999 does provide in Section 33 for a “duly certified citizenship certificate” to be proof of nationality it does not establish how to obtain one.

<sup>123</sup> Tanzania Passports and Travel Documents Act No. 20 of 2002, Section 11 (the Act also provides that the decision of the Minister in relation to refusal, revocation or cancellation of a passport is final); Kenya Citizenship and Immigration Act 2011, Section 32; Uganda Registration of Persons Act 2015, Section 69, provides that a national identity card is *prima facie* proof of the particulars entered in it.

<sup>124</sup> Interviews, Department of Immigration, Dar es Salaam, July 2016.

<sup>125</sup> Historically, British law regarded the grant of travel documentation as being within the “crown prerogative”, a privilege and not a right. In the 1985 Mwaui case in Kenya, the High Court similarly ruled that “in the absence of any statutory provisions . . . the issue and withdrawal of passports is the prerogative of the president” (*In re application by Mwaui*, 1985 LRC (Const) 444). A 2007 ruling overturned the Mwaui decision, stating: “In Kenya the right of travel is an expressed constitutional right, and its existence does not have to depend on a prerogative, inference or any implied authority” (*Deepak Chamanlal Kamani v. Principal Immigration Officer*

and identification issued by the State to citizens”, and this is confirmed in the Citizenship and Immigration Act.<sup>126</sup> The Ugandan citizenship law adopted in 1999 also gives all citizens the right to a passport.<sup>127</sup> Burundi, Rwanda, Tanzania and South Sudan do not have similar provisions.

A passport is typically more difficult to obtain than a national identity card, and the application is subject to higher levels of scrutiny by the authorities. It is fairly common for people who have an ID card to find that their citizenship is questioned on applying for a passport. Additional vetting procedures are usually in place, and additional documentary evidence required. In Kenya, for example, a birth certificate must be provided to obtain a passport but not (for most people) for a national ID card.<sup>128</sup>

## Access to naturalisation

The provisions of the law on naturalisation may be misleading in giving an indication of the ability of long-term residents to acquire the nationality of their new home. There are few published statistics about the numbers naturalised in most African countries. However, those statistics that are available reveal that the numbers of naturalised persons vary hugely across the continent, and are generally low. This difficulty in naturalising is partly a matter of law but even more a matter of practice: the procedures tend to be heavy in bureaucratic requirements, subject to much discretion, and often require quite substantial outlay in official and unofficial fees. Vetting procedures relating to a person’s suitability to acquire nationality are normal in all countries around the world; however, vetting is extremely stringent in the East African countries.

In the civil law countries, including Rwanda and Burundi, naturalisation is generally by presidential or ministerial decree, which must be published in the official gazette. A survey of the Rwandan gazettes for 2015 to 2017 revealed one naturalisation decree, for 71 people in July 2016 (as well as 13 who had renounced nationality).<sup>129</sup> Burundi presidential decrees available on the presidency website indicate a total of 55 adults naturalised from 2011 to 2017, most of them men married to Burundians, with 48 minor children included in those decrees.<sup>130</sup>

Naturalisations are not published in the common law countries. In interviews for this report, the Tanzanian Immigration Department stated that 195 people had naturalised in total in 2014, and 463 in 2015 (this is an aggregate figure including married women, long-term residents, and the separate applications of minor children whose parents also naturalised; it excludes the extraordinary naturalisation process for refugees).<sup>131</sup> In Tanzania, refugees have rarely been naturalised under the normal provisions (the exceptions may be for those who are most wealthy, or refugees from outside Africa). However, Tanzania is one of the African countries that has made the most positive efforts to grant citizenship to refugees, through mass outreach

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and 2 Others [2007] eKLR; see also Peter Mwaura, “Passport is a right for every citizen, not a privilege”, *The Nation* (Nairobi), 7 July 2007.

<sup>126</sup> Constitution of Kenya, 2010, Article 12(1)(b); Citizenship and Immigration Act 2011, Section 22(1)(g).

<sup>127</sup> Citizenship and Immigration Control Act 1999, Section 39: “Every Ugandan shall have the right to a passport or other travel documents.”

<sup>128</sup> The application form for a Kenya passport states that “All applications must be accompanied by a previous passport, if any, or current national Kenya Identity Card, Birth Certificates plus certified photocopies of each.” In addition, it states that “Documentary evidence of Kenya citizenship must be produced” – although the only document that is stated by law to be *prima facie* evidence of Kenyan (or other) citizenship is, in fact, a passport (section 32, Citizenship and Immigration Act, 2011). Form 19 available at: <http://www.immigration.go.ke/downloads/Form-19-Application%20for%20Kenya%20Passport.pdf>.

<sup>129</sup> Official Gazette No. 30 of 25/07/2016; Rwanda Official Gazette available at: <http://primature.gov.rw/index.php?id=42>

<sup>130</sup> *Décret No. 100/41 du 16 février 2011; Décret No. 100/96 du 24 mars 2011; Décret No. 100/163 du 16 juin 2011; Décret No. 100/293 du 18 décembre 2013; Décret No. 100/21 du 29 janvier 2015; Décret No. 100/168 du 26 mai 2015; Décret No. 100/048 du 17 octobre 2015, and Décret No.100/ 0134 du 30 juin 2016.* Burundi Presidential decrees available at: <http://presidence.gov.bi/>. Fees for Burundi were established by the *Ordonnance ministérielle conjointe No. 550/540/713 du 17 juin 2004 fixant les frais d'enquête et de publication relatifs à la naturalisation*. See Burundi’s second periodic report to the Human Rights Committee, UN Doc. CCPR/C/BDI/2, 28 May 2013.

<sup>131</sup> Interview, Department of Immigration, 16 July 2016.

programmes (see box pp. 66–67). Between July 2014 and June 2018, Uganda had registered 1,460 people as citizens, and naturalised 452; in addition, 719 had recovered Ugandan citizenship under the provisions enabling dual citizenship.<sup>132</sup> Refugees are not eligible to register as Ugandan citizens under the law (see above, heading on naturalisation of refugees); and according to interviews in 2016, no registered refugee in Uganda was known to have been naturalised. The Kenyan Department of Immigration indicated that around 100-150 people a year acquire citizenship by registration each year, and between four and five hundred are recovering citizenship under the provisions of the 2010 constitution permitting dual citizenship.<sup>133</sup> Refugees cannot access these procedures in practice.

The official fees for naturalisation are often out of reach for many people at risk of statelessness. In Uganda, it costs USh 100,000 (approximately US\$ 30) to register as a citizen for a spouse, but US\$ 1,000 for registration in other circumstances; except that there is a reduced fee of USh 100,000 for “people who have lived all their lives in Uganda and consider themselves as Ugandans except for the citizenship papers.” No fees are posted on the Immigration Department website for naturalisation, implying that this procedure is little used.<sup>134</sup> In Kenya, acquisition of citizenship by a spouse costs KSh 30,000 (US\$ 300), or KSh 5,000 (US\$ 50) for a person from another East African state, but KSh 200,000 (US\$ 1,940) on the basis of long-term residence. The fee for registration under the special temporary procedures for “migrants” and “stateless persons” was, however, reduced to KSh 2,000 (US\$ 20).<sup>135</sup> In Rwanda, acquisition on the basis of marriage, birth or residence in Rwanda until majority costs RwF 20,000 (US\$ 25), while naturalisation on the basis of long term residence is RwF 100,000 (US\$ 125).<sup>136</sup>

The Tanzanian naturalisation procedure is especially elaborate, involving multiple stages of approval and amongst the highest fees in the world. After filling in the relevant forms, the applicant submits the application at his or her nearest local government area (the Ward Executive Secretary, or *sheha* in Zanzibar). The forms are sent, with an initial recommendation letter, to the District Immigration Office. At that time, the application process is formally registered, the applicant pays a non-refundable fee of US\$ 1,500, and must also pay for the publication of a notice of intention to apply for naturalisation in two consecutive issues of daily newspapers registered in Tanzania mainland and in Zanzibar. The applicant is interviewed by the District Defence and Security Committee, and the file is then sent, with a recommendation, to the Regional Immigration Officer. The application is then scrutinised at the regional level, with or without an interview, and forwarded with a recommendation from the regional defence and security committee to the Commissioner General of Immigration Services.<sup>137</sup> The applicant may be interviewed again at national level, and the Commissioner General makes a recommendation to the Minister of Home Affairs. For an applicant from Zanzibar, an additional layer of scrutiny comes through the Office of the Second Vice President (representing the islands). The Minister makes the final decision, and may disregard or overrule

<sup>132</sup> Interview, Department of Immigration, 10 August 2016; Uganda government focal point on statelessness, “Clarification on Ugandan position on the draft report on statelessness and citizenship in the East African Community”, 21 September 2018.

<sup>133</sup> Interview, Department of Immigration, 20 March 2017.

<sup>134</sup> Fees for Services Offered by the Directorate of Citizenship and Immigration Control Effective 1st July 2015, available at website of Directorate of Immigration Control, Uganda: <http://www.immigration.go.ug/about/fees-services-offered-directorate-citizenship-and-immigration-control-effective-1st-july-2015>.

<sup>135</sup> An application for permanent residence is even more expensive, attracting a non-refundable “processing fee” of KSh 10,000 (US\$ 97), and an “issuance fee” payable on approval of KSh 500,000 (US\$ 4,850). Kenya Citizenship and Immigration Regulations, 2012 (LN 64/2012 as amended by LN 145/2014). Kenya has recently switched all applications for citizenship, work permits and related matters to an online system, but fees are not posted there: see Kenya e-services website <https://fns.immigration.go.ke/infopack/citizenship/>.

<sup>136</sup> Presidential Order No. 21/01 of 27/05/2009 establishing the procedure for the application and acquisition of Rwandan Nationality, Official Gazette No. special of 28/05/2009.

<sup>137</sup> The Tanzania National Security Council Act No. 8 of 2010 provides that the functions of the District Security Committee include to “consider applications for citizenship and submit recommendations to the Regional Security Committee” (Section 11(e)); and that functions of the Regional Security Committee include to “Consider applications for citizenship and advise the Minister responsible for citizenship” (Section 9(e)).

recommendations (which may in any event contradict each other), or simply not respond. If the Minister approves the application, a further fee of US\$ 3,500 is payable before citizenship is formally granted. For certain categories of person, including those who would have qualified to register for citizenship under the 1961 constitution transitional provisions and their descendants born in Tanzania, there is a facilitated naturalisation procedure with a lower fee (two instalments of one million Tanzanian shillings, or a total of approximately US\$ 870), but grant of citizenship is still at the discretion of the Minister.<sup>138</sup>

### **Weaknesses in nationality administration**

- **Weak civil registration systems**

Birth registration is the foundation for nationality administration, but three of the six EAC countries have birth registration rates of less than 50% of those under five years old, and none is higher than 85%. Older children and adults tend to have even lower rates of registration.

- **The vital need for due process, including both administrative and judicial review and appeal**

Documents attesting to nationality are ever more important for individuals to access their other rights. It is critical that decisions made by officials to deny or refuse to renew a document are subject to review and appeal not only by other officials, but also by the courts. As affirmed by the African Court on Human and Peoples' Rights in the *Anudo* decision, when a person has previously been treated as a national, including holding documents attesting nationality, the burden of proof should fall on the state to prove that the person is not entitled to hold that document.

- **The lack, in some countries, of a document that is conclusive proof of nationality**

In Burundi and Rwanda the courts have the jurisdiction to issue a certificate of nationality that is proof of that status unless overturned by another court. In Kenya, South Sudan, Tanzania and Uganda there is no such document for citizens from birth, meaning that citizenship may be required to be proven each time an application is made for identity documents.

- **Discriminatory vetting procedures can exclude legitimate applicants**

All states have procedures to verify a person's entitlement to their nationality. However, where higher standards of proof are applied to certain communities – including requirements to produce documents that many cannot be expected to hold – then members of that community without connections or access to lawyers and other assistance may be excluded from recognition of nationality, even if they fulfil all the criteria in fact.

- **Naturalisation is only available to a very few**

The discretionary nature, high costs, and heavy procedural requirements attached to naturalisation means that regular naturalisation procedures is only accessible to a small elite. The exceptional programmes initiated by Kenya for stateless persons and by Tanzania for certain Burundian refugees, should be replicated for other groups whose only meaningful ties are to the country of residence.

- **Costs can obstruct access to nationality documentation**

While official fees for birth registration, identity documents and nationality certification are mostly reasonable, they can still create barriers for the poorest people. The fees charged by intermediaries who facilitate applications, transport costs, and the many hours of lost time waiting for documents to be issued put them out of reach for many more.

<sup>138</sup> Interviews, Immigration Services Department, Dar es Salaam, 16 July 2016; most recent fees established by the Tanzania Citizenship (Amendments) Regulations G.N. 427 of 13 October 2017; see also the instructions available on the Immigration Department website at <http://www.immigration.go.tz/>.

## 5. Groups at risk of statelessness

The categories of people at risk of statelessness are similar across the African continent, and indeed across the world. This section first outlines the common categories, and then highlights some of the specific groups falling within these categories at risk of statelessness in each of the six EAC countries. These country summaries should not be taken as an exhaustive list of the populations concerned; the nature of this study means that it could not hope to identify all the communities and categories of people resident in East Africa who cannot obtain proof of nationality in any country. It is also not possible to provide statistics on how many are stateless: statelessness is often only a situation that becomes apparent over time, after repeated efforts to obtain documents from the authorities of one or more countries. It is, in the end, an individual and not a group condition, and different members of a group sharing some characteristics may succeed or fail in obtaining recognition of nationality because of their different circumstances. Thus, the categories here are of people “at risk of” statelessness: not all those fitting the description of each group will in fact be stateless, and the level of risk may vary.

### Common categories across all countries

#### Descendants of pre-independence migrants

The history of Africa’s colonisation by European powers creates challenges related to the status of populations that were not incorporated into the body of citizens on succession of states; that is, by the transitional provisions that operated on the transfer of sovereignty to the newly independent states. Those most at risk of becoming stateless at this time were the descendants of people who migrated, or were forced to move, during the colonial period, when administrative borders among territories of one colonial power were open.

This group divides in turn into two main sub-categories: those whose ancestors came from outside the continent (from Europe, Asia or the Middle East); and—far more numerous—those whose ancestors came from elsewhere in Africa (including, in East Africa, farmworkers recruited across borders to work on commercial plantations, Nubian soldiers from Sudan settled in Kenya and Uganda, Comorian migrants to Zanzibar and Kenya, and others).

#### Border populations

Across Africa, members of the many ethnic groups that straddle the colonially-imposed borders often face difficulties in being recognised as nationals on either side of that border, even where the laws of both countries place no obstacle to a person holding both nationalities.

Perhaps those most affected by the challenges created by these borders are the groups following a pastoralist way of life and livelihood. Modern state borders may disrupt the long-established routes of both transhumant (seasonal) or fully nomadic pastoralist communities; and members of those communities may have a weak sense of belonging to any individual state, paying taxes where they are required to do so, and obtaining identity documents where they can. Many members of these pastoralist communities do not have identity documents: they can cross borders without any papers, while state institutions may barely exist in the remote rural regions. In any event, even with the correct papers they may be subject to extortion at border points.<sup>139</sup> But even those living in urban areas who have never herded a cow can find themselves unable to get recognition of citizenship because of their presumed affiliation to a traditionally pastoralist ethnic group.<sup>140</sup>

<sup>139</sup> See for example, John Markakis, *Pastoralism on the Margin*, Minority Rights Group, 2004.

<sup>140</sup> For Kenya, see *The People’s Choice: The Report of the Constitution of Kenya Review Commission*, 2002; and two reports by the Kenya National Commission on Human Rights: *An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya*, 2007 and *Out of the Shadows: Towards Ensuring the Rights of Stateless Persons and Persons at Risk of Statelessness in Kenya*, 2010. Also

Similar difficulties can affect Central Africa's Batwa peoples (of whom some live in Rwanda and Burundi), who face discrimination in many areas of life, and may struggle to provide evidence of connection to an individual state.<sup>141</sup>

A further category of border populations at risk of statelessness are those living in areas of contested borders—in East Africa often also the areas mainly populated by pastoralist groups. For example, the “Ilemi triangle” on the Kenya-South Sudan-Ethiopia border was never clearly delineated during the colonial period and is claimed by all three countries. An area of more than 10,000 square kilometres (approximately the size of The Gambia), the Ilemi triangle is valued by pastoralists originating from all three countries and from Uganda for its dry-season grazing.<sup>142</sup> The Ngok Dinka of the disputed area of Abyei (see below, p. 59) also have a precarious status in both Sudan and South Sudan. Typically in such situations, a country will claim the territory as incontrovertibly its own, but express doubts about the citizenship of the people living there.

### Vulnerable children

The longer it takes to establish nationality for those people where it is in doubt, the greater the risk of statelessness. Those children who are at risk of being stateless fall in various sub-categories; for all, the risks are increased where births have not been registered and birth certificates issued. The devastating impact of statelessness on children was highlighted by the African Committee on the Rights and Welfare of the Child in its General Comment on Article 6 of the African Children's Charter.<sup>143</sup>

Gender discrimination in law, such as exists in Burundi, leaves children of mothers who are nationals and foreign fathers at great risk of statelessness, especially where the child's birth is not registered. Although the constitution provides for gender equality, the nationality law states that women only transmit nationality to their child if born out of wedlock and the father is unknown or if the father formally repudiates the child. Where a child is born in wedlock to a foreign father, nationality can only be acquired from the mother on opting formally to do so.<sup>144</sup> However, for the child to acquire the father's nationality, it is often an additional requirement that the birth must be registered with consular authorities of the father's country, something almost impossible to imagine for most ordinary people and which might first require establishing documentation of the father's nationality.

Children born out of wedlock face general discrimination in some cultural contexts. In EAC Partner States those born within a settled community will usually not face problems obtaining recognition of nationality, even if the technical forms of recognition required by the law are not in place. However, where the father of the child is obviously foreign (for example of European, Arab, or Asian origin; but also from Somalia or Ethiopia or one of the other Horn of Africa countries), or known to have been so (for example in the case of rape in war time), they may face difficulties in being recognised as nationals of the mother's country. In Burundi, children born out of wedlock to fathers who were colonial officials, and their descendants, or more recently to fathers working for the UN or NGOs as peacekeepers or development workers, are at risk of statelessness. In addition, and likely more numerous, children of Burundian mothers and Congolese fathers

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the report by the Kenya Human Rights Commission (an NGO), *Foreigners at Home: The Dilemma of Citizenship in Northern Kenya*, 2009.

<sup>141</sup> See for example, Jerome Lewis, *The Batwa Pygmies of the Great Lakes Region*, Minority Rights Group, 2000.

<sup>142</sup> Members of five ethno-linguistic communities; the Turkana, Didinga, Toposa, Inyangatom, and Dassanech, who are members of the larger ethno-cultural groups of Ethiopia, Kenya, Uganda, and Sudan, traditionally migrate to graze in the triangle. Nene Mburu, “Delimitation of the Elastic Ilemi Triangle: Pastoral Conflicts and Official Indifference in the Horn of Africa”, *African Studies Quarterly*, Vol. 7, No. 1, 2003; see also Gilbert M. Khadiagala, ‘Boundaries in Eastern Africa’, *Journal of Eastern African Studies*, Vol. 4, No. 2 (July 2010), pp. 266–78.

<sup>143</sup> African Committee of Experts on the Rights and Welfare of the Child, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, 2014, ACERWC/GC/02.

<sup>144</sup> *Loi No. 1-013 du 18 juillet 2000 portant réforme du Code de la nationalité*, Articles 2, 5 and 13. It is not clear how accessible this procedure is in practice; in other countries in Africa with similar procedures they are rarely used.

face similar difficulties.<sup>145</sup> Without recognition as Burundian these children have little or no access to education or healthcare, cannot own land and are not free to leave and enter the country.

Children separated from their parents in various circumstances are another major category, including children of unknown parents, street children, orphans, and trafficked children from another country who are apprehended by the authorities but cannot be returned to their country of origin because their families cannot be traced.

While some countries, including Rwanda, have in place a clear system for the documentation of abandoned babies or infants, others do not have procedures on how to handle these cases. Nonetheless, even in countries where there is no formal provision on children of unknown parents, such as Tanzania, an abandoned infant will usually be presumed to be a national if there is no apparent evidence of foreign parentage. But this is not always the case, especially for older children. In Kenya, the 2010 constitution and 2011 legislation provided for the first time a presumption of citizenship for the children of unknown parents. However, the Citizenship and Immigration Regulations of 2011 contain no guidance on how to implement the presumption. While some magistrates began issuing court orders in relation to abandoned infants, this is not systematic. With support from an institution, children of unknown parents who are believed to be Kenyan can usually obtain late birth registration and identity documents as Kenyan; but children who appear to be Somali or who are old enough to report a name indicating that they have come from another country are not recognised in this way.<sup>146</sup>

In Uganda, the children of the abducted “wives” of members of the Lord’s Resistance Army who were born outside the country have been recognised as Ugandan if their mothers are alive and have returned to Uganda; but if their parents have died the children may not know sufficient information to show where they are from.<sup>147</sup> There may also be some descendants of Tanzanian soldiers, from the time that the Tanzanian army briefly occupied the country in 1978-79, toppling the government of Idi Amin, following his occupation of Tanzanian territory, who face similar difficulties.

Children adopted from another country may also be left outside the provisions of the law, as noted under the heading on adopted children. In Tanzania, for example, the law is silent. If a Tanzanian family adopts, for example, a child of Burundian refugees, there is no procedure other than formal naturalisation (both extremely costly and highly discretionary) to grant the child Tanzanian citizenship.

#### **Stateless child born in Tanzania**

“Miranda” is a Kenyan woman born in Kenya to a Kenyan mother and a father from a Southern African State. She lives and works in Tanzania. She had a baby in Tanzania with a man from the Caribbean who then left her. She wanted to give her child a nationality. She went to the state in Southern Africa to attain a nationality for her son, but was denied one because the father of her own child is not from that state. She then turned to Kenya but her son was denied nationality in Kenya as well, because of gender discrimination in the law at that time. Considering he was born in Tanzania, she turned to the Tanzanian authorities but they also rejected her plea for her son’s nationality. Her son is now stuck in Tanzania without a nationality.<sup>148</sup>

<sup>145</sup> Information from International Refugee Rights Initiative, by email August 2016.

<sup>146</sup> Interviews, Nairobi and Mombasa, July 2015 and June 2016.

<sup>147</sup> Interview, Victor Ochen, African Youth Initiative Network, Kampala, 9 August 2016.

<sup>148</sup> Summary of presentation by Donald Deya, Pan African Lawyers Union, in *The Right to Nationality in the East African Community*, East Africa Civil Society Organisations’ Forum (EACSOFF), 2 December 2015. Before the adoption of the 2010 Constitution and the 2011 Act, children of Kenyan mothers born outside Kenya did not acquire their mother’s citizenship. If “Miranda” can establish her own Kenyan citizenship, the child would now in principle also be entitled to Kenyan citizenship.



### Refugees, former refugees and internally displaced persons

Most refugees are not stateless: although they lack the protection of their state of nationality, this is presumed to be a temporary situation. Some refugees may also be stateless; and in some cases lack of recognition of nationality may be one of the reasons for the person's flight or expulsion and for the difficulty of return: in East Africa this would apply especially to the Banyarwanda of Eastern Congo, whose status as Congolese has been contested for many decades.<sup>149</sup>

Refugees registered with UNHCR usually receive both a UN document and a document issued by a national refugee agency (the institutional structures vary) recognising their refugee status, which state their country of origin and/or nationality (and in principle also indicate that they are stateless, if that is the case). For those refugees who return home within a few years such documentation is usually sufficient to provide them with proof of nationality on return. For refugees in a "protracted" situation the question of documentation becomes steadily more difficult. This is the case especially for those who fled into a neighbouring country and never registered as refugees. For those born outside the country of origin of their parents, access to documents in the parents' country of origin may also be of limited use, if their lives are established elsewhere.

Those who do not cross an international border may in some ways be even worse affected by lack of documents, since they are much less likely to be registered by an international or national agency at the time of displacement, but equally likely to be affected by loss or destruction of their existing documents and the dispersal of community leaders who could vouch for a person's identity. Displaced children separated from their parents are the most vulnerable of all.

The 1951 Refugee Convention provides for "cessation clauses" which set out the situations in which refugee status may properly come to an end. One of these clauses refers to "ceased circumstances", where the situation in the country of origin has changed sufficiently to make return possible. For this clause to be applicable, there must have been a change in the refugee's country of origin which is "fundamental, durable, and effective". In such cases, UNHCR may issue a statement that, as a group, refugees from that country no longer have a well-founded fear of being persecuted (though individuals may rebut the presumption, so that the application of the clause should always be individually assessed).<sup>150</sup> UNHCR will then typically enter into agreements with the countries of origin and refuge for repatriation or local integration of the refugees (resettlement in a third country is unlikely to be possible at this time). There is, however, no requirement on the host countries to follow the recommendation that the ceased circumstances clause should apply, and repatriation agreements are often entered into without formal reference to "ceased circumstances".

Since 2010, the ceased circumstances clause has been invoked in Africa for refugees from Sierra Leone (at the end of 2008), Angola and Liberia (in 2012) and Rwanda (in 2013). The status of former Rwandan refugees is of most concern in East Africa.<sup>151</sup> The decision to invoke the ceased circumstances provision in the case of Rwanda was controversial, on the grounds of continued fear of persecution by some refugees from that country.<sup>152</sup> The recommendation applied only to those who left the country from 1959 to 1998, while it is open to any refugee to apply on an individual basis for continuing protection. Some Rwandan refugees thus retain their status even in countries that have accepted the recommendation to invoke the cessation clause;

<sup>149</sup> Bronwen Manby, *Struggles for Citizenship in Africa*, Zed Books, 2009; Bronwen Manby, *Citizenship in Africa: The Law of Belonging*, Hart Publishing, 2018.

<sup>150</sup> UNHCR ExCom Conclusion No. 69 (XLIII), Cessation of Status, 1992; *The Cessation Clauses: Guidelines on their Application*, UNHCR, Geneva, April 1999.

<sup>151</sup> "Implementation of the Comprehensive Strategy for the Rwandan Refugee Situation, including UNHCR's recommendations on the Applicability of the 'ceased circumstances' Cessation Clauses", UNHCR, 31 December 2011.

<sup>152</sup> *Rwanda: Cessation of Refugee Status is Unwarranted*, FAHAMU, 22 September 2011; Barbara Harrell-Bond and Guillaume Cliche-Rivard, "Rwandan refugees face no choice but repatriation", OpenDemocracy.Net, 10 May 2012; "No consensus on implementation of cessation clause for Rwandan refugees", IRIN, 12 July 2013.

among the EAC countries, only Burundi has done so.<sup>153</sup> Elsewhere, however, some Rwandan refugees have been rejected or not applied for continuing protection, meaning that their continued legal residence in that country will depend on any arrangements that are made for local integration as Rwandan nationals. In Burundi, naturalisation was offered to Rwandan refugees who wished to acquire Burundian nationality, an offer taken up by only two families (out of an estimated 2,000 Rwandan refugees in total). The application was still being processed as of September 2018.

Rwandan refugees who returned to Rwanda before the 2008 nationality law came into force were automatically regarded as having reacquired Rwandan nationality. Those who have returned to Rwanda since 2008, after acquiring another nationality elsewhere, have to go through an application procedure for restoration of nationality.<sup>154</sup>

The largest group of Rwandan refugees in the other EAC countries is in Uganda (just over 15,500), but there are also many in Tanzania and Kenya; by contrast, the number of Rwandan refugees registered with UNHCR in the Democratic Republic of Congo (DRC) was 217,997 as of July 2018.<sup>155</sup> Although only Burundi among the EAC countries has formally accepted the ceased circumstances recommendation, the status of the refugees in all the EAC countries remains precarious. Under the EAC freedom of movement regime, refugees willing to apply for a Rwandan passport and thus relinquish their refugee status would be able to regularise their status in other EAC countries. However, some refugees may not be willing to approach the Rwandan authorities. The application is also costly, with a fee of Rwf 55,000 and a requirement to file at the Rwandan embassy in the capital city. There have been only limited efforts to facilitate access to documentation of Rwandan nationality among those communities who cannot obtain the nationality of the country where they live.

There is also a small group of Rwandans who have been accused of crimes of genocide before the International Criminal Tribunal for Rwanda. Both those who have served their sentences and those who have been acquitted state that they fear to return to Rwanda, on the grounds that they may be charged with additional offences. Their travel documents have expired and can only be renewed in Kigali. Eleven people (eight acquitted and three now released from prison) were known to be in Tanzania as of 2015, with no access to documents granting them a legal residence status.<sup>156</sup>

### Long term migrants and their children

African states face the same contemporary challenges of migration as states in other parts of the world in this era of globalisation: the conundrum of how to integrate migrants and their children into the national polity.

Like other regions of Africa, East Africa hosts many hundreds of thousands of people who have moved from their country “of origin”, some as refugees and some as economic migrants (though the distinction may be hard to draw). Some of these migrant populations have been resident in the “new” country for decades; many hold no documents from their country of origin, have no ongoing connections there, and are completely integrated into their host communities. In some cases, those who originally migrated have now

<sup>153</sup> In Africa, only Malawi, the Republic of Congo, Zambia and Zimbabwe initially accepted the recommendation. “No consensus on implementation of cessation clause for Rwandan refugees”, IRIN, 12 July 2013. By 2017, they had been joined by Burkina Faso, Burundi, Cameroon, Niger, Senegal, and Togo. UNHCR, “Update on assisted voluntary repatriation to Rwanda”, 1-31 July 2017.

<sup>154</sup> Article 7 of the 2003 Constitution of Rwanda stated that “Rwandans or their descendants who were deprived of their nationality between 1st November 1959 and 31 December 1994 by reason of acquisition of foreign nationalities automatically reacquire Rwandan nationality if they return to settle in Rwanda.” This article was implemented by the 2004 nationality law. However, those returning to Rwanda since the adoption of the 2008 nationality law have to go through a formal procedure to reacquire nationality. The revised constitution adopted in 2015 does not include this provision.

<sup>155</sup> UNHCR, “Uganda Operational Update”, July 2018; UNHCR, “Update on assisted voluntary repatriation to Rwanda”, 1-31 July 2017; UNHCR, “Democratic Republic of the Congo Operational Update”, July 2018.

<sup>156</sup> Summary of presentation by Donald Deya, Pan African Lawyers Union, in *The Right to Nationality in the East African Community*, EACSO, 2 December 2015.

passed away, but purely descent-based laws mean that their children born in the new country cannot acquire nationality there—in the only country they have ever known.

Even though in principle the children of most migrants should have entitlement to the nationality of one or both of their parents, this will depend on proof of the facts and on the attitude, effectiveness and accessibility of the consular authorities of the country from which the migrants came. While most countries do not restrict transmission of nationality in principle to children born abroad, there may be requirements to register a birth with the consular authorities.

Moreover, it is likely that parents with an irregular migration status, not wishing to draw attention to themselves or because of the costs involved, do not register the birth of their children with the authorities either of the country where they are resident or with the consular authorities of their countries of origin. This is especially the case where the parents both lack documents and are unable or unwilling for good reason to approach the consular authorities of their own countries; for example, because they are refugees but never formally registered as such.

### Stranded migrants in transit

The East African region is a zone of transit as well as of refugee flows and other in-migration. In particular, many travel through the region from the Horn of Africa en route to South Africa. They avoid the authorities as best they can, but many do not succeed. For example, up to 500 Ethiopian migrants are reportedly arrested in Kenya every month, but there is no working mechanism to repatriate them to Ethiopia, so they spend protracted periods in detention.<sup>157</sup> Hundreds, possibly thousands, of others also find themselves held in detention in other countries of the region, until the resources are found to repatriate them or they can bribe their way out. In other regions of the world, research into immigration detention has found many cases of stateless persons who have spent months incarcerated simply because they cannot prove their nationality or regularise their immigration status and there is no country to which they can be deported.<sup>158</sup> Although there is no detailed research, the situation appears to be the same in East Africa, where, if the authorities cannot determine a country of origin “you are forgotten”.<sup>159</sup>

### Deportees from countries outside the region

Another category of migrant at great risk of statelessness is made up of those expelled from one country where they have been in irregular status, to another where they also do not hold or cannot establish citizenship. For example, during Tanzania’s 2013 Operation Kimbunga to expel irregular migrants, some of those expelled by Tanzania were not accepted as citizens by the country to which they were expelled (see box p. 62).

There has been significant concern over the relationship between the EU and African countries around management of migration, as integrated into EU-African cooperation frameworks, especially the procedures for re-admission of African migrants deported from European countries.<sup>160</sup> African opposition to an EU proposal for the deportation of Africans from EU countries on the basis of EU-issued temporary travel

<sup>157</sup> *Mixed Migration in Kenya: The scale of movement and associated protection risks*, Regional Mixed Migration Secretariat (RMMS), June 2013.

<sup>158</sup> *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, London: Equal Rights Trust, 2010.

<sup>159</sup> Ty McCormick, “In Pursuit of the African Dream”, *Foreign Policy*, 19 August 2016.

<sup>160</sup> The signatory states to the EU-Africa Cotonou Agreement agreed to cooperate on irregular migration and readmission of nationals as well as to consider strategies for the “economic and social development of the regions from which migrants originate”. Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part, “The Cotonou Agreement”, signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005, revised in Ouagadougou on 22 June 2010, Article 13.

documents led to it being dropped from the migration deal reached in Malta in 2015.<sup>161</sup> However, failure of African countries to provide effective consular assistance to their citizens abroad, including issue of citizenship papers to stranded migrants in the EU, Gulf States, or elsewhere, leaves many at risk of long term detention and in some cases also statelessness. Children born abroad of parents whose status is irregular are at high risk of not having their births registered, and thus are at increased risk of statelessness, especially if they become separated from their parents.

In 2015, the International Refugee Rights Initiative published a report highlighting the situation of African deportees from Israel.<sup>162</sup> In the two and a half years before the report's publication, approximately 10,000 African asylum seekers had left in departures classified by Israel as "voluntary", but following severe pressure exerted by the Israeli authorities, including extended detention. The majority of those who have left Israel were returned to Sudan and Eritrea, their countries of origin. However, more than 1,500 asylum seekers believed to be from Eritrea and Sudan have also been deported from Israel to officially unidentified "third countries", since they are not willing to return to their country of origin. Most of these are sent to Rwanda and some to Uganda. They arrive in these countries without valid documents permitting them to stay as legal residents, and no procedure is in place to determine their status, including a possible claim to asylum. They are housed for a few days, but then abandoned. In the absence of any legal status where they now are, these deportees often set off once again on the dangerous road to try to enter the European Union states. The Rwandan government denies these reports.<sup>163</sup>

#### Arbitrary deprivation

Regular UN resolutions have confirmed that "arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, including disability, is a violation of human rights and fundamental freedoms".<sup>164</sup>

The African Commission on Human and Peoples Rights has also condemned deprivation of nationality as a violation of Article 5 of the African Charter, affirming the right to legal status.<sup>165</sup> In African states, it is far more common for deprivation to take the form of annulment or non-renewal of documents, retrospectively denying that nationality was ever obtained, rather than implementation of the formal processes for deprivation under the law (which are often restricted to naturalised citizens). By withdrawing recognition of citizenship that a person has previously held from birth, the government will leave that person stateless unless they are already in possession of another nationality.

Tanzania has attempted to strip troublesome individuals of their citizenship several times. In 2001, the government declared that four individuals were not citizens, though giving them the option of applying for naturalisation; the move was interpreted as reprisal for independent media criticism of political and economic developments in Tanzania.<sup>166</sup> In 2018, the African Court on Human and Peoples' Rights found

<sup>161</sup> Matthew Holehouse, "EU drops plan to give African migrants deportation papers", *The Telegraph* (London), 11 November 2015. For a West African case study see, Florian Trauner and Stephanie Deimel, "The Impact of EU Migration Policies on African Countries: The Case of Mali", *International Migration*, Vol. 51, No. 4, 2013.

<sup>162</sup> "I was left with nothing": "Voluntary" departures of asylum seekers from Israel to Rwanda and Uganda, International Refugee Rights Initiative, September 2015.

<sup>163</sup> Rwanda government focal point on statelessness, "Comments on the Draft Study on Citizenship and Statelessness in EAC", April 2018.

<sup>164</sup> UN Human Rights Council biannual resolutions on "Human rights and arbitrary deprivation of nationality", the most recent adopted on 24 June 2016, A/HRC/32/L.8.

<sup>165</sup> See African Commission on Human and Peoples Rights, *The Right to Nationality in Africa*, 2014.

<sup>166</sup> "Tanzania drops envoy to Nigeria over citizenship", *The Guardian*, Dar es Salaam, 5 February 2001. The four were Timothy Bandora (the country's then High Commissioner to Nigeria); Jenerali Ulimwengu (a leading publisher, journalist, media proprietor and chief executive of Habari Media Limited and also a former Tanzanian diplomat and member of parliament, who was born and

Tanzania in violation of human rights standards in retroactively denying nationality in violation of due process.<sup>167</sup>

Burundi, Rwanda and South Sudan have all withheld or revoked passports from citizens in the last few years for apparently political reasons, though without necessarily withdrawing recognition of citizenship.<sup>168</sup>

### A taxonomy of statelessness

#### Migrants

- Historical migrants from before independence, and their descendants
- Contemporary migrants stranded in another country, especially when undocumented
- “Returnees” to a country of origin or deported from another country
- Long-term refugees and former refugees, and their descendants

#### Cross border populations

- Ethnic groups divided by international borders
- Nomads
- Those who live in zones where borders are contested or have been changed

#### Vulnerable children

- Children born out of wedlock
- Abandoned babies and orphans
- Children separated from their parents
- Children of undocumented migrants
- Trafficked children

## Burundi

Although nationality law in Burundi, as established by the nationality code of 2000 and the constitution of 2005, contains no explicit ethnic element, it provides an exclusively descent-based system, with the exception only of children of unknown parents. In the absence of a framework to govern the succession of states at independence, and the continuing existence of a Burundian monarchy, there were no rules on who became Burundian on 1 July 1962. This omission leaves those who are descendants of migrants to the country—potentially dating back generations—at risk of statelessness.

The first Burundian nationality code was only adopted in 1971, nine years after independence. It drew heavily on the Belgian descent-based model and discriminated on the basis of the sex of the parent: attribution of nationality at birth depended on being the child of a father with the “status of a Murundi” (“*ayant la qualité de Murundi*”). There were exceptions in favour of children of unknown parents, and of a person born in Burundi and domiciled there for at least 15 years, *unless* it was established that the person was the national

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educated in Tanzania), Anatoli Amani (the leader of the ruling Chama Cha Mapinduzi (CCM) party in the north-western Kagera region), and Mouldine Castico (a former publicity secretary of the CCM in Zanzibar).

<sup>167</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania*, App. No. 012/2015, African Court of Human and Peoples’ Rights, Judgment of 22 March 2018. See further below under heading on the jurisprudence of the African human rights bodies.

<sup>168</sup> Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices for 2013, 2014 and 2015*, U.S. Department of State.

of another country, or “being of foreign origin” the person “is not assimilated with Burundian citizens”.<sup>169</sup> Amendments made to the nationality code in 2000 left the basic framework in place, providing a descent-based system primarily through a father who is Burundian (“*ayant la qualité de Burundais*”), and discriminating also on the basis of birth in or out of wedlock.<sup>170</sup> It repealed the provision providing access based on birth and residence for fifteen years. A draft law to remove gender discrimination in the law has been prepared for discussion by the Council of Ministers but is not yet before the National Assembly.<sup>171</sup>

The nationality law is not explicitly based on ethnicity, but nonetheless can be interpreted with an ethnic inflection, thanks to the absence of clear criteria for attribution of nationality on attaining independence from Belgium. This possibility is perhaps reinforced by the current constitutional framework, using quotas for representation in the National Assembly and other branches of government to manage the tensions between the two ethnic groups making up the majority of the population.<sup>172</sup>

#### People of Omani descent and other Muslims

Some 1,200 people of Omani descent live in Burundi, and many are not recognised as nationals by either Burundi or Oman. Their ancestors came to Burundi via Zanzibar in the 19<sup>th</sup> and early 20<sup>th</sup> centuries, first when Oman carried out slave-raiding in the interior of Africa, and later as traders under the German and Belgian administrations. Although theoretically many would still be eligible for Omani nationality, if they could prove their descent through the male line (since there is no restriction on transmission of nationality outside of Oman), renewal of documents requires traveling to Oman. As a consequence, only a few have Omani passports. Some of this group have lived in Burundi on the basis of temporary permits; others have had no papers and have been subject to harassment and arrest. Parents who do not have identity papers unable to register the births of their children in Burundi, increasing the risk of statelessness.<sup>173</sup>

Following an effort to identify people with irregular immigration status in Burundi from 2010, investigations by the *Office National pour la Protection des Réfugiés et des Apatrides* (ONPRA) in 2012 and 2016 found 974 individuals of Omani origin present in Burundi (among whom some had access to another nationality, but many did not). This group has been offered naturalisation as Burundian (though no formal statement of this offer exists in writing), but they have rather sought to obtain recognition of Omani nationality, which has not been forthcoming. In the meantime, they have been offered renewable three-year residence permits to regularise their immigration status.<sup>174</sup>

There is in addition a group of Muslim Swahili-speakers in Burundi, also descendants of traders and other migrants from the 19<sup>th</sup> and 20<sup>th</sup> centuries. Although centrally involved in the struggle for decolonisation, they

<sup>169</sup> *Décret-loi no 1/93 du 10 août 1971 portant Code de la Nationalité*, Article 3: “*Est Murundi par présomption légale [...] (c) toute personne née au Burundi et y domiciliée pendant quinze ans au moins, sauf s’il est établi qu’elle a la qualité de ressortissant d’un Etat étranger ou que, étant d’origine étrangère, elle n’est pas assimilée aux citoyens burundi*”.

<sup>170</sup> It is not clear what, if any, was the significance of the change from the father’s status as “Murundi” to “Burundais”: research would need to be done into the government’s proposals and debates in the National Assembly during the adoption of the legislation.

<sup>171</sup> *Bureau du point focal national sur l’apatridie*, “*Note sur les contributions du Burundi par rapport au projet d’étude sur l’apatridie et la citoyenneté dans les six pays de la Communauté des Etats de l’Afrique de l’Est*”, 9 June 2018.

<sup>172</sup> Constitution of the Republic of Burundi, 2005, especially Articles 129, 143, 164 and 180. See also, Pacifique Manirakiza, “The 2005 Constitution of Burundi” (Pretoria: Institute for International and Comparative Law in Africa), n.d., available at: [http://www.icla.up.ac.za/images/country\\_reports/burundi\\_country\\_report.pdf](http://www.icla.up.ac.za/images/country_reports/burundi_country_report.pdf).

<sup>173</sup> “*Risque d’apatridie pour le peuple omanais vivant au Burundi*”, *Commission Nationale Indépendante des Droits de l’Homme*, 31 July 2012; “*Will Oman welcome home its stateless people in Burundi?*” Agence France Presse, 4 December 2012; *Rapport annuel sur la situation des droits de l’Homme au Burundi, Edition 2013*, Ligue Iteka (Burundi); “*Burundi: des descendants d’Omanais veulent être reconnus par leur pays*”, RFI, 27 August 2013; “*Statelessness in Burundi*”, IWACU (Burundi), 31 August 2014, available at: <http://www.iwacu-burundi.org/englishnews/statelessness-in-burundi/>; “*Apatrides malgré eux*”, IWACU (Burundi), 26 December 2014.

<sup>174</sup> *Opération de vérification de la population omanaise à risque d’apatridie résidente au Burundi : Rapport*, Office National de Protection des Réfugiés et Apatrides and UNHCR, 23 October 2016.

were excluded from the right to vote or organise politically in the first elections held in Burundi, on the grounds that the Muslim population were foreigners.<sup>175</sup> This group has not been subject to much research, but it is claimed that they continue to face difficulties in obtaining recognition as Burundian.<sup>176</sup>

## Kenya

In Kenya, unlike in Burundi, the constitutional framework governing the transition to independence provided a theoretically complete system for determining who among the residents of Kenya obtained citizenship automatically on succession of states or who had the right to register as citizens if certain facts were established. Those who automatically became citizens of Kenya at independence were people born in Kenya who had one parent also born in Kenya and who were at that time citizens of the UK and colonies or British protected persons. Others born or resident in Kenya, including those from non-British territories in Africa, could register as Kenyan under certain conditions.<sup>177</sup>

Many, however, did not apply to register: only around 20,000 people applied to register as Kenyan citizens during the transitional two-year period, most of them South Asian, out of an estimated 230,000 Asians and Europeans who would have been eligible.<sup>178</sup> Very few African migrants applied, yet there had been much labour recruitment into Kenya, to work on the pyrethrum farms, tea estates, and other large commercial enterprises.

These transitional provisions continue to have an important role in determining access to citizenship today, because of the decision in 1985 to adopt (with retroactive effect) a purely descent-based citizenship law.<sup>179</sup> Despite the arguably illegal nature of such retroactivity, there was no legal challenge to the amendment, perhaps because interpretation of the law had already moved that way in practice.<sup>180</sup> Many thousands of people today struggle to obtain documentation of Kenyan citizenship either because of the restrictive nature of citizenship law, or because of discrimination in its application.<sup>181</sup>

The special temporary procedures for naturalisation created by the 2011 Citizenship and Immigration Act for those tracing their ancestry in Kenya to before 1963 (see above, p. 19), were not initially accessible. As of mid-2016, just before the initial five-year deadline was to expire, no person had yet been registered as Kenyan as a result of the temporary provisions related to stateless persons, and only seven had been registered under the category of long-term migrants.<sup>182</sup> While application forms were eventually made available on the Immigration Department website and at immigration offices, there had been no outreach to eligible groups, and as a consequence few who would appear to fulfil the criteria had applied. In late 2016, however, this situation changed, as the government took steps to register a group of descendants of

<sup>175</sup> Case study in Geert Castryck, “The Hidden Agenda of Citizenship: African Citizenship in the Face of the Modern Nation-State”, in Steven G. Ellis, Guðmundur Hálfðanarson and Ann Katherine Isaacs (eds.) *Citizenship in historical perspective*, Pisa University Press, 2006.

<sup>176</sup> Maître Mbongo Ali, *Pour mieux connaître les Swahilis du Burundi et comprendre leurs revendications*, Front de Liberation de la Minorité Swahilie du Burundi (FLSB), n.d. See also letter dated 23 March 2013 from the President of the National Assembly to the legal representative of the organisation Via-Volonté, and resources at: <http://www.waswahiliburundi.org/> and <http://www.viavolonte.org/index.html>.

<sup>177</sup> Constitution of Kenya 1963, Articles 1, 2, and 6; as supplemented by the Citizenship Act 1963.

<sup>178</sup> The estimated 1965 population was 185,000 people of Asian descent, and 42,000 Europeans. Donald Rothschild, “Kenya’s minorities and the African crisis over citizenship”, *Race & Class*, Vol. 9, No. 4, 1968, pp. 421-437. Author was not able to find any figures on the population of African origin eligible to register.

<sup>179</sup> Constitution of Kenya Amendment Act No. 6 of 1985.

<sup>180</sup> See Ramnik Shah, “Britain and Kenya’s Citizenship Law: A Conflict of Laws?”, *Tolley’s Immigration & Nationality Law & Practice* 6, No. 4 (1992): 120–25; Ramnik Shah, “Kenya’s Citizenship Laws Revisited”, *Journal of Immigration Asylum and Nationality Law* 26, No. 3 (2012): 269–77.

<sup>181</sup> See footnote 108.

<sup>182</sup> Interview, Director of Citizenship, Department of Immigration, 12 August 2016.

Mozambican migrants to Kenya, and promised to consider other groups. Other groups, however, have yet to benefit from similar initiatives.

#### Descendants of pre-independence Mozambican migrants in Kwale County

There is a community of approximately 3,500 descendants of migrant workers recruited from Mozambique during the 1950s to work on sisal plantations in what is now Kwale County near Mombasa. These workers, mainly from the Makonde ethnic group, did not automatically become Kenyan under the transitional provisions on independence. Although most would have been eligible to register as citizens, they did not do so; whether because of the cost, because they expected to return to Mozambique, or because they did not hear of the requirement. They have not been able to obtain Kenyan identity documents. The Mozambican consulate in Mombasa has sought out this group to register them to vote in Mozambican elections, but many do not wish to hold Mozambican citizenship (or at least not at the cost of not being able to hold Kenyan citizenship).<sup>183</sup>

Following a report on their situation published by UNHCR in collaboration with national civil society groups in early 2015, the National Registration Bureau (NRB) led an investigation by a government task force, which recommended to the cabinet that they should be registered as Kenyan.<sup>184</sup> In October 2016, following a cabinet discussion and decision on this report, which coincided with a four-day protest march at the lack of any action in their case from the Makonde settlements near Mombasa to Nairobi, President Uhuru Kenyatta finally promised the community registration as Kenyan citizens.<sup>185</sup> The temporary registration provisions for stateless persons and long term residents that had recently expired had also just been extended for a further three years.<sup>186</sup> A notice was issued specifically exempting the Makonde from payment of registration fees;<sup>187</sup> authorised by a general amendment to the citizenship regulations.<sup>188</sup> Individual registration of the Makonde commenced in November.<sup>189</sup> Ultimately, 1,492 people (adults and children) were given certificates of nationality, among whom 1,176 adults were issued Kenyan national identity cards.<sup>190</sup> Those rejected for registration included individuals who had Mozambican voter registration documents; during this process a number of previously issued ID cards acquired had to be “deactivated” to enable new ones to be issued following the formal registration process.<sup>191</sup> Those Makonde married to Kenyans were told to apply for registration as the spouse of a national, requiring them to undergo a more onerous application process without the exemption from registration fees.<sup>192</sup>

<sup>183</sup> “Kenya: Makondes Say Mozambique Blocking Their Bid to Be Recognised As Kenyans”, *Daily Nation*, 20 April 2016; Tobias Chanji, “Mozambicans living in Kenya for 60 years refuse envoys call to vote in Mozambique’s election”, *The Standard* (Nairobi), 30 July 2014.

<sup>184</sup> *Integrated, But Undocumented: A study into the nationality status of the Makonde community in Kenya*, UNHCR Representation in Kenya, in partnership with Haki Centre, Kenya Human Rights Commission, Haki Africa, Open Society Initiative for Eastern Africa, February 2015. Interview with NRB Director, June 2015.

<sup>185</sup> Wanja Lisa Munaita, “Kenya’s stateless Makonde people finally obtain papers”, UNHCR, 27 October 2016; Diana Gichengo, “The Arduous Journey of the Makonde to Kenyan Citizenship”, KHRC, 9 November 2016, available at Citizenship Rights Africa website: <http://citizenshiprightsafrika.org/the-arduous-journey-of-the-makonde-to-kenyan-citizenship/>.

<sup>186</sup> Kenya Citizenship and Immigration Act: Legal Notice No. 178, Extension of Time, 7 October 2016.

<sup>187</sup> Gazette Notice No. 8768: The Births and Deaths Registration Act, Declaration, 28 October 2016.

<sup>188</sup> Kenya Citizenship and Immigration (Amendment) Regulations 2016 (published 30 December 2016), amending Regulation 10 of the Kenya Citizenship and Immigration Regulations, 2012.

<sup>189</sup> Wanja Munaita, “Mission to coordinate, monitor and support the registration of the Makonde of Kenya in Kwale and Kilifi Counties”, UNHCR, November 2016.

<sup>190</sup> Email communication from the Director, National Registration Bureau, June 2018.

<sup>191</sup> Input at Arusha workshop, 20 March 2017.

<sup>192</sup> According to reports from those present at the registration, November 2016.



### Pemba and Comorian migrants from Zanzibar

The island of Pemba, the northern island of the Zanzibar archipelago, lies very close to the Kenyan coast. During the period of the Omani and then Zanzibari Sultanate, the coastal strip was also ruled from Zanzibar, a status that retained some recognition in Kenya during the British colonial period, by the separate status of the coastal strip as a protectorate rather than a colony. There are extensive cultural links and continuing intermarriage between the islands and the coastal region. Although there are cases where the Tanzanian citizenship of Zanzibaris resident on Pemba island has been challenged on the ground that the person is Kenyan, it is generally easier to confirm Tanzanian citizenship because of the legal history of nationality in Zanzibar. Tanzania does not allow dual citizenship; however, as noted above, the Tanzanian immigration authorities take the common-sense position that a person with a theoretical right to claim another nationality (for example through one parent) but who has never lived in the other country or made any attempt to claim identity documents there, is not because of that unexercised right to be denied Tanzanian citizenship.

However, for those born and resident in Kenya with family connections to Pemba, it can be very difficult to obtain Kenyan ID documents if they have a theoretical right to Tanzanian citizenship, even if they have never claimed documents from Tanzania and also have a right to Kenyan citizenship, and even though Kenya has permitted dual citizenship since 2010.<sup>193</sup> Pemba is known to be a centre of opposition activity to the Tanzanian government, which creates additional sensitivities over the status of this group.

There is also a community of Comorian descent in Kenya dating back to the early 20<sup>th</sup> century, mainly drawn from the Comorian community in Zanzibar. As in Zanzibar (see below, under heading on Tanzania), their status under British rule in Kenya as “native” or not was somewhat ambiguous. Immigration to Kenya of people of Comorian descent increased after the Second World War and again after the Zanzibar revolution of 1964. During the period in which the first incarnation of the East African Community was in existence (1967-1977), this process was facilitated by free movement between Tanzania, Uganda and Kenya. Many of these Comorians have integrated into the Kenyan Swahili population, where they face the same difficulties in obtaining ID cards as many others in the coastal region where additional identity checks are applied (see box pp. 32–33). But others, especially those resident in the inland regions, may also be at risk of explicit denial of citizenship by the Kenyan immigration authorities, and equally unable to claim Tanzanian papers.<sup>194</sup>

### Descendants of Zimbabwean missionaries

In Kiambaa, on the outskirts of Nairobi, there is a community of people of Zimbabwean and other Southern African descent, mainly Shona-speakers but fully integrated into the local community. They are followers of the Gospel of God Church founded in 1932 by a Zimbabwean, Father Johane Masowe, born in what was then Southern Rhodesia in 1914. Missionaries expanded the church to other parts of Africa, and a branch was established in Kenya during the 1960s, registered by the government of President Kenyatta, and allowed to preach and recruit.

Even if some members of this community were present in Kenya in 1963, they would not have automatically become Kenyan on independence; however, most arrived after the independence constitution was already in force. The majority of those who came to Kenya—who themselves had passports issued by the British colony of Southern Rhodesia—have now died, but their children and grandchildren born in Kenya are still living in Kiambaa and elsewhere across Kenya, numbering around four thousand in all. Members of the community were issued different forms of permit at different times, but “alien” cards issued under President Moi expired in 2007 and have not been replaced.

This community is not recognised as Kenyan, and its members face severe problems because of the lack of identity cards for adults. Although their children are admitted to the primary and secondary schools, without birth certificates and ID cards they are unable to progress to tertiary education, enter formal employment or

<sup>193</sup> Wanja Munaita and June Munala, “Identity and Articulations of Belonging: A Background Study on the Pemba of Coastal Kenya”, UNHCR, 6 April 2016.

<sup>194</sup> Gillian Marie Shepherd, *The Comorians in Kenya: The Establishment and Loss of an Economic Niche*, PhD Dissertation, London School of Economics, 1982.

access finance for their own businesses (many are self-employed carpenters). They approached the Minister for Immigration and Registration of Persons in 2009 in the hope that their situation could be regularised, submitting lists of names of those affected. They were not provided a route to obtain Kenyan citizenship, although in principle they would have been eligible to naturalise. The Zimbabwean High Commission in Kenya has also refused applications by the second-generation descendants of the original migrants for Zimbabwean papers: under Southern Rhodesian and then Zimbabwean law citizenship did not transmit to the second generation born outside of the country.<sup>195</sup> In any event, those living in Kenya no longer have active connections in Zimbabwe, nor have they ever visited that country: without documents they are unable to travel outside of Kenya. Although the harassment that they faced during the period of President Moi has ceased, they still face risk of arrest if they leave their neighbourhood, despite their perfect Swahili and Kikuyu language skills.<sup>196</sup>

#### Rwandans, Burundians and others

Scattered around Kenya there are smaller communities originating from other African countries that have struggled to obtain recognition of Kenyan citizenship despite very long residence and births in the country. Among them are people of Rwandan, Burundian, and Congolese descent. Following the successful campaign for the recognition of the Makonde, representatives of these groups also brought their situation to the media. In February 2017, descendants of an estimated 500 people who were brought from Rwanda to Kenya by the British colonial administration during the 1940s to work in tea plantations in Kericho raised their own claim to Kenyan citizenship with the Rwandan High Commissioner to Kenya.<sup>197</sup>

#### South Asians: Children of British Overseas Citizens and others

A small group of people at risk of statelessness are children born in Kenya whose parents are British overseas citizens (BOCs). The status of BOC was created by a major restructuring of British nationality law enacted in 1981.<sup>198</sup> It is a residual category with limited rights in the UK for people with a connection to a territory of the former British Empire who did not acquire the status of British citizen (with full rights in the UK) under the same legislation. It was estimated that around 1.5 million people were eligible to be BOCs in 1981. In East Africa, this category applied particularly to people of Asian origin resident in Kenya in 1963 who had been citizens of the UK and colonies (a category abolished in 1981) and who had not acquired Kenyan citizenship by registration during the two year period permitted after independence. The status of BOC is a closed category: a child does not inherit BOC status from a parent, although in very limited circumstances there may be a right for the child to register as a BOC and subsequently as a British citizen, if that person can prove that they hold no other citizenship. Few have done so—probably under 5,000 globally.<sup>199</sup>

The Kenyan High Court confirmed in 2014, in the case of Kulraj Singh Bhangra, that the child of Kenyan Asian parents who acquired Kenyan citizenship after his birth, but while he was still a minor, did not acquire Kenyan citizenship because of their naturalisation; however, it ordered the Kenyan government to deal expeditiously

<sup>195</sup> Although this restriction was removed with the adoption of the 2013 Constitution, transmission of citizenship is still subject to registration of the birth of a child with the Zimbabwean authorities: Constitution of Zimbabwe, 2013, Article 37. The Citizenship of Zimbabwe Act (Cap. 4:01, No. 23 of 1984) was last amended in 2003, and has yet to reflect these changes, still providing for transmission of citizenship by descent to be limited to the first generation born outside the country (Section 6).

<sup>196</sup> Interviews, Kiambaa, June 2016. See also Joseph Ngunjiri, “Nowhere to call home in promised land”, *The Nation* (Nairobi), 13 June 2009; “After 50 years, stateless Shona still trapped in Kenya’s shadows”, Thomson Reuters Foundation, 29 May 2015.

<sup>197</sup> “Makonde celebrate citizenship while other stateless people cry foul”, Kenya News Agency, 3 February 2017; David Ohito, “Rwandans who have lived in Kenya for 70 years appeal for naturalisation”, *The Standard* (Nairobi), 16 February 2017.

<sup>198</sup> British Nationality Act, 1981 (entry into force 1983).

<sup>199</sup> British nationality rules are notoriously complex, and this is a simplification. See *Fransman’s British Nationality Law*, section 11.1.3, and Immigration Law Practitioners Association, *Submission to Lord Goldsmith for the Citizenship Review: The Different Categories of British Nationality*, 21 December 2007. The refusal to offer East African Asians full rights as British citizens was litigated before the European Commission of Human Rights: for an account of this case, see Anthony Lester, “Thirty Years On: The East African Case revisited”, *Public Law* (2002), Spring Issue, pp. 52-72.

with the petitioner's own application for Kenyan citizenship by registration.<sup>200</sup> In July 2016, the High Court threatened to hold the Immigration Service in contempt of court for failure to comply with this order: Bhangra's application for citizenship had by then been outstanding for 12 years, and no update was available on this case at the time of publication.<sup>201</sup>

In principle, both the BOCs and their children should be able to register as Kenyan citizens. Those who themselves hold BOC status are eligible under the normal provisions of Kenyan law for registration as citizens on the basis of long term residence. Both the parents and the children would in addition be eligible under the special registration provisions of the 2011 Citizenship and Immigration Control Act for migrants and stateless persons resident in Kenya since 1963. In practice, accessing these special procedures has been next to impossible, without major advocacy efforts: as noted above, only seven people had been registered under the special procedures for "migrants" as of mid-2016, with no updated figures available at the time of publication.

There are others who never obtained confirmation of BOC status, yet who also did not register as Kenyan during the post-independence period. The Asian community in Kenya does not get much political sympathy, being stereotypically regarded as wealthy and exploitative, lacking real loyalty to Kenya and holding onto citizenship documents from India or Britain—though some Kenyan Asians are stateless and poor, poverty being both a consequence and a cause of statelessness.<sup>202</sup> Most have no connection to any other country that would entitle them to citizenship there, and Kenya is their home: indeed, in 2017 President Kenyatta issued a "Presidential Proclamation" that Kenyans of Asian Heritage were recognised as Kenya's "44<sup>th</sup> tribe".<sup>203</sup>

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<sup>200</sup> *Kulraj Singh Bhangra v Director General, Kenya Citizens and Foreign Nationals Management Service*, High Court of Nairobi, Petition No. 137, 5 December 2014.

<sup>201</sup> Abiud Ochieng, "'Stateless' man to be granted Kenyan citizenship", *The Nation* (Nairobi), 17 July 2016.

<sup>202</sup> Some may have a theoretical right to apply for citizenship in the UK. This is extremely difficult to access. It also requires the person to obtain proof that they do not have Kenyan citizenship; which, given that for most people Kenyan citizenship is what they seek, is likely to be in parallel with an application to obtain registration as a Kenyan citizen.

<sup>203</sup> Kenya: Presidential Proclamation: In the Matter of the Petitions by the Asian Community for Formal Recognition as a Tribe in Kenya, Gazette Notice No. 7245, Kenya Gazette, Vol. CXIX—No. 102, 21 July 2017. Kenya is traditionally regarded as having 42 tribes, based on census categories employed in the colonial period (see Samantha Balaton-Chrimes, "Counting as Citizens: Recognition of the Nubians in the 2009 Kenyan Census", *Ethnopolitics*, Vol. 10, No. 2, 2011, pp. 205-218); the Makonde were informally stated to be the 43<sup>rd</sup> tribe at the time of their registration. It is not clear what legal status the Presidential Proclamation has: see Zarina Patel and Jill Ghai, "A tribe, a nation, a people – or just Kenyans?" *The Star* (Nairobi), 14 August 2017.

## Kenyan Asians at risk of statelessness

### The Bansal family<sup>204</sup>

Gurpreet Bansal was born and lives in Kitale in Trans Nzoia County in Kenya. Bansal is the child of British Overseas Citizens. He and his brother are stateless. He contacted the Kenya Human Rights Commission (the NGO, not the constitutional body) in August 2015. His email read:

*Subject: stateless*

*Dear sir, my parents are British citizens but have lawfully been in Kenya their whole life, I was born in Kenya and I've studied here, I am a commercial pilot, in high distress as I am stateless, the British have refused to issue me my rights because I was born in Kenya and my parents cannot transfer their citizenship to me and at the same time the Kenyan Immigration Department has denied to give me my rights, I cannot do the basic stuff in life, I am in high distress I am unable to work, to better myself. What do you suggest me to do? I have a birth certificate and a travel document, how can I attain my citizenship? Kindly advice, as I don't know what to do anymore.*

Gurpreet Bansal's father had applied for Kenyan citizenship under the special procedures for "migrants" provided by the Citizenship and Immigration Control Act 2011, but no response had been forthcoming.

KHRC helped Bansal to advocate for a resolution to his case, including presenting the impact of statelessness on his family in October 2015 before Members of Parliament, the Senate Committee on Security and Foreign Affairs and officials from the Directorate of Immigration. He also took part in talks on youth and statelessness organized by the UNHCR in November 2015. His father applied for a third time under the special procedures of the 2011 Act, after two earlier applications had been misplaced. As a result of this pressure, and the advocacy of MPs, in June 2016 Bansal's father Kuldip Bansal was registered as a Kenyan citizen, and two weeks later Gurpreet and his brother were also registered as citizens and issued with national identity cards.

In his own words "I feel reborn and now life is very meaningful".

### The Shah family<sup>205</sup>

Kamlesh Shah was born in 1949 in Kenya to parents who had moved there from India in 1941. His birth was not registered, and his father died in 1959, before independence. His mother died in 1968, but she did not apply for registration as a Kenyan citizen after independence, largely due to the cost of the application process; he was himself not yet an adult at that time, and so not able to apply in his own name. Kamlesh Shah has never held any papers, and has worked as a labourer without formal employment all his life. He is married with two sons, born in 1986 and 1999; only the second son's birth was registered. In May 2013 the family applied to register as Kenyan citizens under the temporary procedures. They received an acknowledgement of the application, as of mid-2016, but no further information about their case. No update was available at the time of publication.

Narinder Shah, the older of the two sons, now 30, had existed without a Kenyan national ID for 12 years: "Without documents you can't do anything, just move your arms and legs. It is only because of support from the Hindu community that we are surviving".

<sup>204</sup> With thanks to the Kenya Human Rights Commission.

<sup>205</sup> Interview, Mombasa, 7 June 2016. Names have been changed.

### Somali Kenyans and Somali refugees

The group perhaps at most risk of statelessness in Kenya today are those of Somali ethnicity; though it is sometimes difficult to draw a clear line between the generalised discrimination faced by Somali Kenyans and a specific risk of statelessness. The situation of Somali Kenyans is greatly complicated by the presence of a very large Somali refugee population in the country, and by the security risks created by the Al-Shabaab militant Islamist group based in Somalia.

Many of the Somali community in Kenya belong to communities who have always lived in the territory of what is now Kenya. An international border was drawn through their territory by the British and Italians. There is also a community of Isahakia (Isaq) Somalis originating from Somaliland (mainly living in Isiolo, but some also in Naivasha and elsewhere across the country), who are recognised as Kenyan. They were British protected persons and thus enjoyed a different status from other Somali immigrants during the colonial period; most would have automatically become Kenyan under the transitional provisions at independence.<sup>206</sup> Nonetheless, some of this group have faced difficulties in obtaining recognition as citizens.<sup>207</sup>

Finally, there is a large refugee population resident in Kenya that has fled Somalia at different times since the collapse of the Somali state in the early 1990s. Some have now lived in Kenya for 25 years; others are more recent arrivals; many have been born in Kenya and never visited Somalia. This population, estimated to number more than 526,932 people as at June 2018,<sup>208</sup> mainly lives in the Dadaab camp in Garissa County in north-east Kenya, but also in the Eastleigh neighbourhood of Nairobi and other areas.

The former North Eastern Province of Kenya has long been a zone of insecurity, living under a state of emergency for several decades since soon after independence. In 1989 (prior to the large influx of refugees), the Office of the President ordered a comprehensive screening process for all Somali-Kenyans. The screening process took place before panels of elders who questioned applicants on their family history, lineage, and knowledge of Kenya. Those successful were issued with pink identity booklets, to be carried along with the regular Kenyan identity card. The Task Force submitted to the registrar a list of persons whose registration records were cancelled, detained and deported.<sup>209</sup>

Many whose Kenyan citizenship was not in doubt had their documents confiscated and not returned as a result of this screening. These included several dozen members of the Galje'el Somali community resident in the Tana River area for some decades, now multiplied by family increase to a group of several hundred who are unable to obtain Kenyan national identity cards.<sup>210</sup> In a constitutional petition heard in 2013, the High Court ordered that, given that the state had not contested that the applicants were citizens, they had a right to national identity cards.<sup>211</sup> Although the National Registration Bureau issued cards to the two named plaintiffs in the case in accordance with the court order, as of June 2016 no further action had been taken to issue the others with documents.<sup>212</sup> In 2017, the High Court in Mombasa found in another petition brought on behalf of the Galje'el that the plaintiffs' right to fair administrative action under Article 47 of the

<sup>206</sup> E.R. Turton, "The Isaq Somali diaspora and poll-tax agitation in Kenya, 1936–41" *African Affairs*, Vol. 73, No. 292, 1974, pp. 325–346. See also Antony Gitonga, "One hundred years of solitude and sufferance", *The Standard* (Nairobi), 25 August 2010.

<sup>207</sup> See "Government to recognize the Isahakia community as Kenyans", K24 TV, 29 October 2016.

<sup>208</sup> Somalia Situation Operational Portal, UNHCR, available at: <https://data2.unhcr.org/en/situations/horn/location/178>.

<sup>209</sup> See generally, Human Rights Watch, *Screening of Ethnic Somalis: The Cruel Consequences of Kenya's Passbook System*, 5 September 1990; Emma Lochery, "Rendering difference visible: The Kenyan state and its Somali citizens", *African Affairs*, Vol. 111, No. 445, 2012, pp. 615–639.

<sup>210</sup> *Banditry and the Politics of Citizenship: The Case of the Galje'el of Tana River*, Muslims for Human Rights (MUHURI), Mombasa, 1999; TJRC Report, Vol. IIC, paragraphs 66–70.

<sup>211</sup> *Hersi Hassan Gutale & Another v. Attorney General & Another*, High Court at Nairobi (Nairobi Law Courts) Constitutional Petition 50 of 2011, 21 January 2013. A court challenge under the former constitution had been rejected: *Hersi Hassan Gulate and Abdullahi Mohammed Ahmed v Principal Registrar of Persons & Attorney General*, Nairobi HC Misc. Application No. 774 of 2004.

<sup>212</sup> Interviews, Tana River, June 2016.

constitution had been violated; the order given was for the Ministry of Immigration and NRB to consider fresh applications.<sup>213</sup>

There have been regular calls for Somalis staying illegally in Kenya (that is, without refugee registration) to be expelled; Somali Kenyans have generally been caught up in these heightened security measures.<sup>214</sup> The calls for action against Somali immigrants intensified following the 1998 bombing of the US embassy in Nairobi and subsequent terrorist incidents. In 2013, following the Westgate shopping mall terrorist attack, the government declared its intention to close the Dadaab refugee camp, alleged to be a breeding ground for recruitment to Al Shabaab.<sup>215</sup> In November 2013, Kenya, Somalia and UNHCR signed a tripartite agreement for the return of refugees to Somalia; though the agreement stressed that repatriation should be voluntary, there was no matching provision for any to have permanent settlement in Kenya.<sup>216</sup> The Refugees Act was amended to restrict the “permitted number of refugees and asylum seekers in Kenya” to 150,000 people.<sup>217</sup> In February 2017, the High Court ruled that the decision to close the camp was unconstitutional.<sup>218</sup>

The situation of the Somali refugees is difficult to resolve, and highly politically sensitive in Kenya, given the large numbers involved and the ongoing instability in Somalia. In reality, most are not likely to “return” voluntarily within any plausible timeframe. In recognition of this situation, in June 2016 opposition leader Raila Odinga proposed granting long-term Somali refugees citizenship.<sup>219</sup>

At least 40,500 Somali Kenyans living within 50 kilometres of the Dadaab camp are believed to hold refugee ration cards, something that has smoothed relationships between the refugees and the host communities, but increases the confusion over who is a Kenyan citizen.<sup>220</sup> Local authorities—largely Somali-Kenyan—put the number of Kenyans with refugee registration at up to 100,000.<sup>221</sup> Those adults who themselves have Kenyan identity cards and also obtained refugee ration cards are under less threat from the planned closure of Dadaab. However, their children are finding, as they turn 18 and are required to obtain a national identity card, that they cannot do so because, on producing one of their parents’ identity card as required, a check is carried out and the double registration is discovered. Therefore they have been denied Kenyan documents, including late registration of birth.<sup>222</sup> The NRB led a government task force investigation into this problem, which recommended the recognition as Kenyan of those with double registration.<sup>223</sup> In June 2016, a process of sorting out the Kenyan citizens from the refugees was initiated, potentially requiring a presidential

<sup>213</sup> *Muslims for Human Rights (Muhuri) on behalf of 40 others v Minister for Immigration & 5 others*, Constitutional Petition No. 50 of 2011, Judgment of 17 October 2017.

<sup>214</sup> See, among many other reports, “Criminal Reprisals: Kenyan Police and Military Abuses against Ethnic Somalis”, Human Rights Watch, 4 May 2012; “‘You Are All Terrorists’: Kenyan Police Abuse of Refugees in Nairobi”, Human Rights Watch, 29 May 2013; “Kenya: Mass Deportation of Somalis, 359 Deported Without Access to Lawyers, Courts, UN Refugee Agency”, Human Rights Watch 23 May 2014; “Kenya: Somalis scapegoated in counter-terror crackdown”, Amnesty International, 27 May 2014.

<sup>215</sup> See Communiqué of the AU Peace and Security Council 590<sup>th</sup> meeting, 14 April 2016, PSC/PR/COMM.(DXC).

<sup>216</sup> Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees, governing the voluntary repatriation of Somali refugees living in Kenya, 2013.

<sup>217</sup> The Security Laws (Amendment) Act, 2014, Sections 45-48, amending Act No. 13 of 2006.

<sup>218</sup> *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.

<sup>219</sup> “Give Daadab refugees Kenyan citizenship, Raila tells gov’t”, *The Citizen* (Nairobi), 5 June 2016.

<sup>220</sup> *In Search of Protection and Livelihoods: Socio-economic and Environmental Impacts of Dadaab Refugee Camps on Host Communities*, Republic of Kenya, Royal Danish Embassy, Royal Norwegian Embassy, September 2010.

<sup>221</sup> Stephen Astariko, “100,000 residents in Dadaab refugee database ask for IDs”, *The Star* (Nairobi), 18 February 2016; see also Joshua Masinde, “As the world’s largest refugee camp closes, some Kenyans struggle to prove they belong in Kenya”, *Quartz Africa*, 27 June 2016.

<sup>222</sup> Interviews, Nairobi, June 2016.

<sup>223</sup> Interview, Director of NRB, June 2016. See also, “Kenya: Government to ensure youths appearing as refugees get IDs”, *Hivisasa*, 17 December 2015.

amnesty if documents had been fraudulently acquired.<sup>224</sup> Nonetheless, the risk must remain of some remaining without recognition of Kenyan citizenship, given the general discrimination faced by Somali Kenyans.

#### Descendants of Nubians settled in Kenya before independence

Among those with reported difficulties in obtaining documents recognising their Kenyan citizenship are members of the Kenyan Nubian community.<sup>225</sup> The Nubians were conscripted into the British army from what is now Sudan, at the time administered jointly by Britain and Egypt. They became known as the King's African Rifles, or as *askaris* (the Arabic/Swahili word for soldier or guard), during the British expeditions of colonisation in East Africa and in both world wars. When they were demobilized in Kenya they were not given any meaningful compensation or benefits, although they were allocated small plots of land for farming in Kibera, near—now part of—Nairobi. Representatives of the Nubian community have sought to litigate their case before the Kenyan courts, resorting to the African continental human rights institutions when that was unsuccessful: both the African Committee of Experts on the Rights and Welfare of the Child and the African Commission on Human and Peoples' Rights have found against Kenya.<sup>226</sup>

The campaign for Nubian citizenship has somewhat eased the situation for the Nubian community in terms of access to identification documents. It is not possible to say that as a group they are stateless or without recognition of Kenyan citizenship, since most do in fact have identity cards. However, Nubians are still subject to additional vetting requirements, such as requiring parents to provide fingerprints or to escort their adult children when applying for identity cards and passports, and some may remain stateless.<sup>227</sup>

## Rwanda

Rwanda's 2008 nationality law provides the most complete protection against statelessness among all the Partner States of the East African Community. The law provides that both a child of unknown parents and a child born in Rwanda who cannot acquire the nationality of his or her parents shall be presumed to be Rwandan (Article 9); and it specifically provides for stateless persons who marry a Rwandan national to be able to acquire nationality (Article 11), as well as stateless children adopted by a Rwandan (Article 12). In a provision introduced in the 2004 nationality code, children born in Rwanda of foreign parents have been able to apply for nationality on majority (Article 9). There are procedures in place to ensure that children of

<sup>224</sup> "Joint Communiqué: Ministerial Tripartite Commission for the Voluntary Repatriation of Somali Refugees from Kenya to Somalia", 25 June 2016; "UN starts sorting false from genuine refugees in Dadaab", *The Nation* (Nairobi), 6 July 2016.

<sup>225</sup> The Kenyan Nubian situation has been quite extensively documented. See Maurice Odhiambo Makoloo, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, Minority Rights Group International / CEMIRIDE, 2005; Douglas H. Johnson, "Tribe or nationality? The Sudanese diaspora and the Kenyan Nubis", *Journal of Eastern African Studies*, Vol. 3, No. 1, 2009, pp. 112-131; Adam Hussein Adam, "Kenyan Nubians: standing up to statelessness", *Forced Migration Review*, Vol. 32, 2009 (Statelessness); and also the articles by Samantha Balaton-Chrimes: "The Nubians of Kenya and the emancipatory potential of collective recognition", *Australasian Review of African Studies*, Vol. 32, No. 1, 2011, pp. 12-31; "Counting as Citizens: Recognition of the Nubians in the 2009 Kenyan census", *Ethnopolitics* Vol. 10, No. 2, 2011, pp. 205-218; "Indigeneity and Kenya's Nubians: seeking equality in difference or sameness?" *Journal of Modern African Studies*, Vol. 51, No. 2, 2013, pp. 331-354; "Statelessness, identity cards and citizenship as status in the case of the Nubians of Kenya", *Citizenship Studies*, Vol. 18, No. 1, 2014, pp. 15-28.

<sup>226</sup> In 2003, representatives of the Nubian community brought a case to the Kenyan courts seeking confirmation of their citizenship and the right to be issued with relevant official documents (Nairobi High Court, civil case no. 256 of 2003). After more than three years of blocked progress at national level on procedural grounds, the Nubians took their case to the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The African Committee of Experts ruled on Kenyan Nubian Children's Case in 2011 (see footnote 15). The African Commission found numerous violations of the African Charter on Human and Peoples' Rights, including Article 5 on recognition of legal status, in its decision on Communication 317/06, ACHPR: *The Nubian Community v. Kenya*, adopted in February 2015.

<sup>227</sup> Ben Oppenheim and Brenna Marea Powell, "Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya", Open Society Justice Initiative Policy Paper, October 2015; Balaton-Chrimes, "Statelessness, identity cards and citizenship".

unknown parents are entered in the civil registration system and can acquire national identity cards on majority.<sup>228</sup>

Deprivation of citizenship is not permitted from a person who was attributed Rwandan nationality at birth (nationality of origin) (Article 19). In the case a naturalised person, an individual can be deprived of Rwandan nationality if it was acquired fraudulently even if this results in statelessness (Article 19); while this provision nevertheless complies with the requirements of the 1961 Convention on the Reduction of Statelessness, the permitted extension of deprivation to the individual's spouse and children does not (Article 21).

The rules on population registration and identification before the 1994 genocide, with their recording of ethnic identity, played a notorious role in facilitating the identification of those to be killed.<sup>229</sup> The current practices in relation to identification avoid such categorisation. In line with the civil law tradition, disputes over citizenship and civil registration in Rwanda are resolved by the courts, with procedures established by the law itself.

In 2007, Rwanda conducted a mass registration process for a new population register and identity card for all residents over 16 years in age. It is claimed that 9.2 million people were registered with biometric details in one weekend, and processed within 45 days.<sup>230</sup> During this period of mass registration it was relatively easy to gain access to registration as a citizen; those who are over the age of compulsory registration and seek to gain an ID card are now finding it more difficult to do so. There is a need to provide reasons why the person was not registered in the initial process; and for children whose parents were refugees and remain, or have returned to live, outside Rwanda it can be difficult and costly to provide the documentary and witness evidence needed to be recognised as Rwandan.<sup>231</sup> Recovery of Rwandan nationality, which was very easy in the post-genocide period, has become more controlled since 2008, when the current nationality law was adopted.<sup>232</sup>

Rwanda, like Burundi, is a state with a relatively homogenous and culturally unified population, compared to its neighbours. Rwanda is not known to host stateless communities similar to the non-nationals of Omani and Swahili descent in Burundi; the major population at risk of statelessness are the refugees from Kinyarwanda-speaking communities in DRC. There are also, however, likely to be some people for whom their status as Rwandan or Burundian nationals is in issue, given the cultural similarities between the two countries, and the refugee and migrant flows between them. In addition, the strong economic growth in Kigali over the past decade has drawn migrants from other countries to the city to work; and while their children born in Rwanda should have the right to Rwandan nationality if they cannot obtain the nationality of their parents, the implementation of this protection may require further investigation.

<sup>228</sup> ID4Africa conference site visit, 25 May 2016.

<sup>229</sup> Timothy Longman, "Identity cards, ethnic self-perception and genocide in Rwanda", in Jane Caplan and John Torpey (eds.) *Documenting Individual Identity: The Development of State Practices in the Modern World*, Princeton University Press, 2001.

<sup>230</sup> Presentation, NIDA, ID4Africa conference site visit, 25 May 2016; see also Atick, *The Identity Ecosystem of Rwanda*, p. 18.

<sup>231</sup> Round table discussion, Legal Aid Forum, 26 July 2016. Presidential Order No. 21/01 of 27 May 2009, Article 3, provides for proof of Rwandan parentage to be by birth certificate and Rwandan identity card or passport of the parent, or if they are not available by inquiry of the Director General for Immigration and Emigration. As noted under the heading on birth registration, however, the 2008 nationality law states that a birth certificate alone can serve as proof of Rwandan nationality.

<sup>232</sup> The Rwandan constitution of 2003 provided that "Rwandans or their descendants who were deprived of their nationality between 1st November 1959 and 31 December 1994 by reason of acquisition of foreign nationalities automatically reacquire Rwandan nationality if they return to settle in Rwanda" (Article 7). The provision was included in the 2004 nationality code, which also stated that "All persons originating from Rwanda and their descendants are upon their request from the registrar of civil status entitled to Rwandan nationality" (Article 26). The constitutional additional provision was included in the 2008 nationality code, but the additional provision of the 2004 code was amended to make the procedure for people of Rwandan origin more difficult and require a presidential order. The provision for recovery of nationality by those who acquired another from 1959 to 1994 is not included in the latest (2015) revision of the constitution.



## Congolese refugees

Tens of thousands of refugees from the Democratic Republic of Congo still live in Rwanda after fleeing the violence that erupted in North and South Kivu provinces, especially in 1995-97, in the aftermath of the Rwandan genocide; the outflow of refugees and ethnic militia responsible for the killings; civil conflict in Congo, and subsequent military interventions by the Rwandan government into Congo. These refugees are Kinyarwanda speakers, culturally similar to the population in Rwanda itself, and one of the central reasons for their flight from Congo is the denial of their Congolese nationality and rights in that country. Although there have at different times been efforts to repatriate this group to Congo, especially following the 2008 military agreement between Presidents Kagame of Rwanda and Kabila of Congo, these efforts have been strongly resisted on the ground in the Kivus. A tripartite agreement signed in early 2010 between UNHCR and the governments of DRC and Rwanda did not result in a single repatriation to Congo from Rwanda, thanks to ongoing tensions about the identification of those who should be able to return.<sup>233</sup>

These refugees have not been naturalised in Rwanda and their children born in Rwanda are not regarded as Rwandan citizens. These refugees would under the nationality law have the right to apply for naturalisation as Rwandan under the normal procedures for any long-term resident. However, the specific provisions in the Rwandan constitution and nationality law of 2008 that “Any person with Rwandan origin and his or her descendant shall have the right to acquire the Rwandan nationality upon request thereof” requires evidence of genealogical connections and historical residence in Rwanda itself through witness testimony and other means; a general connection to Rwandan culture is not sufficient.<sup>234</sup> In principle, refugee children born in Rwanda might also benefit from the provisions in the nationality code for “otherwise stateless” children to acquire its nationality based on birth in Rwanda. Some of those who are registered as refugees have also acquired Rwandan identity cards, and the government has stated that it will revoke identity documents in these circumstances.<sup>235</sup> However, there are also asylum seekers in the camps who have never been registered as refugees because their status as Rwandan or Congolese has not been determined.

The refugees themselves mainly wish to return to Congo, subject of course to the security situation improving, but in the Kivus their return is viewed with great suspicion.<sup>236</sup> Reforms to the Congolese nationality law adopted in 2004, as part of the peace process aimed at bringing an end to the civil war, still found nationality on membership of an ethnic group established in Congo at independence, leaving ongoing room for disagreement as to which groups are indigenous Congolese.<sup>237</sup>

Resolution of the stateless limbo of these refugees may depend on resolution of the question of access to citizenship in DRC itself: the framework for this to happen has been agreed by regional leaders through the structures of the International Conference on the Great Lakes Region (ICGLR), but the political will has been lacking.<sup>238</sup>

<sup>233</sup> International Crisis Group, *Five Priorities for a Peacebuilding Strategy*, Africa Report No. 150, 11 May 2009; *Eastern Congo: Why Stabilisation Failed*, Africa Briefing No. 91, 4 October 2012.

<sup>234</sup> Article 22, Organic Law No. 30 of 2008; Article 18, Presidential Order No. 21/01 of 27 May 2009 establishing the procedure for the application and acquisition of Rwandan nationality. Interviews with faculty members School of Law, University of Rwanda, Legal Aid Forum, Kigali, July 2016.

<sup>235</sup> Daniel S. Ntwari, “Kigali to crackdown on refugees with national identification”, *The East African*, 26 March 2016.

<sup>236</sup> International Refugee Rights Initiative, *Shadows of Return: The Dilemmas of Congolese Refugees in Rwanda*, July 2011.

<sup>237</sup> Congolese nationality is attributed to every person who “belongs to the ethnic groups and nationalities of which the individuals and territory formed what became Congo at independence”: “*Est Congolais d’origine toute personne appartenant aux groupes ethniques et nationalités dont les personnes et le territoire constituaient ce qui est devenu le Congo (présentement la République Démocratique du Congo) à l’indépendance.*” *Loi No. 04/024 du 12 novembre 2004 relative à la nationalité congolaise*, Article 6. The law moved the relevant cut-off date from 1884 to 1960 (the date of independence); other provisions do allow for those born in DRC to apply for nationality at majority, but no regulations have been adopted to allow these provisions to be implemented in practice.

<sup>238</sup> Information on the Pact on Security, Stability and Development in the Great Lakes Region and its protocols available at the website of the ICGLR Executive Secretariat: <http://www.icglr.org/>.

## South Sudan

South Sudan's nationality law is very broadly drafted: it attributes nationality at birth, wherever a person is born, to people who belong to the "indigenous ethnic communities" of South Sudan; those with a parent, grandparent *or* great-grandparent who was born in South Sudan,<sup>239</sup> and those whose ancestors have been resident in the territory since 1956. In principle most—though not all—of those habitually resident in South Sudan who desire to do so should be able to obtain recognition of South Sudanese nationality under this law; either by birth or, if resident for more than ten years, by naturalisation.

Nonetheless, the fundamentally ethnic definition of nationality in Section 8(1)(b) of the South Sudan Nationality Act creates difficulties in deciding which groups in fact form the "indigenous ethnic communities of South Sudan". Neither the Transitional Constitution of South Sudan nor the South Sudan Nationality Act provides a list of these groups (by contrast with Uganda), nor outlines the criteria to be deemed a member of one of those communities. This definition creates potential problems both for those of South Sudanese origin who have for many years or generations been resident in (north) Sudan, and for minority or cross-border ethnic groups who may not be commonly understood to be an ethnic community of South Sudan.

In practice, implementation of the nationality legislation has been slow and challenging. Even without the breakdown in the government from late 2013, the lack of an existing national civil registry, the history of forced displacement, and the lack of administrative infrastructure in many parts of this new country would create significant obstacles to the efficient implementation of nationality legislation. In practice, there are reports that certain vulnerable groups, including women without male relatives to represent them; orphaned children; returned refugees, and members of some ethnic groups, have faced difficulties accessing proof of citizenship when they have applied.<sup>240</sup>

Those applying for documents recognising South Sudanese nationality are required to show that they are members of one of the "indigenous ethnic communities" (unless they are of obviously "foreign" ancestry applying on one of the other grounds). Regulations adopted under the Nationality Law provide that "where documentary evidence is not available to support an application" witness testimony may be taken into account from a range of community or traditional leaders.<sup>241</sup> Applicants are tested on their ability to speak Juba Arabic; required to bring letters of support from traditional authorities, and judged according to their skin colour and facial characteristics. Members of ethnic groups from Equatoria, on the border with Uganda, such as the Acholi or Kakwa, find it more difficult to obtain South Sudanese documents, as well as those of mixed ethnicity and who look "Arab", and others who have lived outside South Sudan for many years.<sup>242</sup>

The very broad attribution of nationality under the law also creates problems for those resident outside the country who do not wish for South Sudanese nationality.<sup>243</sup> In (north) Sudan, it is already the case that people who are believed by the Sudanese authorities to fit the definition under the law of South Sudan are being deprived of Sudanese nationality, under legal amendments that prohibit dual nationality with South Sudan

<sup>239</sup> The New Sudan Nationality Act adopted by the SPLM/A in 2003, before the CPA was adopted and of no formal legal effect, provided a similar framework to the law of 2011, except that a person was stated to be a national if "he was or his parents, his grand *and* great grandparents were born in the New Sudan": the difference between the "and" and the "or" in the 2011 law (see footnote 13) in theory means a change from providing a *jus soli* attribution or requiring three prior generations born in the country, or just a single great-grandparent born there, a massively diluted level of connection.

<sup>240</sup> UNHCR, *A Study of Statelessness in South Sudan*, 2017.

<sup>241</sup> South Sudan Nationality Regulations, 2011, under heading "General Procedures for all Nationality and Naturalization Certificates: Inquiry and Standard of Proof".

<sup>242</sup> Interviews, Kampala, July 2016; *South Sudan Nationality: Commitment now avoids conflict later*, Refugees International, 29 May 2012; Ferenc Dávid Markó, "Negotiations and morality: the ethnicization of citizenship in post-secession South Sudan" *Journal of Eastern African Studies*, Vol. 9, No. 4, 2015, pp. 669–684; Ferenc Dávid Markó, "We Are Not a Failed State, We Make the Best Passports": South Sudan and Biometric Modernity, *African Studies Review* Vol. 59, No. 2, 2016, pp. 113–132.

<sup>243</sup> Bronwen Manby, *The Right to Nationality and the Secession of South Sudan: A Commentary on the Impact of the New Laws*, Open Society Foundations, 2012.

(but no other country). Many of those being deprived of Sudanese nationality consider themselves Sudanese and have little or no effective connections to South Sudan.<sup>244</sup> Others do see themselves as South Sudanese, but the South Sudanese representatives in Khartoum have not conducted effective outreach to reach all those potentially needing such documents.

#### Northerners and cross-border ethnic groups

UNHCR estimated that there were just over 80,000 people of northern origin living in South Sudan in 2011, at the time of state succession. Whereas traders and civil servants generally possessed Sudanese documentation, the larger percentage of this figure was made up of what were then internally displaced persons from conflict in Darfur (some of them resident for many years and others more recent arrivals), most of whom had no documents.<sup>245</sup> The Darfuris also face difficulties in obtaining documents in (north) Sudan, and given the poor relations between Sudan and South Sudan, those who are now refugees in South Sudan (and especially their children) are at risk of not being recognised as citizens of either state.

Some ethnic groups are not clearly from Sudan or South Sudan. For example, the Kresh, Kara, Yulu, Frogai and Bigna are all ethnic groups that exist on both sides of the border between South Darfur in Sudan and Western Bahr el Ghazal state in South Sudan, and many families have members living on both sides of the border. It remains unclear how such groups and individuals will be treated by South Sudan in the longer term, once administration is re-established.

#### Ngok Dinka of Abyei

The “Abyei Area” that straddles the border was supposed to have its own referendum on whether it would join Sudan or South Sudan. This never took place, because the parties were unable to agree on the criteria for determining who should vote in such a referendum. The Republic of Sudan asserts that the territory should remain under its jurisdiction. In principle the Ngok Dinka, whose traditional territory it is, therefore retain their Sudanese nationality. However, individual members of the community face the risk of being treated as belonging to one of the “indigenous ethnic communities of South Sudan”, since they are a subgroup of the Dinka, one of the dominant ethnic groups in South Sudan. They may thus have difficulties asserting their Sudanese nationality. At the same time, they do not have any territory to return to in South Sudan, and the South Sudanese government has stated that the Ngok Dinka are not South Sudanese.<sup>246</sup>

#### Mbororo (Falata) pastoralists

The Mbororo (also known as Falata) are a branch of the Fulani ethnic group found across West and Central Africa. They are largely nomadic pastoralists originating in West Africa whose migratory routes cross both Sudan and South Sudan, as well as Chad, Central African Republic, Democratic Republic of Congo and Cameroon. An Mbororo population has been established for a long time in Sudan, in both the northern and southern regions, many of them with ancestral roots in Nigeria: most arrived in Sudan in the early 20th century; others are more recent arrivals. Some settled to become agro-pastoralists; others practise long distance nomadic pastoralism.<sup>247</sup>

Members of these communities primarily resident in Sudan had, prior to the Comprehensive Peace Agreement of 2005 and the secession of South Sudan in 2011, already faced difficulties in obtaining recognition of Sudanese nationality. During the transitional period, the relationship between the Mbororo and settled populations in the South deteriorated, especially in Western Bahr el-Ghazal and in the Western

<sup>244</sup> *Nationality and Statelessness in Sudan following the Secession of South Sudan*, Human Rights Centre, University of Khartoum, Draft Report May 2016, on file with author.

<sup>245</sup> UNHCR, *Survey of Northerners at Risk of Statelessness Living in South Sudan*, December 2010-February 2011.

<sup>246</sup> “South Sudan government says people of Abyei are foreigners”, Sudan Tribune, 21 March 2016.

<sup>247</sup> Dereje Feyissa and Gunther Schlee, “Mbororo (Fulbe) Migrations from Sudan in to Ethiopia”, in Gunther Schlee, Elizabeth E. Watson, *Changing Identifications And Alliances In North-east Africa: Volume II: Sudan, Uganda, and the Ethiopia-Sudan Borderlands*, Berghahn Books, 2013.

Equatoria region neighbouring the Central African Republic, Democratic Republic of Congo and Uganda. The damage done by cattle to crops and access to water points are, as in the Sahel region, the main points of conflict; in South Sudan the “foreignness” of the Mbororo is emphasised by the fact that the great majority are Muslim, associated with the state from which the South has seceded.<sup>248</sup>

In 2007, Sudan People’s Liberation Movement (SPLM) leader and future President Salva Kiir threatened the Mbororo with expulsion from the South; some were resettled in Blue Nile State in Sudan, home to a longstanding Mbororo population, raising tensions in that region.<sup>249</sup> More recent comments from South Sudanese officials also indicate that the Mbororo are not regarded as South Sudanese.<sup>250</sup>

Some may be able to establish nationality and obtain papers in South Sudan, if they can show descent from a person resident in South Sudan in 1956; others may have sufficient evidence of connection to Sudan or another state to obtain recognition of nationality there. However, for many there is no state where they are accepted: the nomadic pastoralist lifestyle is fundamentally not accommodated by the fixed systems of nationality established by the modern state.

### IDPs in South Sudan

There are more than one and a half million internally displaced people in South Sudan, who are generally at some risk of statelessness, though the risk will vary according to circumstances. In 2016, the UN Special Rapporteur on internally displaced persons emphasised that:

Documentation for all South Sudanese, including for all internally displaced persons and South Sudanese residing in the Sudan, is essential to allow a process leading to a durable solution. The *issuance of national documentation is also a condition for the implementation of the Framework Agreement [between Sudan and South Sudan] on the Status of Nationals of the other State and Related Matters; the implementation matrix provides for accelerated forms of cooperation in providing nationals with documentation.*<sup>251</sup>

UNHCR and UNICEF are making efforts to increase birth registration in South Sudan, including among the displaced, as well as to register IDPs in general.<sup>252</sup> UNHCR since 2015 has also been implementing a project supporting the issuance of nationality certificates to people living in remote areas and to vulnerable IDPs, including in Juba, Bor and Wau, in collaboration with the Directorate of Nationality, Passports and Immigration.

## **Tanzania**

As in Kenya, the transitional provisions put in place at independence continue to have relevance today in Tanzania. In particular, the distinction between those who were automatically attributed citizenship on the independence of Tanganyika and those who were required to register or naturalise in order to acquire citizenship is still dominant in the understanding of citizenship for those on the mainland. The situation in Zanzibar is somewhat different, because of the much older legislative framework for citizenship, but the pre-independence rules still impact the interpretation of the laws currently in effect.

<sup>248</sup> Report on the migrations of Mbororo nomadic pastoralists by the factfinding mission dispatched to the Democratic Republic of Congo, the Central African Republic and Cameroon, pursuant to Decision PSC/PR/Comm(XCVII) of the 97th Meeting of the Peace and Security Council, Held on 25 October 2007, PSC/PR/2(CXIX).

<sup>249</sup> G. Sørnbø and A. Ahmed, *Sudan Divided: Continuing Conflict in a Contested State*, Springer, 2013.

<sup>250</sup> Louisa Lombard, “A Page From Khartoum’s Playbook”, *Latitude*, New York Times Blog, 20 February 2012, available at: [http://latitude.blogs.nytimes.com/2012/02/20/south-sudan-like-khartoum-oppresses-ethnic-minority/?\\_r=0](http://latitude.blogs.nytimes.com/2012/02/20/south-sudan-like-khartoum-oppresses-ethnic-minority/?_r=0); see also UNHCR, A Study of Statelessness in South Sudan, 2017, which quotes the State Director of the Directorate of Nationality, Passports and Immigration in Renk: “[Mbororo] or Falata, in general, are not ever allowed to submit their application for [nationality certificates] because they are not South Sudanese”.

<sup>251</sup> Report of the Special Rapporteur on the human rights of internally displaced persons - Mission to South Sudan, 16 June 2016, A/HRC/26/33/Add.3, paragraph 52.

<sup>252</sup> See for example, *South Sudan Situation: UNHCR Regional Update 78*, 17–30 October 2015.

The identification of the groups at risk of statelessness in Tanzania is greatly complicated by the conflict between the letter of the law and the interpretation of the law in practice. The wording of the law, common to the UK and almost all the newly independent Commonwealth countries at the time it was adopted, clearly provides, with minor standard exceptions (for example, for children of diplomats), for citizenship to be attributed on the basis of birth in Tanzania (in Tanganyika for those born since independence, and Zanzibar whether born there before or after independence). The official interpretation of the law is that it is a descent-based system. In terms of identifying the groups at risk of statelessness it is the official interpretation of the law that must be considered.

At the same time, Tanzania's history and current politics of identification and citizenship is, with exceptions, relatively open and unpoliticised by comparison with its neighbouring countries in the EAC. The original pan-African vision and rhetoric of President Nyerere still has a hold on the state administration and the popular imagination. Many of those descended from migrants or refugees consider that public statements that they were to be offered citizenship indicate that in fact they became citizens. Nonetheless, questions of access to citizenship have been controversial at times; including during the discussions over the original adoption of a *jus soli* framework for citizenship.

The fact that until very recently most Tanzanians had no identification documents, and that rates of birth registration are still extremely low means that the ambiguity over legal status is profound. As recently as 2013, many who considered themselves to be Tanzanian were subject to expulsion, when President Kikwete launched "Operation Kimbunga" in September 2013 to expel "illegal immigrants" living in Tanzania without a permit. In the first phase, from 6 to 20 September, a total of 12,704 people were arrested, among them 3,448 Rwandans, 6,125 Burundians, 2,496 Ugandans, 589 Congolese, 44 Somali, 1 Yemeni and 1 Indian.<sup>253</sup> The majority of those arrested were deported; some were released after they proved their Tanzanian citizenship, and a small minority remained in jail after the closure of the Operation. The government states that a total of approximately 35,000 migrants were forcibly expelled by the end of the operation; according to IOM, around 65,000 left altogether, including those who were not expelled but left because they feared deportation.<sup>254</sup>

Among those expelled, some claimed Tanzanian citizenship, and others were rejected as citizens by the immigration officials of the countries to which they were expelled on the grounds that they were either Tanzanian or from another state.<sup>255</sup> Most of the remainder were admitted as citizens and resettled in the countries to which they were expelled (at least in Uganda and Rwanda), others are still stranded in countries to which they are expelled which are not their countries of origin, and some of those are Tanzanians with their spouses from another country.<sup>256</sup> Some have returned to Tanzania and are resident again in the areas which they left.

The concerns around these expulsions centred on the arbitrary and discriminatory way in which people were identified as "foreigner".<sup>257</sup> During Operation Kimbunga immigration officers relied on ten cell and street leaders, the lowest level representatives of central government who are responsible for registering every household in their neighbourhoods, to gather information and identify who was and who was not a Tanzanian citizen. While documents such as voters' cards, birth certificates and other identification are relevant, more important is that these leaders know each family and the family history in the area. The reliance on ten cell

<sup>253</sup> Data according to an official government letter by Deputy Police Commissioner Simon Sirro on behalf of the Commander of Operesheni Kimbunga Mwanza, 22 September 2013 (in Swahili), available at: <https://issamichuzi.blogspot.com/2013/09/operesheni-kimbunga-awamu-ya-kwanza.html?m=1>

<sup>254</sup> "IOM Tanzania launches migrant registration exercise in Kigoma", 2 December 2014; further information from IOM office in Dar es Salaam.

<sup>255</sup> See for example, "Expelled immigrants stranded as 'countries of origin' deny their citizenship", *The East African*, 21 September 2013.

<sup>256</sup> Interview, Office of the Prime Minister, Uganda, 3 August 2016.

<sup>257</sup> Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2013*, March 2014.

leaders to do the identification of migrants without permits left a lot of authority in the hands of local leaders and their interpretation of what gives a person the right to Tanzanian citizenship and/or residence in Tanzania. Generally, it seems that the understanding is based on a combination of descent (parents are known to be Tanzanian) and on the length of stay in a particular area. The security of those who have returned after deportation thus still rests on the relationship they have with a leader in a particular village.

In 2016, the East African Court of Justice condemned the failure of the EAC institutions to investigate and provide redress for the illegal expulsion of immigrants, which “if its illegality was confirmed, would constitute a flagrant violation of the objectives and fundamental principles of the community”.<sup>258</sup> In a separate case relating to an individual expulsion, the African Court on Human and Peoples’ Rights found that Tanzania had arbitrarily deprived Anudo Ochieng Anudo of his citizenship and also arbitrarily expelled him from the country, leaving him living stateless for several years in no-man’s land at the border as a result. It ordered Tanzania to amend its laws to allow for proper court review of such decisions.<sup>259</sup>

Tanzania’s semi-federal system, with substantial autonomy for Zanzibar, creates additional factors around the identification of who is a “Zanzibari” (important for rights to vote and own property on the islands) that also impact on access to Tanzanian citizenship.

### Stories from Operation Kimbunga<sup>260</sup>

“Anthony”, 30

Anthony is a Burundian refugee in Tanzania who had already been naturalized in 2013. During Operation Kimbunga he was arrested on a street with other people who were believed to be Burundian. They were taken to the central police office in Dar es Salaam and imprisoned there for two days. Afterwards they were taken to the immigration office and the next day they were transported to Burundi. When they reached the border, Burundian officials refused to take them, saying: “these are not our people and we don’t know them”. As they continued refusing to accept them, a Tanzanian immigration officer told them that they can go back to Tanzania, but on their own cost (meaning they needed to pay for a bus fare). Those who had relatives in Burundi (in Anthony’s view, truly Burundians) had to find their relatives to collect money for bus fare to return to Tanzania. Others (Tanzanians) had to call their relatives in Tanzania to ask for money for transport. According to Anthony the situation was very different in Rwanda. There the government accepted the migrants and assisted them by providing temporary settlement options, especially those who have been in Tanzania for many years and could not trace back their family in Rwanda. Nonetheless, the majority decided to go back to Tanzania within a period of 6 months after the closing of the Operation.

“Emmanuel”, 28

Emanuel is a former Burundian refugee who had applied for naturalisation but who, at the time of Kimbunga, had not yet obtained his citizenship certificate. During Kimbunga a police officer stopped him and asked him to prove his citizenship. He failed to produce a document and explained that he applied for naturalization and was accepted and is only waiting to receive his certificate. The police officer did not understand him, as he was not aware of the naturalization exercise, and Emmanuel was imprisoned for one week. According to him, after a few days the police officer returned and asked for all those Burundians that were naturalized to

<sup>258</sup> East African Law Society v. Secretary General of the EAC, Ref. No. 7 of 2014, Judgment of 22 March 2016, available at: <http://eacj.org/wp-content/uploads/2016/04/Referene-No-7-of-2014-Judgment-of-22-March-2016.pdf>; see also summary of judgement by International Justice Resources Centre, 9 May 2016, available at: <http://www.ijrcenter.org/2016/05/09/east-african-court-community-must-investigate-tanzanias-expulsion-of-migrants/>.

<sup>259</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania*, App. No. 012/2015, African Court of Human and Peoples’ Rights, Judgment of 22 March 2018. See further below under heading on the jurisprudence of the African human rights bodies.

<sup>260</sup> Interviews conducted by Amelia Kuch, PhD candidate, University of Edinburgh, in Dar es Salaam, Tabora and Urambo, Tanzania, June/July 2016. All the names have been changed. With thanks generally to Amelia for her inputs on this section.

step forward. They needed to show their naturalization application documents, and shortly after they were released.

“Stanley”, 29

Stanley, a former Burundian refugee, already naturalized in 2013, was caught on the street in his village in Kagera region and deported to Rwanda. According to him the method that police and immigration officers used to determine whom to capture was simply looking at people’s faces and judging if someone looked like Munyarwanda. They would catch people, take them to the police station, and then transport them to Rwanda without asking any questions or even giving them a chance to prove their citizenship. Stanley was caught and transported to Rwanda with a large group of people. When they reached the border, they were told: “*Kama unajijua wewe ni raia wa Tanzania njoo hapa*” (meaning “if you know you are a citizen of Tanzania come here”). At this point those who were citizens had to step forward and show their identification card (or other document). Stanley showed his naturalization documents, and he was released and allowed to go back to Tanzania (he had to buy a bus ticket and travel back by himself). He said that those who did not have their national identification card or any other document were handed over to Rwandan border officers. Stanley returned to his village in Kagera region and he lives there now, as he says, without fear.

“Steven”, 35

Steven is one of the Burundian refugees who opted to repatriate to Burundi during the naturalization exercise in 2008, but a few months later he came back to Tanzania and settled in the city of Tabora. During Operation Kimbunga police came to his family and asked for their permits. He did not have any documents, and was taken to the police station and imprisoned for one year (2013-2014). He was eventually released when his family collected enough money for bail.

### Comorians in Zanzibar

A community of people of Comorian descent has lived in Zanzibar since before the period of Omani rule established in the 19<sup>th</sup> century. More arrived in Zanzibar under the Omani sultanate and during the British protectorate over Zanzibar (1890–1963), at all levels of economic and social status, from manual labourers to civil servants and religious leaders. Because Comoros was a French and not British colony, the Comorians had a different status from immigrants to Zanzibar from other territories under British “protection”, a distinction that they were keen to emphasize as one way of gaining higher status than other “natives”. Under the 1911 decree on Zanzibari nationality, those of Comorian descent born in Zanzibar were not automatically subjects of the Sultan, unless they applied to be so. From 1952, Zanzibari nationality was automatically attributed on the basis of birth in the Sultan’s dominions, but not to subjects or citizens of countries named in a schedule to the 1952 Nationality Decree, which included France. Comorians in Zanzibar thus were not subjects of the Sultan, nor British protected persons, but rather remained French subjects.<sup>261</sup>

The 1963 independence constitution of Zanzibar established in the islands a *jus soli* rule for those born before or after independence, with only the usual limited exceptions; and from 1964, when Zanzibar joined Tanganyika to form the United Republic of Tanzania, the Tanganyika Citizenship Act was extended to recognise as citizens of Tanzania those born prior to union in Zanzibar, as well as those born after union in any part of the United Republic.<sup>262</sup>

<sup>261</sup> See Iain Walker, “Comorians and Hadramis in the western Indian Ocean: Diasporic practices in a comparative context”, *Journal of Social Dynamics*, 2012, Vol. 38 (3), pp. 435-453; Iain Walker, “Identity and citizenship among the Comorians of Zanzibar, 1886-1963” in Abdul Sheriff & Engseng Ho (eds.), *The Indian Ocean: Oceanic Connections & Creation of New Societies*, London: Hurst & Co, 2014; Gillian Marie Shepherd, *The Comorians in Kenya: The Establishment and Loss of an Economic Niche*, PhD Dissertation, London School of Economics, 1982.

<sup>262</sup> Constitution of the State of Zanzibar, 1963, Chapter I; Tanganyika Citizenship Act 1961, as amended, sections 3 and 10(1). See also *Fransman’s British Nationality Law*, Catalogue entry on Tanzania.

The government of Zanzibar continued to hold devolved power in the islands in the semi-federal system agreed on the creation of the United Republic. In 1968, against the background of a generalised targeting of “Arabs” and other privileged “foreigners” since 1964 by the revolutionary government of Zanzibar, in which some 7,000 people of Arab or Asian descent had been expelled and others killed, there was a crackdown on the rights of Zanzibaris of Comorian origin, including closure of Comorian schools and other ethnically based institutions. Sheikh Abeid Karume, leader of the revolutionary council and rival of Abdulrahman Mohammed Babu, of Comorian and Yemeni descent, announced that Comorians would be deprived of citizenship and expelled from Zanzibar unless they renounced their status as French subjects and naturalised as Tanzanian: the rationale for this requirement being that because they were French nationals they had not been subjects of the Sultan before the revolution. The provisions of the 1963 Constitution of Zanzibar and the Tanganyikan Citizenship Act as extended to Zanzibar, which had not required renunciation of citizenship for these individuals, were discounted. In 1970, the remaining Comorian civil servants were dismissed and citizenship again revoked from many.<sup>263</sup> The French government also denied, with few exceptions, that members of this community were French nationals (Comoros only obtained independence from France in 1975).

In 2009, the Immigration Department revived the 1968 announcement, and announced that Zanzibaris of Comorian origin would not be entitled to passports unless they had naturalised as Tanzanian citizens and renounced any other nationality. Where people have held passports in the past, they have been refused renewal, on the grounds that they were issued in error. It seems that at least one hundred people have been affected by this decision; many more may potentially be affected, but because few people require an international passport, they are not aware of the issue. Paradoxically, many of those denied Tanzanian passports hold ZanIDs, for which Tanzanian citizenship is supposed to be a pre-condition.<sup>264</sup> Although many people of Omani descent repatriated to Oman during the 1970s (they were not allowed entry during the immediate revolutionary period), those who remained in Zanzibar do not face the same difficulties.<sup>265</sup>

There are several thousand people of Comorian descent living in the two islands of Zanzibar. If not recognised as Tanzanian, this community would be stateless (the offer of naturalisation would not change that, since naturalisation is a discretionary and expensive process and not guaranteed success). Although connections with Comoros have been retained by some, most have no family links or documented connection enabling them to obtain recognition of Comorian citizenship.

#### Makonde in Zanzibar

There is a group of a few thousand people of Mozambican descent living in Zanzibar, the majority from the Makonde ethnic group, descendants of people who came to Zanzibar in the 1950s and 60s when the Mozambican liberation movement FRELIMO had a presence on the island. Like the Comorians, their status in Zanzibar is complicated because of their origin from a non-British territory; Portugal, the colonial power in Mozambique, was one of the countries whose nationals were excluded under the 1952 Nationality Decree from obtaining Zanzibari nationality based on birth in Zanzibar, and thus it is asserted that they need to naturalise to obtain Tanzanian citizenship. However, like the Comorians, in principle they should have been retroactively attributed Tanzanian citizenship by the independence constitution of Zanzibar and by the extension of the Tanganyika Citizenship Act to Zanzibar in 1964.

Following the revolution in Zanzibar, the Makonde were allocated land by the Zanzibari government as part of the redistribution of the large spice estates. As a result of their presence, Mozambique has a consulate in Zanzibar, and recognises these people as its nationals; those who wish to can register to vote in Mozambican elections. However, the community is integrated into Zanzibari society, while retaining some cultural traditions, and its members have little if any contact with Mozambique. Very few of those who came from

<sup>263</sup> Citizenship laws have been manipulated in other cases also. Ali Mohammed Nabwa, a Zanzibari journalist of Comorian origin and editor of the independent newspaper *Dira*, faced a long battle over his citizenship. “Veteran editor stripped of citizenship”, *The Guardian*, Dar es Salaam, 8 August 2006. See also US Department of State, *Country Reports on Human Rights Practices*, entries on Tanzania for the years 2003 to 2006.

<sup>264</sup> Interviews, representatives of Comorian community, Zanzibar, 18 July 2016.

<sup>265</sup> Interview, Omani consulate, Zanzibar, 19 July 2016.



Mozambique are still alive. They are not regarded as Tanzanian citizens by the Department of Immigration. Most do not have Mozambican documents. Although the Mozambican immigration authorities travelled to Zanzibar in 2015 to make documentation available on application, and several hundred did obtain Mozambican identity cards, the application fees of US\$3 (TzSh 7,500) for an identity card and \$65 (TzSh 143,000) for a passport were out of reach for many in this very poor community—especially for a document that would not give them many benefits where they in fact live. With a Mozambican document a person is eligible to apply for a residence permit, but such a permit costs several hundred dollars and is only valid for three months. Tanzania does not have a status of permanent resident.<sup>266</sup>

The descendants of those who migrated from Mozambique to Zanzibar will progressively be at greater risk of statelessness as they remain without documents from either country. Although Mozambican documents would assist, the solution that would recognise their integration in Zanzibari society and acquired rights in Zanzibar, is citizenship of Tanzania. The very high cost and elaborate procedures for naturalisation in Tanzania (see heading on access to naturalisation) place that process out of reach. In practice, some have ZanIDs, based on a letter of approval from the local *sheha*; but this document is only useful in Zanzibar itself.

### Long-term migrants and refugees, and their children

There had been large-scale recruitment of labour to work on Tanganyikan plantations prior to independence, from both Portuguese (Mozambique) and Belgian (Ruanda-Urundi and Congo) territories, and to a lesser extent from Kenya and Uganda. Although the importation of labour from Mozambique had not been formalised, Britain and Belgium had established a recruitment system through the Sisal Labour Bureau (SILABU): more than 100,000 people a year were recruited to work through SILABU during the 1950s, though on a circular basis with many returning home.<sup>267</sup> In addition, there was a small population of Kikuyus suspected of being Mau Mau sympathisers forcibly resettled by the British in Tanganyika (though others were deported from Tanganyika as suspected infiltrators).<sup>268</sup>

These migrants did not automatically become Tanganyikan on independence. Even if they came from two generations born in Tanganyika, those originating from Mozambique or the Belgian territories were not British protected persons, to whom this attribution applied.<sup>269</sup> Those from British territories without two generations born in the country would have been included in the original provisions allowing access to the non-discretionary process of registration as a citizen, and from 1962 the law also provided for those originating from certain other African but non-Commonwealth countries (those where liberation struggles were under way) to register as Tanganyikan.<sup>270</sup> In practice, as in Kenya, few if any migrants from other African states applied under these provisions; they were both less aware of the requirements and under less political threat by the approach of independence. It was estimated that 120,000 people were entitled to register as citizens under the temporary provisions. As of the deadline on 31 December 1963, only 12,178 people had registered as citizens, including only 77 Africans.<sup>271</sup>

In the decade following independence, in line with the agreement on free movement within the East African Community and Nyerere's pan-African vision, the 1963 Immigration Act exempted "Africans" from listed

<sup>266</sup> Interviews, Department of Immigration and Mozambican Consulate, Zanzibar, 18 July 2016.

<sup>267</sup> Charlotte Lee Miller, "Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980." PhD (Doctor of Philosophy) thesis, University of Iowa, 2011.

<sup>268</sup> There is little information about this group. A British former colonial official wrote for the Overseas Service Pensioners' Association about his experiences at a resettlement camp, available at: <http://www.britishempire.co.uk/article/resettlementmaumau.htm>.

<sup>269</sup> Although Tanganyika was a League of Nations Mandate and then UN Trust Territory, with therefore a different status from that of British protectorates such as Uganda, its own "natives" — while not formally British nationals — were still categorised as British protected persons for these purposes.

<sup>270</sup> Tanganyika Citizenship Ordinance Amendment Act No. 69 of 1962.

<sup>271</sup> Charlotte Lee Miller, "Who are the "permanent inhabitants" of the state? Citizenship policies and border controls in Tanzania, 1920-1980." PhD (Doctor of Philosophy) thesis, University of Iowa, 2011, p. 141.

countries from immigration controls. Mozambican migrants in southern Tanzania, and migrant and refugee communities from Rwanda, Burundi and Congo, were told that they were welcome to stay. Nonetheless, as in most countries, there was unease about levels of immigration. The Refugee Control Act of 1965 required refugees to register and obtain identification cards; however, not all did so. The 1972 Immigration Act was more restrictive, and subjected nationals of African countries to the same requirements as other foreigners. These tensions were reflected in swings in government policy in the following decades.<sup>272</sup>

With the war for independence and subsequent civil war in Mozambique, and the periodic wars in all three former Belgian territories (Rwanda, Burundi and Congo), the distinction between the descendants of pre-independence migrants, more recent economic migrants, and refugees, became ever more unclear. Where refugees were located in specific camps or settlements (as required in principle by Tanzanian refugee law and policy), refugees were more easily identifiable. But in many places refugees became integrated into local communities, and there is no real way to separate one population from the other; in the past, a party membership card was often sufficient for a refugee to “pass” as a citizen when living in urban areas or among a related ethnic group in the border areas.<sup>273</sup> The fact that the vast majority of those living in Tanzania had no identity documents—registered refugees being the main exception—made integration at a local level easier to achieve.

The issue of certificates following the naturalisation process for refugees (see box below) has provided some of those whose citizenship was in doubt with proof of their status. However, there may be exceptions, leaving people caught between two countries without documents from either. Those “old case load” refugees (including the “self-settled”), and their children, who have not benefited from naturalisation programmes are at great risk of finding themselves stateless as the new national identity card is implemented. Long-term voluntary migrants and their descendants, including those from the pre-independence era, were not offered naturalisation (even though many would be eligible under the usual rules) and are at similar risk.

#### **Naturalisation of refugees in Tanzania**

In 1980, refugees who came to Tanzania from Rwanda and Burundi in 1959 and during the 1960s were given the right to Tanzanian citizenship on a group basis in which normal application procedures and fees were waived. The mass ceremonies in which naturalisation was announced were, however, not followed up with the issue of naturalisation certificates to all those eligible.<sup>274</sup>

In 2003 the government also announced that it would consider granting Tanzanian citizenship to around 3,000 Somali refugees of “Bantu” origin who had fled persecution by the Siad Barre regime in Somalia and the civil war that followed his fall from power. In May 2005 naturalisation certificates were awarded to the first 182 of around 3,000 people. The Chogo refugee settlement where the Somalis live, in the north-eastern part of Tanzania, has, like the Burundian refugee camps dating from the 1970s, been re-designated as a local authority area. In June 2014, the government held a ceremony of naturalisation for 1,514 people, following a year-long registration process; some 150 of the community preferred to keep refugee status.<sup>275</sup>

In 2007, Tanzania offered naturalisation to Burundian refugees resident in the country since 1972 and their descendants; of those eligible, 80 percent, or 162,000 people, expressed their desire to remain in Tanzania, and the remaining 20 percent were to receive assistance with repatriation from March 2008. The naturalisation procedure was then stalled when almost complete, leaving thousands in limbo; some of these

<sup>272</sup> Miller, “Who are the “permanent inhabitants” of the state?”.

<sup>273</sup> Among many works on this subject, see Liisa H. Malkki, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (Chicago University Press), 1995, for an interesting perspective on the impact of such integration on the refugees themselves.

<sup>274</sup> Charles P Gasarasi, “The Mass Naturalization and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Prospects”, *Journal of Refugee Studies*, Vol. 3 No. 2, 1990, pp. 88-109.

<sup>275</sup> Lucas Liganga, “We are happy to be back home!” *The Citizen* (Dar es Salaam), 7 June 2014; Eric Kabendera, “Bantu-Somalis to call Tanzania home”, *The East African*, 7 June 2014.

may have been among the thousands who were expelled from Tanzania in 2013, even though many of them had been approved for citizenship or were likely entitled to recognition as citizens, based on their birth in the country.

In 2014, the process of issuing naturalisation certificates resumed, with most of those who had been approved receiving their new documents during 2015. As of April 2016, 151,019 naturalization certificates had been distributed and 6,620 applications had been submitted on behalf of children of those naturalised. UNHCR had assisted 1,850 to appeal a refusal, while over 22,000 Burundian refugees from the 1972 case load in the Kigoma Region were still in need of naturalization.<sup>276</sup> In October 2017, more than 19,000 cases were still pending.<sup>277</sup> However, without prejudice to the ongoing process for this group, President Magufuli ordered in July 2017 that no further naturalisations be undertaken for other groups of Burundian refugees, including more recent arrivals.<sup>278</sup>

## Uganda

Uganda's independence provisions on citizenship followed the standard Commonwealth model. Those born in Uganda with one parent also born there became citizens automatically. Those who did not fulfil these requirements but were themselves born or ordinarily resident in Uganda had the right to register as citizens if they were citizens of the UK and colonies or British protected persons.<sup>279</sup> Unlike Kenya and Tanzania, Uganda did not provide for registration of those originating from other non-Commonwealth African countries.

Uganda was the site of one of the most widely-publicised episodes of mass expulsion during the post-independence period: the expulsion of the Ugandan Asians in 1971/72. At the time the expulsion was announced by President Idi Amin, the population of Asian descent recorded in Uganda was just under 75,000, of whom around one third were Ugandan citizens with no other nationality; the non-citizen population, including people who had applied to register as citizens, was more than 500,000, mainly Kenyans and Tanzanians (in a total population of 9.5 million).<sup>280</sup> In 1982, a new government passed legislation for the restoration of confiscated property<sup>281</sup> and enabling the return of Ugandan Asians. There have also been

<sup>276</sup> UNHCR, *Tanzania: Mpanda Operational Update*, Special Edition for April 2016. These processes have been quite extensively documented: Charles P. Gasarasi, "The Mass Naturalisation and Further Integration of Rwandese Refugees in Tanzania: Process, Problems and Perspectives", *Journal of Refugee Studies* Vol. 3, No. 2, 1990; Bonaventure Rutinwa, "The Tanzanian Government's Response to the Rwandan Emergency", *Journal of Refugee Studies*, Vol. 9, No. 3, 1996, pp. 291-302; James Milner, "Can Global Refugee Policy Leverage Durable Solutions? Lessons from Tanzania's Naturalization of Burundian Refugees", *Journal of Refugee Studies*, Vol. 27, No. 4, 2014, pp. 553-573, as well as a series of reports by the International Refugee Rights Initiative, Kampala (including *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania*, 2008; *Resisting Repatriation: Burundian Refugees Struggling to Stay in Tanzania*, 2011; *An urgent briefing on the situation of Burundian refugees in Mtabila camp in Tanzania*, 2012; *'I can't be a citizen if I am still a refugee': Former Burundian Refugees Struggle to Assert their new Tanzanian Citizenship*, 2013; *From refugee to returnee to asylum seeker: Burundian refugees struggle to find protection in the Great Lakes region*, 2013).

<sup>277</sup> Email communication from UNHCR Tanzania, September 2018.

<sup>278</sup> "Magufuli — No citizenship for Burundi refugees", *The Citizen* (Dar es Salaam), 21 July 2017; Charlie Ensor, "As risks rise in Burundi, refuge in Tanzania is no longer secure", IRIN, 8 May 2018.

<sup>279</sup> Constitution of Uganda, 1962, Articles 7 and 8.

<sup>280</sup> James S. Read, "Some Legal Aspects of the Expulsion", in Michael Twaddle (ed.) *Expulsion of a Minority: Essays on Ugandan Asians*, Athlone Press, London, 1975.

<sup>281</sup> Uganda Expropriated Properties Act, No. 9 of 1982, Laws of Uganda, 2000, Cap. 87.

other mass expulsions, including of the Kenyan Luo and other East African workers in 1970,<sup>282</sup> and of the Banyarwanda in 1982-83.<sup>283</sup>

As in other Commonwealth countries, the principles in place on the transition to independence continue to have an important impact on access to Ugandan citizenship today. Although the 1995 Constitution completely reformulated the principles on which citizenship is based, it also provided that those who were already citizens of Uganda remained so.<sup>284</sup> Uganda had repealed the *jus soli* provisions for those born after independence as early as 1967<sup>285</sup> to create a descent-based regime; the 1995 framework re-establishes *jus soli* citizenship, but only for members of “indigenous communities” listed in the third schedule to the constitution. These rights based on birth in Uganda provide significant protection against statelessness, for those who can claim to be members of those groups. For this reason, the Nubian community in Uganda, for example, which is included in the list in schedule 3, does not have the same problems in relation to citizenship as the Nubians in Kenya (though they are still subject to discrimination).

But the ethnically-based approach also increases the risk of statelessness for members of other communities not listed in the constitution; this includes the very different Somali and Maragoli communities discussed below, as well as the Asians (who argued unsuccessfully to be listed as “indigenous” on the grounds that Asians were present in Uganda in 1926), and a small group of mainly mixed-race descendants of Polish refugees settled in Uganda by the British during the second world war.<sup>286</sup> The ethnic basis for citizenship does not fully protect even members of those groups who are listed. For example, the Kuku community, who are listed in the constitution, are mainly found in South Sudan and are regarded by most Ugandans as, in fact, South Sudanese. Members of this group face additional vetting and difficulties in obtaining Ugandan passports.

Moreover, the fact that citizenship by registration or naturalisation does not transmit to the next generation means that the children of those who were registered or naturalised during the mass registration process for the new national identity card during 2014/15 will, at least in theory, not acquire citizenship at birth.

Until the introduction of the new national identity card, it was only on application for a passport that a person would find out that he or she was not considered to be Ugandan. While the national identity card is still enrolling new applicants who were missed in the original registration drive, there is a possibility that more people come to face the same problems. There is a complaint system to address cases of people whose nationality is questioned, but this procedure is administrative rather than judicial, and does not include a specific process to identify stateless persons and provide them with access to Ugandan citizenship or other protection.

#### Children of Ugandan Asian “returnees”

The child of a person who obtains Ugandan citizenship by registration or naturalisation does not him or herself obtain citizenship as part of the same process; nor does the child born after the parent acquires citizenship automatically obtain citizenship at birth. There is a group of children whose parents are Ugandan Asian “returnees”, who have been brought up and some even born in Uganda, yet are not citizens of Uganda. Some of these may also be stateless, given that their parents may have renounced another citizenship in order to reacquire Ugandan citizenship by registration before dual citizenship was permitted following 2005

<sup>282</sup> Ali Mazrui, “Casualties of an Underdeveloped Class Structure: The Expulsion of Luo Workers and Asian Bourgeoisie from Uganda”, in William A. Shack and Elliott P. Skinner (eds.) *Strangers in African Societies*, University of California Press, 1979.

<sup>283</sup> Mahmood Mamdani, *When Victims Become Killers, Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, 2002, p. 160.

<sup>284</sup> Constitution of Uganda, 1995, as amended in 2005, Article 9. The 1967 Constitution similarly preserved the status of those who acquired citizenship at independence.

<sup>285</sup> Constitution of Uganda 1967.

<sup>286</sup> Input at Arusha workshop, 20 March 2017; for background, see “When Europeans Were Refugees In Africa”, *New African Magazine*, 20 June 2012.

constitutional amendments. A period of residence in Uganda as a child (or a student) also does not count towards the 20 year period required for an individual to apply for registration as a citizen in their own right.<sup>287</sup>

#### The Maragoli community in Kiryandongo

The Maragoli community is a branch of the Luhya ethnic group that is mainly found in Kenya. Maragoli history records that some members of the community were present in Uganda from the 19<sup>th</sup> century or earlier; others arrived in the early 20<sup>th</sup> century as construction workers on the East African railway, and in 1957 the Omukama of Bunyoro (the king of the Bunyoro community) invited other members of the group to settle in his lands in western Uganda.<sup>288</sup> The Maragoli themselves estimate that there may be around 18,000 people within their community in Uganda, though there is no systematic survey.<sup>289</sup>

The Maragoli were not included in the list of “indigenous communities” of Uganda in the third schedule to the 1995 Constitution, for which citizenship was attributed based on birth in Uganda; nor were they added by the amendments to the list made in 2005. Nonetheless, they have been treated as Ugandan for other purposes, and have always been registered to vote in elections. The Maragoli have made various attempts over the years to make the case for their own inclusion in that list, in part to secure their claims to the land allocated to them by the Omukama, but the question has assumed renewed urgency with the adoption of a new national identity card. Most Maragoli registered as members of the Bunyoro community on the grounds of their welcome from the Bunyoro kingdom, but they were rather offered citizenship by registration during the mass registration process.<sup>290</sup> However, they insisted that this solution was not suitable, since they should qualify as an indigenous community in their own right and should not be required to “renounce” the citizenship of another country whose citizenship they have never in fact held. In May 2015, representatives of the community appeared to present their case before the Legal and Parliamentary Affairs Committee of the Ugandan Parliament, which was at that time considering a constitutional amendment bill. The committee recommended that a constitution review commission be established to deal with this and other matters outside the scope of that bill.<sup>291</sup>

In February 2016, the Solicitor General advised NIRA that the Maragoli should be issued with ID cards, since they had already applied and been registered “pending the constitutional amendment for inclusion of the Maragoli as one of the indigenous communities”; this was supported by the Attorney General in December of the same year. Already some were being turned away from hospitals for lack of national ID; there were grave concerns at exclusion from other services, including access to government scholarships for higher education, and financial services. Without a parent with an ID, it may not be possible to register the birth of a child, in turn threatening that child’s access even to primary and secondary school. Others were threatened with the loss of positions in government employment, including as teachers and other key workers. Despite official commitments to resolve their situation, many had yet to receive ID cards by 2018.<sup>292</sup>

<sup>287</sup> Uganda Citizenship and Immigration Control Act, 1999, Sections 12(b), 14, 15 and 25.

<sup>288</sup> A.N. Ligale, “Some factors influencing the pattern of rural settlement in Maragoli, Western Kenya”, *East African Geographical Review*, Issue 4, April 1966, pp. 65-68; Letter dated 27 July 2012 from the Office of the Omukama headed “Recognition of Maragoli community of Kigumba, in Kiryandongo in Bunyoro-Kitara” (included within the Petition dated 29 July 2014 from the Maragoli Community to the Speaker of the Ugandan Parliament, available at: <http://citizenshiprightsafrika.org/petition-to-parliament-of-uganda-and-history-of-maragoli-community-in-uganda/>).

<sup>289</sup> Interview, Maragoli representative, Kigumba, 5 August 2016.

<sup>290</sup> Brief to Parliament on the On-Going Mass Registration of Citizens Exercise under the National Security Information System (NSIS) Project, by The Hon. Minister of Internal Affairs, 29th July 2014. This is a very significant distinction, since in Uganda citizenship by registration or naturalisation is not transmissible on the basis of descent to the next generation. See Chapter 3 above.

<sup>291</sup> Letter dated 22 December 2015 from the Speaker of the Ugandan Parliament to the Attorney General (included within compilation of documents related to the Maragoli Petition to the Attorney-General of Uganda, originally filed 10 August 2015, available at: <http://citizenshiprightsafrika.org/petition-to-attorney-general-of-uganda/>).

<sup>292</sup> Letter dated 9 February 2016 from the Solicitor General, Ministry of Justice and Constitutional Affairs to the Director of the National Identity and Registration Authority, Kampala; Letter dated 12 December 2016 from the Attorney General, Ministry of

### Somalis from Somaliland and Somalia

Somalis are not among the communities listed as indigenous to Uganda. However, there is a significant Somali population in the country; many of them refugees but also descendants of pre-independence migrants dating back several generations, among them those whose origins can be traced to Somaliland rather than Somalia.

Pre-independence Isaq Somali migrants from Somaliland were British protected persons, and thus eligible either for automatic attribution of citizenship or for registration as citizens according to the transitional provisions on citizenship at independence. Subject to evidence of membership of this community, numbering perhaps one or two thousand people, the Isaq Somalis are recognised as Ugandan by the authorities.<sup>293</sup>

Nonetheless, the community of Somaliland origin has faced difficulties in the past obtaining Ugandan passports. During the mass registration process for the new national identity card, it was necessary for Somalis to prove that they fulfilled the requirements for automatic attribution of citizenship at independence—that is, that, if not themselves alive in 1962, one parent and one of his or her own parents were born in Uganda; or they were able to apply for registration or naturalisation as citizens. Some who were genuinely entitled to Ugandan citizenship based on the principles for automatic attribution at independence were turned down, and not necessarily informed of the right to register or naturalise on the basis of twenty years' residence in the country.<sup>294</sup> The distinction is critical, because those who acquire citizenship by registration or naturalisation cannot transmit citizenship to their children, whereas those who are descended from people who automatically acquired citizenship at independence are treated as citizens by birth.

The population of Somali ethnicity in Uganda has been swelled in recent years by migrants from Kenya, for example following the 1989 screening process that withdraw identity documents from some Kenyan Somalis.<sup>295</sup> There are also some 307,000 registered Somali refugees, arriving since the collapse of the Somali state in the early 1990s.<sup>296</sup>

### Long-term refugees: Rwandans, Congolese, Sudanese

Like the other countries of the EAC, Uganda has an honourable history of welcome towards those fleeing war or persecution, and Uganda has not enforced requirements for refugees to be confined to camps, permitting those not resident in camps to work and move freely about the country. As of mid-2016, more than 500,000 refugees were resident in Uganda, with new outflows from South Sudan still increasing that number; by March 2018 the number had increased to 1.4 million.<sup>297</sup> Among these, some long-term refugees have been present in the country for more than fifty years, including Rwandan Tutsi who fled to Uganda in various episodes from 1959 to 1973 and Congolese who fled after the 1964 defeat of the Lumumbist rebels.<sup>298</sup> Around 60,000 have been present in the country at least 20 years, the baseline for naturalisation, including Sudanese refugees from before the 2005 Comprehensive Peace Agreement that led to the secession of South Sudan, and both Rwandan and Congolese refugees from the mid-1990s fleeing the genocide in Rwanda and the regional conflicts that followed.<sup>299</sup>

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Justice and Constitutional Affairs to the Director of the National Identity and Registration Authority, Kampala; interviews, August 2016; presentation of John Agison Amugune to International Refugee Rights Initiative workshop, Kampala, 2 May 2018.

<sup>293</sup> Interview, Department of Immigration, Kampala, 9 August 2016.

<sup>294</sup> Interview, representative of Somaliland community, Kampala, 8 August 2016.

<sup>295</sup> Gianluca Iazzolino, *A Safe haven for Somalis In Uganda?* Rift Valley Institute Briefing Paper, August 2014.

<sup>296</sup> UNHCR, Uganda Fact Sheet, March 2018.

<sup>297</sup> UNHCR, Uganda Fact Sheet, March 2018.

<sup>298</sup> Charles Celestin Bafaki Rweyunga, "Local Integration as a Durable Solution for Protracted Refugees in Uganda: A Case Study of the Lumumbist Congolese Refugees at Kyaka 2 Refugee Settlement", Makerere University LLM Dissertation, 2014.

<sup>299</sup> Interview, Office of the Prime Minister, 3 August 2016.

Although Uganda did not accept the recommendation to apply the “ceased circumstances” clause for Rwandan refugees, the status of approximately 15,000 Rwandan refugees in Uganda may have become more vulnerable; yet they are unwilling to return, on various grounds.<sup>300</sup> There is significant political opposition to the possibility of their acquiring Ugandan citizenship.

The children of refugees do not acquire citizenship based on birth in Uganda, even if they are from a community listed in the constitution. Thus, although “Banyarwanda” was listed as one of the “indigenous communities” of Uganda in the 1995 constitution (a controversial decision in the immediate aftermath of the Rwandan genocide) on the grounds that a substantial number of Banyarwanda were included in Uganda by colonial boundaries,<sup>301</sup> children of Rwandan refugees are not attributed Ugandan citizenship at birth. In practice, it is very difficult for officials to distinguish between those who are descendants of Rwandan refugees and those who are Ugandan Banyarwanda. The same is true of Acholi and Kakwa who have fled from South Sudan, and others who are members of cross-border communities.

In October 2015, the Uganda Constitutional Court confirmed the interpretation that refugees are not eligible to register as citizens under the easier provisions for acquisition of citizenship provided in the constitution. The Court did, however, state that, although interpretation of the Citizenship and Immigration Control Act was outside its jurisdiction, refugees in principle should be eligible for naturalisation—a more discretionary procedure than registration—under the act.<sup>302</sup> However, no refugee is known to have been naturalised, except for those married to Ugandans. Refugees approaching the office of the Immigration Department are turned away and told that they are not eligible to apply.<sup>303</sup>

The distinction between refugee and migrant is not always clear. During the mass registration process for the new national identity card in 2014, when registration and naturalisation for citizenship were combined with the process of registration for identification, some long-term refugees who never registered as such may have successfully registered as citizens on the basis of long term residence. For example, on Lake Albert, many who fled from conflict in the 1990s in Ituri Province on the Congolese side of the lake did not register as refugees or move to refugee camps and are fully integrated into the communities around the lake; the other side of the lake was at one time also part of the Bunyoro kingdom. These long-staying and unregistered refugees were, it seems, largely permitted to obtain Ugandan identity cards during the registration process, but more recent arrivals and those in the camps were not.<sup>304</sup> Others were introduced to the vetting committees by members of the local population as effectively being members of their community; those who arrived in Uganda even earlier, in the 1960s, are integrated in farming communities and simply considered Ugandan.

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<sup>300</sup> See generally, Marshall Godfrey Alenyo, “International Refugee Law and the Right to Nationality: Legal Responses to the Rwandan Refugee Crisis in Uganda”, LLM Dissertation, University College Cork, October 2014. International Refugee Rights Initiative, “A Dangerous Impasse: Rwandan Refugees in Uganda”, June 2010.

<sup>301</sup> In 1991, it was estimated there were 450,000 indigenous Ugandan Banyarwanda, 650,000 economic migrants, and 84,000 refugees. Figures cited in Catharine Watson, *Exile from Rwanda: Background to an invasion*, US Committee for Refugees, 1991.

<sup>302</sup> *Centre for Public Interest Law and another v. Attorney General of Uganda*, Constitutional Petition No. 34 of 2010.

<sup>303</sup> Interviews, Office of the Prime Minister and Refugee Law Project, Kampala, August 2016.

<sup>304</sup> Interviews, Kaiso, Lake Albert, 4 August 2016. Those Congolese who had not obtained Ugandan ID cards were, from July 2016, being charged US\$ 2 million for a fishing licence (US\$ 485), whereas those with cards paid US\$ 5,000 (US\$ 1.5), making the distinction of great immediate importance.

## 6. International law on nationality and statelessness

### International standards

The right to a nationality is one of the rights first established by the Universal Declaration of Human Rights in 1948. Article 15 provides that:

- (1) *Everyone has a right to a nationality.*
- (2) *No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.*

The 1961 Convention on the Reduction of Statelessness, which entered into force in 1975, makes it a duty of states to prevent statelessness in nationality laws and practices. Article 1 mandates that:

*A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.*

It also reaffirmed one of the longest-standing norms relating to the prevention of statelessness for those who cannot acquire their parents' nationality: the right to a nationality in the state where they were found for children of unknown parents.<sup>305</sup>

Many human rights treaties mention nationality in relation to their own subject matter, including the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC), which both guarantee the right of every child to acquire a nationality.<sup>306</sup> This right is reaffirmed by the Migrant Workers Convention for the children of migrants.<sup>307</sup> The treaties prohibiting discrimination also encompass the right to nationality. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires that women be granted equal rights with men in respect of nationality.<sup>308</sup> The Convention on the Rights of Persons with Disabilities elaborates more detailed rules on the rights of persons with disabilities to a nationality, on an equal basis with others.<sup>309</sup>

The International Convention on the Elimination of Racial Discrimination (CERD) requires that enjoyment of the right to nationality be guaranteed to everyone "without distinction as to race, colour, or national or ethnic

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<sup>305</sup> First codified by The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930

<sup>306</sup> International Covenant on Civil and Political Rights, Article 24(3); Convention on the Rights of the Child, Article 7(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." Article 8 requires states to "respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference", and to provide appropriate assistance and protection, to re-establishing identity where it has been deprived. See Jaap E. Doek, "The CRC and the right to acquire and to preserve a nationality", *Refugee Survey Quarterly*, Vol. 25, No. 3, 2006.

<sup>307</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29: "Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality."

<sup>308</sup> CEDAW Article 9: "(1) States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. (2) States Parties shall grant women equal rights with men with respect to the nationality of their children." Article 16(1)(d) of CEDAW specifies that men and women should have "[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children".

<sup>309</sup> Convention on the Rights of Persons with Disabilities, Article 18: "(1) States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities: (a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability; (b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement; (c) Are free to leave any country, including their own; (d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country. (2) Children with disabilities 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 their parents."



origin”.<sup>310</sup> However, recognising that some forms of discrimination are in fact the basis of nationality law, CERD also provides that “This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”. It also exempts “legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality”.<sup>311</sup>

## African standards

The African Charter on Human and Peoples’ Rights (ACHPR), adopted in 1981 (entry into force 1986), does not contain an explicit provision on nationality. However, Article 5 of the Charter has been interpreted by the African Commission on Human and Peoples’ Rights to protect nationality rights (see next heading). It provides that:

*Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.*

The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa states in Article 6 that:

*g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband;*  
*h) a woman and a man shall have equal rights with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests.*

Article 6 of the African Charter on the Rights and Welfare of the Child (ACRWC) both repeats the provision of the UN CRC on the right of a child to acquire a nationality and incorporate the requirement in the Convention on the Reduction of Statelessness relating to otherwise stateless children:

- (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) States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.*

In May 2014, the African Committee of Experts on the Rights and Welfare of the Child adopted a General Comment on Article 6, which recommended that states parties should adopt legal provisions that provide nationality to children born on their territory not only where the child is otherwise stateless, but also in other cases where the child has the strongest connection to that state.<sup>312</sup>

In April 2013, the African Commission on Human and Peoples’ Rights adopted a resolution which reaffirmed the right to a nationality as implied within Article 5 of the Charter.<sup>313</sup> A year later, the Commission formally

<sup>310</sup> CERD, Article 5: “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (d) Other civil rights, in particular: [...] (iii) The right to nationality.”

<sup>311</sup> CERD, Article 1(1) and 1(2). See also Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against Non-citizens*, 2005.

<sup>312</sup> African Committee of Experts on the Rights and Welfare of the Child, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child*, ACERWC/GC/02 (2014), adopted by the Committee at its 23<sup>rd</sup> Ordinary Session, 7-16 April, 2014, paragraphs 83-101.

<sup>313</sup> Resolution No. 234 on the Right to Nationality, adopted at the 53<sup>rd</sup> Ordinary Session 9-23 April 2013.

approved a study on nationality prepared in accordance with this resolution<sup>314</sup> and decided to draft a protocol to the Charter on the right to a nationality for adoption by heads of state.<sup>315</sup> In July 2015, in accordance with its resolutions of the previous two years, and following expert meetings to draft the text, the African Commission on Human and Peoples' Rights adopted the text of a draft Protocol on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa, for consideration by the other institutions of the African Union. The proposal for a protocol was accepted by the Executive Council of the African Union during the July 2016 AU summit in Kigali, Rwanda.<sup>316</sup>

## The jurisprudence of the African human rights bodies

Several cases have been brought to the African Commission on Human and Peoples' Rights on behalf of politically active individuals whom governments have attempted (often successfully) to silence by denationalisation or deportation or by otherwise violating their rights on grounds of alleged nationality or immigration status.

Perhaps most importantly the African Commission has found that the provision of Article 5 that states "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status" applies specifically to attempts to denationalise individuals and render them stateless.<sup>317</sup> In 2015, in a decision adopted in relation to the Nubian community in Kenya, the Commission reaffirmed that:

*[N]ationality is intricately linked to an individual's juridical personality and that denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual's right to the recognition of his juridical personality. The Commission considers that a claim to citizenship or nationality as a legal status is protected under Article 5 of the Charter.*<sup>318</sup>

In addition, the Commission has held that Article 7(1)(a), with its reference to "the right to an appeal to competent national organs", includes both the initial right to take a matter to court, as well as the right to appeal from a first instance decision to higher tribunals. In several cases relating to deportations or denial of nationality, the Commission has held that the fact that someone is not a citizen "by itself does not justify his deportation"; there must be a right to challenge expulsion on an individual basis.<sup>319</sup>

Founding its decisions on Articles 2 and 7 as well as Article 12, the Commission has ruled against Angola, Guinea and Zambia in cases relating to individual deportations or mass expulsions on the basis of ethnicity, commenting that mass expulsions "constitute a special violation of human rights."<sup>320</sup>

<sup>314</sup> *The Right to Nationality in Africa*, Study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, pursuant to Resolution 234 of April 2013 and approved by the Commission at its 55<sup>th</sup> Ordinary Session, 28 April – 12 May 2014.

<sup>315</sup> Resolution 277, on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, adopted at the 55<sup>th</sup> Ordinary Session, 28 April – 12 May 2014.

<sup>316</sup> Decision on the Report of the Activities of the African Commission on Human and Peoples' Rights (ACHPR), Doc. EX.CL/968(XXIX), 15 July 2016, paragraph 5.

<sup>317</sup> Communication No. 97/93, *Modise v. Botswana* (2000), paragraph 91. See also Communication No. 212/98, *Amnesty International v. Zambia* (2000); Communication No. 211/98, *Legal Resources Foundation v. Zambia* (2001); Communication No. 246/02, *Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire* (2008).

<sup>318</sup> Communication No. 317/06, *The Nubian Community v. Kenya* (2015).

<sup>319</sup> *Amnesty International v. Zambia*, paragraph 33. See also Communication No. 159/96, *Union Interafricaine des Droits de l'Homme and Others v. Angola* (1997); *Modise v. Botswana*; Communications Nos. 27/89, 49/91 and 99/93, *Organisation Mondiale Contre la Torture and Others v. Rwanda* (1996); Communication No. 71/92, *Rencontre Africain pour la Défense des Droits de l'Homme v. Zambia* (1996).

<sup>320</sup> *Union Interafricaine des Droits de l'Homme and Others v. Angola*, paragraph 16. See also Communication No. 292/2004, *Institute for Human Rights and Development in Africa v. Angola* (2008); *Rencontre Africaine pour la Défense des Droits de l'Homme v.*

The very first decision on the merits of a communication to the African Committee of Experts on the Rights and Welfare of the Child, issued in 2011, concerned the interpretation of Article 6 of the African Charter on the Rights and Welfare of the Child on the right to a name, birth registration and a nationality. In this decision on the Kenyan Nubian children, the African Committee of Experts found the Kenyan state in violation of its obligations under Article 6 of the Charter, despite the reforms of the new 2010 constitution, because it still failed to provide sufficient guarantees against statelessness since it does not provide that children born in Kenya of stateless parents or who would otherwise be stateless acquire Kenyan nationality at birth. The Committee stated that it “cannot overemphasise the overall negative impact of statelessness on children” and held that:

*[A]s much as possible, children should have a nationality beginning from birth. [...] Moreover, by definition, a child is a person below the age of 18 (Article 2 of the African Children’s Charter), and the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the State Party to comply with its children’s rights obligations.*<sup>321</sup>

In March 2018, the African Court on Human and Peoples’ Rights handed down judgment in the case of *Anudo Ochieng Anudo v. Tanzania*. The Court found Tanzania to be in violation of numerous human rights obligations, especially in relation to the application of due process of law. It ruled that Tanzania had unlawfully rendered Anudo stateless, and that:

*[S]ince the Respondent State is contesting the Applicant’s nationality held since his birth on the basis of legal documents established by the Respondent State itself, the burden is on the Respondent state to prove the contrary.*<sup>322</sup>

In relation to provisions in the Citizenship Act excluding court review, it decided that:

*[B]y declaring the Applicant an “illegal immigrant” thereby denying him Tanzanian nationality, which he has, until then enjoyed, without the possibility of an appeal before a national court, the Respondent State violated his right to have his cause heard by a judge within the meaning of Article 7(1) (a), (b) and (c) of the [African Charter].*<sup>323</sup>

*The Court notes further that the Tanzanian Citizenship Act contains gaps in as much as it does not allow citizens by birth to exercise judicial remedy where their nationality is challenged as required by international law. It is the opinion of the Court that the Respondent State has the obligation to fill the said gaps.*<sup>324</sup>

The Court equally condemned similar provisions in the Immigration Act. Accordingly, the Court: “order[ed] the Respondent State to amend its legislation to provide individuals with judicial remedies in the event of dispute over their citizenship.”<sup>325</sup>

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*Zambia; Communication No. 249/02, Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea (2004).*

<sup>321</sup> Kenyan Nubian Children’s case, paragraph 42. See also text with footnotes 15 and 226.

<sup>322</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania*, App. No. 012/2015, African Court of Human and Peoples’ Rights, Judgment of 22 March 2018, paragraph 80.

<sup>323</sup> In the judgment, the reference here is to the ICCPR (International Covenant on Civil and Political Rights): however, given the article reference, and earlier text of the judgment, this is clearly not what was intended.

<sup>324</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania*, App. No. 012/2015, African Court of Human and Peoples’ Rights, Judgment of 22 March 2018, paragraphs 115 and 116.

<sup>325</sup> *Ibid.*, paragraph 132(viii).

## 7. The East African Community legal and policy framework

An EAC was first established in 1967 by the post-independence leaders of Kenya, Uganda and Tanzania, and lasted ten years before dissolving in 1977. While other forms of cooperation continued, it was not until 1993 that heads of state signed new agreement for a Tripartite Commission for East African Cooperation, and 1996 before a secretariat was put in place. In November 1999, negotiations among the three states finally resulted in the signing of a new Treaty for the Establishment of the East African Community, which entered into force on 7 July 2000. Rwanda and Burundi acceded to the treaty and joined the Community in 2007; South Sudan acceded to the treaty in April 2016 and formally joined the organization in October 2016.

The EAC Treaty envisages a customs union, a common market, a monetary union, and ultimately a political federation; protocols to the treaty create the framework for the customs union (2004); the common market (2009), and the monetary union (2013). Most progress has been made towards the customs union, which entered fully into effect in 2010.<sup>326</sup>

The fundamental principles of the EAC include “good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights” (Article 6 (d)). The EAC Partner States also “undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights” (Article 7(2)). The EAC Court of Justice has confirmed the responsibility of the EAC, as an institution, to ensure that Partner States meet their obligations under the EAC treaty, which include their human rights obligations under the African Charter.<sup>327</sup>

The EAC Treaty commits Partner States to adopt measures to achieve free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the community.<sup>328</sup> The common market protocol, in force since 2010, elaborates on these commitments, providing for the free movement of goods, people, labour, services and capital from one EAC state to another, as well as for the rights of establishment and residence without restrictions.<sup>329</sup> Annexes provide greater detail on these rights, including regulations adopted in 2009 on freedom of movement.<sup>330</sup>

Under these agreements, citizens of any EAC Partner State have the right to visa-free travel and to stay in other Partner States for up to six months. They may accept employment or work self-employed in another state, though subject to obtaining a work permit. Implementation of these agreements remains incomplete, although some law reforms have been adopted.<sup>331</sup> There is a general project to harmonise national laws in order to facilitate the creation of the common market in the region.

The common market protocol also provides for standardisation of identification and travel documents (Articles 8 and 9). The second EAC development strategy for 2001-2005 called on Tanzania and Uganda to adopt a national identity card.<sup>332</sup> An East African passport was launched as early as 1999, with the aim of simplifying travel within the states. This document was not recognised as a travel document outside of the

<sup>326</sup> Background on the EAC including the treaty and protocols, available at: <http://www.eac.int/>.

<sup>327</sup> EACCJ Reference No. 1/2007, *James Katabazi and 21 others vs. Uganda*, Judgment of 1 November 2007.

<sup>328</sup> EAC Treaty, Article 104 (scope of cooperation).

<sup>329</sup> Protocol on the Establishment of the East African Community Common Market. See especially Article 5 on scope of cooperation, and Part D on Free Movement of Persons and Labour.

<sup>330</sup> The East African Community Common Market (Free Movement of Persons) Regulations Annex I, November 2009. An overview of the common market and links to the other annexes is available at: [http://eac.int/commonmarket/index.php?option=com\\_content&view=article&id=80&Itemid=117](http://eac.int/commonmarket/index.php?option=com_content&view=article&id=80&Itemid=117).

<sup>331</sup> Page on Free Movement of Persons and Labour, available at: <https://www.eac.int/immigration>.

<sup>332</sup> Second EAC Development Strategy 2001-2005, East African Community, p. 41.

EAC, but it had a six-month multiple entry validity for travel among the states. Take-up was limited, since a person wishing to travel outside the EAC would in any event need an international passport, which also allows visa-free travel within the EAC. A new internationally valid EAC e-passport with increased security features was introduced from January 2018.<sup>333</sup> Each Partner State will phase out its current national passports and replace them with documents issued according to the new standard format. National identity cards are now recognized as travel documents by Burundi, Kenya, Rwanda and Uganda.<sup>334</sup> Proposals for further mutual recognition of national identity cards are under discussion.<sup>335</sup>

As is the case for the proposed AU passport launched at the July 2016 summit in Kigali, EAC passports will be issued by Partner States to their own nationals. The rights and privileges that the passport gives to their bearers are as nationals of individual states, based on the laws and policies of the Partner States and the treaties that establish the EAC.<sup>336</sup>

There is no EAC agreement on treatment of refugees and on the status of convention travel documents (CTDs) issued to refugees, although the treaty envisages the development of “common mechanisms for the management of refugees”.<sup>337</sup> In practice, there are problems with recognition of the rights of holders of CTDs issued by one Partner State in another: for example, Kenya does not recognise Ugandan CTDs issued to refugees for visa free admission into Kenya.<sup>338</sup>

## The EAC and the ICGLR

All EAC Partner States are also members of the International Conference on the Great Lakes Region (ICGLR).<sup>339</sup> Although the EAC itself has no specific framework relating to statelessness, the ICGLR has recognised, from its first meeting in 2004, the contribution that issues relating to contested nationality have made to conflict in the Great Lakes region.

The 2004 Dar es Salaam Declaration that established the Conference committed states to “adopt a common approach for the ratification and implementation of the UN Conventions on Statelessness, harmonise related national laws and standards, and provide refugees and displaced persons with identification documents enabling them to have access to basic services and exercise their rights.”<sup>340</sup>

In 2017, ICGLR Member States strengthened these commitments by adopting a Declaration and Regional Action Plan on the Eradication of Statelessness (2017-2019).<sup>341</sup> The Declaration and Plan of Action commit ICGLR Member States to ratification of the UN conventions on statelessness, reform of nationality laws to bring them into line with international standards on nationality and statelessness, adoption of national action

<sup>333</sup> Originally 2017. Joint Communiqué: 17th Ordinary Summit of the East African Community Heads of State, 2 March 2016.

<sup>334</sup> George Omondi, “Four E. African states to adopt use of identity cards to travel”, *Business Daily Africa*, 2 January 2014.

<sup>335</sup> *Study of Options for Mutual Recognition of National IDs in the East African Community*, World Bank and EAC Secretariat, 2018.

<sup>336</sup> Summary of presentation by Stephen Niyonzima, Principal Labour and Employment Officer, EAC Secretariat, at *Right to Nationality (R2N) in the East African Community*, EACSOE, November 2015.

<sup>337</sup> EAC Treaty, Article 124 (Regional Peace and Security).

<sup>338</sup> Interview, Office of the Prime Minister, Kampala, August 2016.

<sup>339</sup> The ICGLR held its first meeting in 2004 and was formalised in 2006 with the signing of a Pact on Security, Stability and Development in the Great Lakes Region. The original signatories were Angola, Burundi, Central African Republic, Congo, DRC, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia; South Sudan joined in 2012 after it gained its independence.

<sup>340</sup> Dar-es-Salaam Declaration on Peace, Security, Democracy and Development in the Great Lakes Region, ICGLR, adopted by the First Summit of Heads of State and Government, Dar-es-Salaam, 19-20 November 2004, paragraph 68, available at: [http://www.icglr.org/images/Dar\\_Es\\_Salaam\\_Declaration\\_on\\_Peace\\_Security\\_Democracy\\_and\\_Development.pdf](http://www.icglr.org/images/Dar_Es_Salaam_Declaration_on_Peace_Security_Democracy_and_Development.pdf).

<sup>341</sup> Declaration on the Eradication of Statelessness, adopted by Ministers of Foreign Affairs of ICGLR Member States, June 2017, available at: <http://www.refworld.org/docid/59e9cb8c4.html>; Action Plan of the ICGLR on the Eradication of Statelessness 2017-2019, available at: <http://www.refworld.org/docid/5a7c16aa4.html>. Both documents were endorsed by the ICGLR 7<sup>th</sup> Ordinary Summit of Heads of State and Government in Brazzaville, Republic of Congo, 19 October 2017.

plans to end statelessness, and nomination of government focal points on statelessness. By April 2018, focal points had been nominated in all 12 Member States, and trained with the support of UNHCR.

## 8. Conclusions

### Extent of statelessness and profiles of those at risk

It is not possible to establish the number of stateless persons in East Africa; however, it is clear that there are many hundreds of thousands of people at risk of statelessness. Statelessness is ultimately an individual situation that must be determined on the facts of each case; and it may take several years for a person to discover that he or she is in fact not considered to be a national of the state of birth and residence, after applications to different government departments for recognition, and exhaustion of appeal mechanisms. In the context where birth registration rates are low and many people remain undocumented by the state, it is difficult to propose even estimated numbers for those affected. However, it is possible to describe the profile of those most at risk of statelessness. They include the following groups: descendants of pre-independence migrants; members of border populations, including nomadic pastoralists who cross borders; children who are vulnerable in various ways (born out of wedlock, foreign fathers, orphans, separated from their parents, etc.); refugees, former refugees and internally displaced persons; and long term migrants and their children.

Many of these people are only now finding out that their citizenship is in doubt, as new identity cards are being introduced, or old systems upgraded. Among those at risk of statelessness are people who are, in fact, nationals of the state where they live under the laws in force, but who cannot establish that nationality for lack of evidence or because of discriminatory application of the law. Others are not nationals under the law, but have no plausible “home” to return to: they have been in the country of residence for many decades, or were born and brought up there and have never visited the country of origin of their parents or grandparents. They only remain foreigners because the law provides no practical possibility for them to acquire nationality: that is, attribution of nationality to children is exclusively based on descent or explicitly determined by membership of ethnic group, and in addition there are no accessible procedures for acquisition of nationality.

Among the existing members of the EAC, Kenya has had the most difficult challenges around managing access to citizenship; however, levels of awareness about the problem are also highest, including reports by the constitutionally established bodies examining human rights, administrative justice and anti-corruption, as well as by UNHCR and national civil society organisations.

Tanzania and Uganda have similar legal and institutional traditions to Kenya, but have only recently introduced a universal requirement for adults to be registered and carry identity cards. The questions that may arise around entitlement to citizenship have mostly been obscured in these countries because they historically have only arisen when a person is threatened with expulsion as an irregular migrant, or when a person applies for a passport, and very few people have a passport. However, with the introduction of the new national identity cards, it is likely that people who believed themselves to be citizens, and others with entitlement under the law, are going to find that they are not considered to be so, but also cannot establish nationality anywhere else.

Rwanda and Burundi are among the few countries in Africa where the boundaries of the modern state overlap (at least to a large extent) with cultural and linguistic boundaries and historical political units. While the risks are reduced, there are nonetheless not insignificant groups of people at risk of statelessness in both countries.

The newly established state of South Sudan has many complex problems in which the self-definition of the new state is central, and thus also questions of who is entitled to South Sudanese nationality. The weakness of the state administrative systems and the crisis in government means that, as in Somalia, the number of people at risk of statelessness is increased, even for those whose theoretical entitlement to South Sudanese nationality is clear.

### The impact of statelessness

There is a lack of systematic survey evidence of the specific impact of discrimination in access to citizenship and identity documents on the ability of individuals and groups to participate fully in the economic, social and political life of a country; but there is strong qualitative data supporting the significance of the effect. As

the African Committee of Experts on the Rights and Welfare of the Child stated in the Kenyan Nubian Children's case:

*Whatever the root cause(s), the African Committee cannot overemphasise the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherit an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the State. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally antithesis to the best interests of children.<sup>342</sup> [...]*

*In the instant case, the discriminatory treatment of the children affected by the conduct of the Government of Kenya based on their and their parents' and legal guardians' social origin has had long standing and far reaching effects on the enjoyment of other Charter rights.<sup>343</sup>*

This view from the African Committee of Experts is echoed in a UNHCR report on childhood statelessness published in 2015. The summary states:

*The report highlights how not being recognized as a national of any country can create insurmountable barriers to education and adequate health care and stifle job prospects. It reveals the devastating psychological toll of statelessness and its serious ramifications not only for young people, whose whole futures are before them, but also for their families, communities and countries. It powerfully demonstrates the urgency of ending and preventing childhood statelessness. [...]*

*The strongest message to emerge from the consultations with the children and youth was their sense of identification with the countries in which they had been born and had lived all their lives. In almost all cases the best solution to statelessness is to turn a child's existing links with his or her country of birth and upbringing into the legal bond of nationality. It is vital that this be achieved as early as possible so that no child grows up with the indignities and harm caused by statelessness.<sup>344</sup>*

There is also evidence that inability of certain ethnic groups to obtain recognition of citizenship, including difficulty in obtaining identity documents, has been a driver of insecurity in some contexts. Research by the Institute of Security Studies, South Africa, for example, found that discrimination and abuse from different state authorities, including in acquiring identity cards, was a principal driver of recruitment from Kenya into Al Shabaab.<sup>345</sup>

## Legal frameworks

Only Rwanda has a legal framework for nationality administration that almost complies with the international and African norms on the prevention and reduction of statelessness. Most importantly, none of the other five countries has the provision in place required by Article 6(4) of the African Charter on the Rights and Welfare of the Child, that "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

<sup>342</sup> Kenyan Nubian Children's case, paragraph 46.

<sup>343</sup> *Ibid.*, paragraph 58.

<sup>344</sup> UNHCR, *I am Here, I Belong: The Urgent Need to End Childhood Statelessness*, November 2015. See also UN Human Rights Council, *Report of the UN Secretary General: Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, 16 December 2015, A/HRC/31/29.

<sup>345</sup> Anneli Botha, *Radicalisation in Kenya. Recruitment to al-Shabaab and the Mombasa Republican Council*, ISS Paper 265, September 2014. See also UNDP, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment*, 2017.



with its laws". The purely descent-based systems in Burundi and Kenya place significant numbers at risk of statelessness. This is exacerbated in Burundi by the conflict between the constitution and the law, in particular in relation to gender discrimination in transmission of citizenship to children. The conflict between law and its interpretation in Tanzania, coupled with the exclusion of decisions relating to citizenship from any review by the courts, creates a level of executive discretion around determination of citizenship that is extreme by international standards. Tanzania is also the only EAC Partner State to lack a legal provision to protect children of unknown parents from statelessness.

The explicitly ethnic basis for citizenship in Uganda and South Sudan creates challenges of its own, but the descent-based system in Kenya and Burundi, and in Tanzania as implemented, mean that even in those countries it is often necessary to show a connection to an ethnic group "originating from" the country, or—in the Commonwealth countries—an ancestor who qualified to become a citizen based on the transitional provisions at independence. Only Rwanda creates rights to acquire citizenship based on birth in the territory (a provision introduced since 2004), so that people who have been born and brought up in Rwanda can under the law apply for citizenship at majority if they wish to become Rwandan, in a non-discretionary procedure.

Thanks to their legal heritage, none of the EAC countries have the legal provision common in West Africa, deriving from French law, that a person born in the territory of one parent also born there becomes automatically a citizen at birth. The adoption of this rule, and regulations and procedures to create the rules of evidence for it to be implemented, would immediately greatly reduce the numbers of people at risk of statelessness. Another rule from the French tradition that is helpful in West Africa is the concept that a person who has always been treated as a national and exercised rights as a national (is in *possession d'état de national*, usually translated as having the "apparent status" of a national) can obtain a court order confirming that status, based on certain rules of evidence. There are many people lacking evidence of their citizenship, thanks to low rates of birth registration and documentation in general, that could be helped by such a procedure. The reduced fees available in Uganda for those applying to register as citizens on the basis that they "consider themselves as Ugandans except for the citizenship papers" is an example of the same recognition that it may be impossible to produce documentation showing entitlement to citizenship. Similarly, the principle of "collective effect" common in civil law systems (including Rwanda and Burundi), by which children acquire nationality at the same time as a parent who is naturalising, if included within the application, is absent in the common law countries: this is another procedural measure that facilitates access to nationality without requiring separate applications for nationality on behalf of all children in a family, or having to wait until they are themselves adults.

Where rights based on birth in the country do not exist, provisions on acquisition of nationality after birth become more important. A high level of executive discretion reduces the accessibility of any such provisions, and this remains problematic in most EAC states, though to a lesser extent in Rwanda and Burundi. In practice, acquisition of citizenship by adults is very difficult in all EAC Partner States, with only a few hundred at maximum acquiring nationality each year, excluding Tanzania's exceptional mass naturalisation programmes for refugees.<sup>346</sup> The legal framework for naturalisation appears to be most difficult in Uganda, where twenty years' residence is required, and there are significant restrictions on the periods of residence that count towards that total, including periods of residence as a dependent. Tanzania fails to provide for acquisition of citizenship by adopted children or by children whose parents are naturalising; while the regular processes of naturalisation in Tanzania are amongst the most elaborate and expensive (US\$5,000) anywhere in the world. Uganda is highly unusual in failing to provide that the child of a naturalised or registered citizen born after the parent acquired citizenship does not automatically become a citizen at birth. This leaves many at great risk of statelessness, despite the partial permission for dual citizenship in place since 2005, especially since children are not eligible for dual citizenship.

Countries that have a purely descent-based nationality law have a particular obligation to increase access to nationality based on long-residence or other criteria. Among populations at risk of statelessness, especially children born in their territory who cannot claim the nationality of their parents (for reasons of law or fact),

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<sup>346</sup> See heading on Access to Naturalisation in section 4 of this report.

this should be through non-discretionary forms of registration, or failing that, simplified and facilitated naturalisation procedures. Even where a state does have in place legal protections for stateless children born in their territory, these procedures are usually very difficult to access, so other means of acquisition are critical. Naturalisation should be based on objective criteria and decided upon by a fair and transparent process, rather than depending on the personal decision of the Minister or President. Reasons should be given for refusal, and options to challenge a decision should be available if it is asserted that the person does not fulfil the conditions established in legislation. A state's obligations to facilitate naturalisation under the 1951 Refugee Convention (Article 34) and 1954 Convention relating to the Status of Stateless Persons (Article 32) should be taken into account – for example, through reduced fees in such circumstances, as implemented by Kenya in the case of the Makonde, or Tanzania for long-term Burundian refugees.

Although there is no polling across the region, surveys of public attitudes in Kenya and Uganda to acquisition of citizenship by refugees and their children born in the country suggest reasonable openness to legal reform to widen access to citizenship for those of foreign origin. Reports published in June 2018 by the International Rescue Committee found that more than half of Ugandans and 32 percent of Kenyans supported access to citizenship for refugees after 5-10 years, and 62 percent of respondents in both countries after 20 years. In Kenya, 62 percent of respondents also thought that the children of refugees born in Kenya should have access to citizenship.<sup>347</sup>

### **The status of pastoralists**

Nationality law in most countries in the world is very poorly adapted to provide for those who do not live a settled existence. Nationality laws in African countries are largely derived from European models; that is from countries where nomadic lifestyles are the exception. In East Africa, however, nomadic pastoralists form a substantial percentage of the population. They have historically lived literally and figuratively at the margins of the state; today, with the security and development imperatives around identification, they risk yet further marginalisation – as do those from the same ethnic groups who in fact are not nomadic but have a settled existence.

The East African Community could make a contribution to the development of norms for the African continent by devising rules for the effective incorporation of nomadic pastoralists within their states through the conferral of nationality.

### **Statelessness and lack of identity documents**

It can be difficult to distinguish between a person who is undocumented and a person who is stateless. For example, Kenya's national oversight bodies have documented the impact that difficult access to national identity cards has in Kenya, and have often referred to those people as stateless, although many denied access should be recognised as citizens of Kenya under the law. As UNHCR states, the determination of statelessness is a "mixed question of fact and law" (see box below).

It is also hard to disentangle the impact of lack of identity documentation from the impact of statelessness. People whose citizenship is in doubt are especially likely to lack proof of identity, but there are also many not at risk of statelessness who lack documents and face the same risks of exclusion. Conversely, lack of a national identity document may not always place a person at risk of economic and social exclusion, where national identity documents are not widespread and are not required for most transactions. For example, until recently, various different identity documents or referral letters might have served to access private or public services in Tanzania; but a person is now required to show a new national identity card. Although the former systems also created risks of exclusion (for those without access to networks who could vouch for them), the primary risk of not holding proof of identity was that a person who was not perceived to be Tanzanian would be at risk of expulsion as an irregular migrant. The rollout of a new national identity card is hoped to increase the government's knowledge of its own population and of non-Tanzanians resident in the country, and also

<sup>347</sup> International Rescue Committee, *Kenya: Citizens' Perceptions on Refugees*, June 2018; International Rescue Committee, *Uganda: Citizens' Perceptions on Refugees*, June 2018.

to increase inclusion in the formal economy and access to benefits; but it will also reveal and perhaps exacerbate exclusion if care is not taken to avoid those effects. This is equally true in other countries where the requirements for identification are becoming more stringent.

Thus, efforts to roll out universal requirements for identification should be paired with efforts to reduce statelessness, which requires as a first step legal and practical measures to reduce the number of people whose nationality is undocumented.

### **When is lack of identity documentation evidence of statelessness?<sup>348</sup>**

Lack of documentation is in part just one symptom of more general weaknesses in the state. A very large number of people in Partner States of the EAC have no documents because they don't see the point of having documents, and because they are costly in time and money to obtain. The first point of need is often when a child should enter school or needs to take an exam, but if schools are inaccessible or of poor quality (either objectively or as a matter of opinion), then what need for birth registration? If you remain entirely in the informal sector, a peasant farmer or transhumant pastoralist, then identity documents are not required; if the police demand money when you cross a border or an internal checkpoint whether or not you have the right documents, then a passport or identity card does not serve even its most basic use of proving your right to be present or to travel. If, in addition, obtaining documentation requires a journey to the nearest administrative centre; a long wait to be seen; a mixture of official and unofficial fees, and at least a day's lost income, the cost-benefit analysis looks untempting.

It is not the case that all these people are necessarily stateless as a result: but those who are in this situation and are in addition members of a social group generally regarded as marginal – including those described in this study – are certainly at risk of statelessness. It is only in the effort of seeking documents that statelessness will become apparent.

UNHCR has published a Handbook on Protection of Stateless Persons which considers the definition of a stateless person.<sup>349</sup> The definition in international law appears in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, as follows:

*For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.*

In its guidelines on this definition, UNHCR notes that "establishing whether an individual is not considered as a national under the operation of its law [...] is a mixed question of fact and law", thus:

*[E]xamining an individual's position in practice may lead to a different conclusion than one derived from a purely objective analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to "law" in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.<sup>350</sup>*

The guidelines go on to emphasise that in many states it is not one single authority that determines whether a person has the nationality of that state, but rather a combination of many different agencies responsible for issuing different documents and making different decisions for different purposes. It may therefore be a cumulative rejection of applications for documents rather than one single one that shows that a person is not regarded as a national. Where a person acquires nationality automatically, by operation of law – as is usually the case for attribution of nationality at birth (whether the nationality of the parents or of the state in which birth takes place) – documents are not usually issued at that time. But it is later, when documentary

<sup>348</sup> Extracted from Bronwen Manby, *Nationality, Migration and Statelessness in West Africa*, UNHCR and IOM, June 2014.

<sup>349</sup> UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons*, UNHCR, 2014.

<sup>350</sup> Handbook, paragraph 24.

proof of nationality is sought, that it may become apparent that the state concerned does not regard the person as its national. In particular:

*Where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national.<sup>351</sup>*

For very many people in the groups highlighted as being at risk of statelessness in this study it is not exactly clear if they are stateless or not: they exist in a blurred zone between clearly having a nationality and clearly being stateless. It may be the case that some members of a community have some (but not all) documents related to nationality (just a birth certificate, just a national identity card, just an electoral card – but were rejected or never applied for a nationality certificate or passport), whereas others were never registered at birth and applications for all other documents have been rejected; others may have obtained documents by paying bribes to intermediaries, and others may have travelled to a different “home” country to obtain documents there because they cannot get them where they currently live (or because they prefer to keep that affiliation). Each person has his or her own narrative, and his or her own particular circumstances (of parentage, place of birth and childhood, marriage partner, habitual residence, autonomy of social status, access to connections and money) that will explain these outcomes – but among the groups highlighted in this study are certainly people who fulfil the definition of stateless person under international law.

### **The importance of due process and transparency**

Tanzania's exclusion of court review of decisions under the Citizenship Act has become unusual, and urgent to reform. However, the guarantee of a right to challenge decisions made under the act in the High Court would not in itself satisfy a requirement for due process and fairness in decision-making on acquisition and loss of citizenship. An application to the High Court for judicial review in the common law system is a highly expensive undertaking. What is needed is for the common law countries to borrow from civil law and introduce court adjudication of decisions around access to citizenship as a routine matter. Free legal assistance is also crucial in ensuring these systems are effective.

Completely discretionary systems for deciding questions of nationality create major risks of statelessness, not necessarily for reasons of ill faith, but because they have enabled a paralysis in the process for people to change their nationality to that of the place where they have the closest connections. They also greatly favour people with money, lawyers and connections over the poor who do not have access to such assistance in navigating the application process.

The introduction of comprehensive identification requirements for adults tends to make somewhat fluid rules in undocumented communities about who belongs immediately more rigid and centralised. This can have positive aspects in terms of increasing legal certainty, but also means that the rules around non-discrimination in access to the status claimed, due process and fairness in the issue of documents, and protections against statelessness become much more important.

The rules on how to determine nationality where it is in doubt should be laid down in law, and the regulations and administrative procedures to implement the law published and made easily available. It is, for example, unacceptable that guidance on the interpretation of the provisions on citizenship by birth in the Tanzanian Citizenship Act is not published, especially since this guidance appears to go against an ordinary reading of the law.

Rules on the provision of evidence of entitlement to nationality from birth should apply to any person applying for documentation, not only members of certain ethnic groups. As recommended by the African Court on Human and Peoples' Rights in the *Anudo* case discussed above, the burden of proof should be on the state to justify rejection of an application if a person has previously held documents recognising

<sup>351</sup> Handbook, paragraph 37.

nationality. Alternative forms of authentication of a person should be accepted where the currently required documentary evidence is not available. For example, documents such as primary school completion certificates, birth notification documents, or health clinic attendance cards should be accepted where birth certificates are not available, especially for older generations. Witness testimony should also be permitted.

If a person's entitlement to nationality is questioned, the civil law procedure for consideration of the facts and issue of a certificate of nationality by a court would be best practice; at minimum there should be accessible and low cost procedures for court review of a decision by the executive branch. Decisions to recommend naturalisation should be made by a committee with a designated and balanced composition, based on clearly established criteria, and transmitted to the applicant in writing.

The government departments responsible for nationality administration should also seek to dispel misunderstandings about access to nationality by publishing annual reports detailing disaggregated statistics where possible on acquisition of nationality (other than automatically at birth); deprivation of nationality; the times taken to process applications, and rejections for naturalisation or for issue of nationality documents (including passports and identity cards).

The different government departments involved in such processes should have linked decision-making processes and channels of communication. Thus, if nationality is for all usual purposes shown by possession of a national identity card, then there should be a procedure to refer the nationality status of a person applying for an identity card for adjudication as part of the same process, rather than requiring a separate referral to immigration officials with an indefinite delay. If the person is not a national under current law but would qualify to acquire nationality, the application for a national identity card should be taken to be an application for acquisition of nationality and referred accordingly.

### **Efforts to reduce statelessness**

There have been important efforts within the EAC to try to resolve questions of statelessness:

- The adoption of (time-limited) provisions in the Kenyan Citizenship and Immigration Act 2011 for easier access to registration as a citizen for people resident in the country since independence.
- The protections against statelessness included in Rwanda's nationality code, especially for children born in the territory who cannot claim another nationality and the right to acquire nationality based on birth and residence in the country until majority.
- Tanzania's major initiatives to naturalise refugees present in the country for many decades.
- Uganda's leverage of the initial mass registration process for a new national identity card to allow who are not citizens by birth to register as citizens.

Among these legal provisions and initiatives, the Tanzanian government's mass naturalisation programmes for refugees have been quite extensively studied, especially the most recent effort for "old caseload" Burundi refugees (see box pp. 66–67). The other efforts would reward greater study: the reasons why the Kenya legal provisions have not been as effective as hoped and the means by which it could be improved and extended; the processes for identification of children born stateless in Rwanda and for giving them Rwandan citizenship, and the ways in which Uganda's citizenship registration processes were deployed during registration for the national identity card – and how they could be extended for regular use.

### **Regional cooperation mechanisms**

There is a general lack of cooperation between countries (not only in East Africa) to resolve cases where nationality is in doubt. While there may be contact between consular authorities to obtain agreement on the nationality of a person without documents in order to arrange deportation, there is no positive system to establish nationality and documents for a person where it is clear that he or she can only lay claim to the nationality of two possible states, but both states are currently disputing that claim.

It is usual for state officials to consider that their obligations centre on ensuring that people who are not entitled to citizenship do not obtain citizenship documents. But in the context of East Africa where many

people do not hold documentation of citizenship, the rejection of an application for citizenship documents by a person who does not hold documents anywhere else should be accompanied by an effort to facilitate that person's access to citizenship documentation in another country. If the other country also rejects the application, then the state of habitual residence should have the first obligation to provide that person with access to its nationality.

The East African Community legal frameworks and institutions should be adapted to promote cooperation in the determination of nationality of populations where that is in doubt, including working with UNHCR and other relevant international agencies to establish bi- or tri-lateral commissions to hold sessions in border regions and adjudicate the cases of people who could possibly lay claim to two or more nationalities but hold documentation nowhere.

The Brazzaville Declaration and Regional Action Plan adopted by the ICGLR Member States provide another important framework for collaboration to end statelessness. The ambitious timeframes envisaged by the Action Plan, including ratification of the statelessness conventions by 2019, should be monitored by civil society, UNHCR and states themselves.

## 9. Recommendations

### Regional institutional support for inter-state cooperation and common norms

The EAC institutions should facilitate collaboration among EAC Partner States to resolve cases of potential statelessness, by:

- Promoting the establishment of bi- and tri-lateral commissions to conduct verification missions to border populations, ensuring that all those resident in border areas have the documents of one or other (or both) state(s).
- Promoting the exchange of information and coordinated adjudication procedures among EAC Partner States and with neighbouring countries in order to establish a nationality for persons whose nationality is in doubt.
- Facilitate the provision of training on statelessness for officials responsible for nationality administration.
- Creating a mechanism such as a regional ombudsperson to serve as an interface between EAC citizens and the EAC Commission on nationality matters.
- Promoting the harmonisation of the nationality laws and practices of Partner States in line with the recommendations in this report and the Dar es Salaam and Brazzaville Declarations of the ICGLR, as part of the project to harmonise laws among Partner States.
- Ensuring that initiatives to strengthen the implementation of the EAC regime on free movement of persons, including the adoption of the biometric national ID card, take adequate account of the obligation to reduce statelessness.
- Conducting research and publishing reports on the consequences and prevalence of statelessness in the region and the profiles of those at risk, in collaboration with UNHCR and other relevant international agencies, in order to inform legislative and policy reforms to be implemented by Partner States.

These recommendations apply in equal measure to the ICGLR Executive Secretariat and coordination mechanisms, which should in addition build on existing commitments by:

- Ensuring the commitments adopted in the Brazzaville Declaration and Regional Action Plan are upheld within the timeframes agreed to by states, particularly the commitment to ratify the statelessness conventions by 2019, and to develop national action plans to eradicate statelessness. If the commitments are not upheld in time, the Regional Action Plan should be extended to 2024, in line with UNHCR's #IBelong Campaign to End Statelessness.

### Law reform

EAC Partner States should:

- Remove discriminatory provisions from domestic legislation in relation to the transmission of nationality to a spouse or child on the basis of sex or on the basis of birth in or out of wedlock.
- Review provisions that create preferential access to citizenship on the basis of race, religion or ethnic group to ensure that they comply with international and African norms and standards, and in particular to avoid the risk of statelessness for those who are born in the country who are not members of the preferred group or groups.
- Ensure that every child has the right to a nationality, including through provisions that:
  - Incorporate the safeguards against statelessness that are contained in the international conventions on statelessness and the international and African human rights treaties, in particular for children born in the country who cannot obtain access to proof of nationality of one of their parents.
  - Provide for access to citizenship for a person born in the country who remains there during childhood and until majority, whether automatically or on the basis of an application procedure, in particular where that person is otherwise stateless.

- Establish an accessible procedure for the confirmation of nationality, based on testimony and other forms of proof as well as birth registration, and the issuance of a document that is conclusive proof of nationality unless overturned by a court.
- Review the conditions and procedures for naturalisation to provide clear limits to the excessive discretion to grant or refuse naturalisation. Conditions should be clearly described and advertised, not be overly onerous to fulfil, and should not discriminate against any particular ethnic, religious or racial group. Decisions that a person does not fulfil the conditions for naturalisation should be reasoned, and subject to challenge in court.
- Ensure that domestic legislation on nationality ensures a right to nationality, and documents to prove it, for vulnerable children, including abandoned infants and children who are unaccompanied or separated from their parents.
- Review laws and procedures to ensure that they are adapted to contemporary East African realities, including to create systems for access to nationality from birth for nomadic and border populations, as well as the descendants of migrants and refugees.
- Provide in law for decisions by the executive to deprive a person of nationality, or to refuse to recognise claimed existing nationality, to be reasoned and subject to review and appeal by the courts.
- Provide in law for administrative and judicial procedures for the determination or certification of nationality where that is in doubt and for issuance of a document that is conclusive proof of nationality, including the right to appeal in case of rejection.
- Provide in law for rapid and effective administrative review of decisions relating to entitlement to identity documents (complaints systems) and also facilitate low-cost access to an independent judicial authority for adjudication of those decisions, as well as permitting appeal to the normal courts responsible for similar matters.

## Nationality administration

EAC Partner States should adopt measures to increase accessibility, due process, transparency and efficiency in nationality administration, including by:

- Publishing annual statistics on nationality procedures, including issuance of identity documents and naturalisations, and percentage of applications refused in each case.
- Conducting public awareness campaigns on the need for and procedures to obtain birth registration and other documentation, especially in border areas, among nomadic populations and in the poorest neighbourhoods.
- Clarifying which department or agency is responsible for the consideration and resolution of cases of statelessness. This should be the body with nationality matters among its responsibilities, combined with the courts for review or appeal of certain decisions.
- Improving the current operation and archiving of civil registration systems, aiming to achieve free, accessible, and universal registration of births, including for children of migrants, refugees, nomadic populations and other marginalised groups.
- Providing or facilitating legal and other assistance for those who are seeking proof of nationality, especially during periods when new procedures or law reforms are introduced.
- Ensuring that any vetting systems to verify a person's citizenship are established by law, apply to all applicants equally, have clear criteria and procedures, allow the right to be heard in person or by a representative, and provide for decisions to be issued within a reasonable period and for a negative response to be reasoned and delivered in writing.
- Ensuring that costs related to nationality administration and identification do not prevent people from obtaining the documents to which they are entitled in law.
- Taking urgent measures to ensure universal birth registration and strengthen civil registration systems more generally.



## Identification of populations at risk of statelessness, and prevention and reduction of statelessness

EAC Partner States should seek to identify and provide solutions for those persons who are stateless or at risk of statelessness, and in particular they should:

- Conduct research into populations at risk of statelessness, in order to identify those groups or individuals who require confirmation of their right to nationality of the country they live in, or interim protection as stateless persons prior to facilitated acquisition of nationality.
- Conduct specific awareness raising activities among populations at risk of statelessness to encourage individuals to acquire those documents that would confirm their nationality, including birth certificates, and to apply for confirmation of nationality through the procedures available, whether of the country of residence or another relevant country.
- In case of forced population movements caused by conflict or other crises, ensure documentation of those who have been forced to move at the earliest moment, and take particular measures to provide access to birth registration for their children, in line with the 1951 Refugee Convention (Article 25).
- Where individuals cannot be confirmed to have a nationality under existing laws, provide them with a temporary protective status in accordance with the procedures required by the Convention relating to the Status of Stateless Persons, and facilitate their acquisition of nationality.

### An integrated approach to nationality systems

- EAC Partner States should address nationality and statelessness from a systemic perspective, seeking to put in place coherent initiatives on documentation and identity management that provide access to a nationality for all both in theory and in practice, and that identify and provide documentation to all.

### Accessions to and implementation of UN and AU treaties

- EAC Partner States should take steps to fulfil the commitment they adopted, as ICGLR Member States in the Brazzaville Declaration and Action Plan, to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, and to review national law and practice to ensure it is compliant with their requirements, based on UNHCR's Handbook on Protection of Stateless Persons and guidelines on prevention of childhood statelessness. Uganda acceded to the 1954 Convention in 1965; Rwanda to both conventions in 2006; and Burundi's National Assembly unanimously approved accession to both conventions in September 2018, as this report went to print. No action had been taken by other EAC Partner States.
- All EAC Partner States except South Sudan are already party to the African Charter on the Rights and Welfare of the Child, of which Article 6 deals with birth registration and the right to a name and nationality. They should review their laws and procedures in line with the General Comment on Article 6 of the Charter adopted by the African Committee of Experts on the Rights and Welfare of the Child in 2014.
- Burundi and South Sudan should consider acceding to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. South Sudan should additionally consider acceding to the ACRWC.

### Recommendations to individual countries

In addition to the recommendations applying to all EAC countries listed below, the following apply to individual states.

Burundi

- Adopt legislation that retroactively clarifies the citizenship status of those who were resident in Burundi at independence, and their descendants, and allows those still resident in Burundi today to acquire nationality.
- Amend the nationality law to remove gender discrimination in transmission of nationality to children and spouses.
- Clarify the meaning of “legally unknown” in the nationality code, to facilitate effective protection against statelessness for children of unknown parents.
- Facilitate access to nationality for persons of Omani or Swahili origin, including via redoubled sensitisation of this population and a clear, written procedure.
- Facilitate access to birth registration and birth certificates upon return for the children born abroad of Burundian refugee parents, whose births were not registered or whose foreign registration needs transcription into the Burundian civil registration system for it to be recognised.

Kenya

- Conduct education and outreach campaigns, including to the communities mentioned in this report, to ensure that those who are eligible to register as citizens under the extended time limit for registration of stateless persons and migrants provided for by the 2011 Citizenship and Immigration Act are able to do so.
- Consider making the temporary registration period indefinite, and establishing a date before which a person’s ancestors must have been present in Kenya closer to the present than 1963.
- Implement court orders relating to issues of identification, and extend the effect of the orders to persons in a similar class to the plaintiffs in each case rather than requiring each individual to sue.
- Consider and implement the recommendations by the Ethics and Anti-Corruption Commission; the Kenya National Commission on Human Rights; the Truth, Justice and Reconciliation Commission; the Commission on Administrative Justice, and the decisions on complaints brought against Kenya before the African Committee of Experts on the Rights and Welfare of the Child and the African Commission on Human and Peoples’ Rights, with progress or reasons why recommendations are not to be implemented reported to Parliament.
- Specifically, adopt legal reforms to provide protection against statelessness for children born in Kenya who cannot acquire the nationality of one of their parents, as recommended by the African Committee of Experts in the Kenyan Nubian Children case.
- Accelerate the process of adoption, following broad consultation, of the proposed new legislation to replace the Births and Deaths Registration Act and the Registration of Persons Act.

Rwanda

- Take steps to reassess on an individual basis the status of asylum seekers and refugees from DRC living in refugee camps or elsewhere in Rwanda, in order to recognise Rwandan nationality if a person may have a claim to recognition (especially based on birth in Rwanda) and wishes to assert that right, to grant naturalisation if a person is eligible and wishes to naturalise, or to confirm protection as Congolese refugees.
- Provide a statelessness safeguard within Article 21 of the nationality law to ensure that children and spouses of individuals deprived of fraudulently acquired nationality are not exposed to statelessness by subsidiary loss of Rwandan nationality.

South Sudan

- Review the constitutional and legislative provisions basing access to citizenship on ethnicity, to provide access to citizenship to those who are not recognised as being members of an “indigenous ethnic community”, for example because they are members of cross-border communities, but with

long-term connections to South Sudan and no other state where they hold proof of citizenship. Reforms should address both the substantive provisions of the law and the procedural requirements to obtain identification documents.

- Review the law to ensure that citizenship is not attributed to those born and resident outside South Sudan who do not wish for it, for example by providing instead for automatic attribution of citizenship only to those qualified who establish their residence in South Sudan, to avoid exposing individuals holding Sudanese or another nationality to involuntary loss of that nationality.

### Tanzania

- Ensure that the constitutional review process, if it is revived, or a review of the citizenship legislation, addresses concerns raised in this report in relation to access to citizenship, including providing clarity on the basis of the law, while preserving the existing rights of those born before any amendments are adopted.
- Specifically, and in line with Tanzania's commitments under the African Charter on the Rights and Welfare of the Child:
  - Adopt a provision that a child found in Tanzania of unknown parents is presumed to be a citizen.
  - Adopt a provision to protect children born in Tanzania against statelessness if they cannot acquire the nationality of either of their parents.
- Remove gender discrimination in relation to acquisition of citizenship on the basis of marriage to a citizen.
- Amend the Citizenship Act to provide for access to the courts and other due process protections in relation to determination of citizenship, including access to identity documents, as ordered by the judgment of the African Court on Human and Peoples' Rights in the case of *Anudo Ochieng Anudo vs Republic of Tanzania*.
- Publish any official guidance that is applied by officials responsible for decisions on eligibility for citizenship, on interpretation of the provisions of the Citizenship Act on citizenship by birth and the evidentiary requirements in use.
- Use the roll-out of the new national identity card to identify and facilitate access to nationality for long-term migrants and their descendants, especially those entitled to register at independence and those promised citizenship in the past whose formal paperwork was never completed.
- Further extend the possibility of naturalisation for long-term refugees so that it remains available on an ongoing basis for those who fulfil the normal criteria for naturalisation, including self-settled refugees.
- Provide for the minor children of those who naturalise to be included within the same application for citizenship, and a non-discretionary, rapid and low-cost procedure for acquisition of citizenship by adopted children.
- Reduce the fees for naturalisation generally.

### Uganda

- Review the constitutional provisions on citizenship to ensure that they comply with international and African standards related to non-discrimination and provide for access to citizenship at birth to the children of those who are not members of named ethnic groups but have other forms of long-term connection to Uganda.
- Amend the law to permit automatic transmission of citizenship to the child of registered or naturalised citizens born after the parent acquired citizenship, and to allow those born before the parent naturalised to acquire citizenship as part of the same application.
- Identify and facilitate access to nationality for long-term migrants and their descendants, especially those entitled to register at independence and those promised citizenship in the past whose formal paperwork was never completed.
- Address the situation of those individuals and groups whose citizenship is questioned during the registration process for the new national identity card, such as the Maragoli, by adopting legal

reforms that provide access to citizenship for those with access to no other citizenship, even if they are not members of one of the ethnic communities listed in the constitution.

- Permit periods of time resident in Uganda as a child, student or refugee to count towards the legal residence required to register or naturalise as a citizen.
- Permit dual citizenship for children.

### **The role of international partners**

The different UN agencies and other international partners of East African states, including UNHCR, UNICEF, UNDP, UNFPA and the Office of the Special Envoy for the Great Lakes Region should strengthen coordination and collaboration around the right to a nationality both at international and East African levels and among national offices, in particular by:

- Ensuring that different interventions to address lack of documentation are coordinated both with governments and with each other, based on gaps identified through a common baseline assessment and analysis, in particular of qualitative data.
- Adopting regulations or guidelines on statelessness and nationality law as it interacts with other relevant systems, including border management, identity documentation and birth registration.
- Supporting the implementation of the recommendations in this report.

## Appendix I: Nationality laws in force

The list below indicates the version of the nationality law used in the compilation of this report, as amended to June 2018.

Burundi	Constitution 2005 <i>Loi No. 1-013 du 18 juillet 2000 portant réforme du Code de la nationalité</i>
Kenya	Constitution 2010 Kenya Citizenship and Immigration Act No. 12 of 2011 (as amended by Act No. 12 of 2012 and Act No. 19 of 2014).
Rwanda	Constitution 2003 (as last amended 2015) Organic Law No. 30/2008 of 25/07/2008 relating to Rwandan nationality
South Sudan	Transitional Constitution of the Republic of South Sudan 2011 Nationality Act 2011
Tanzania	Tanzania Citizenship Act No. 6 of 1995
Uganda	Constitution 1995 (as amended by Act No. 11 of 2005 and Act No. 21 of 2005) Uganda Citizenship and Immigration Control Act 1999 (as amended by Act 5 of 2009)

## Appendix II: Status of UN treaties

### Treaties relating to statelessness

Dates of ratification/accession available at: <https://treaties.un.org/Pages/ParticipationStatus.aspx>

COUNTRY	Convention relating to the Status of Stateless Persons 1954	Convention on the Reduction of Statelessness 1961
Burundi	National Assembly approved accession bill 19 September 2018	National Assembly approved accession bill 19 September 2018
Kenya	No action	No action
Rwanda	Acceded 4 Oct 2006	Acceded 4 Oct 2006
South Sudan	No action	No action
Tanzania	No action	No action
Uganda	Acceded 15 Apr 1965	No action

### Treaties providing for the right to a nationality

Dates of ratification/accession available at: <https://treaties.un.org/Pages/ParticipationStatus.aspx>

Country	CCPR	CEDAW	CERD	CRC	CMW
Burundi	9 May 1990	8 Jan 1992	27 Oct 1977	19 Oct 1990	--
Kenya	1 May 1972	9 Mar 1984	13 Sep 2001	20 Jul 1990	--
Rwanda	16 Apr 1975	2 Mar 1981	16 Apr 1975	24 Jan 1991	15 Dec 2008
South Sudan	--	30 Apr 2015	--	23 Jan 2015	--
Tanzania	17 Jun 1991	20 Aug 1985	27 Oct 1972	10 Jun 1991	--
Uganda	21 Jun 1995	22 Jul 1985	21 Nov 1980	17 Aug 1990	14 Nov 1995

CCPR: International Covenant on Civil and Political Rights, 1966

CEDAW: Convention on the Elimination of all forms of Discrimination Against Women, 1979

CERD: Convention on the Elimination of all forms of Racial Discrimination, 1965

CRC: Convention on the Rights of the Child, 1989

CMW: Convention on the Rights of All Migrant Workers and Members of their Families, 1990

### Appendix III: Status of AU treaties

Date of ratification/accession available at: <http://www.au.int/en/treaties>

Country	ACHPR	Protocol on the Rights of Women in Africa	ACRWC
Burundi	28 Jul 1989	Signature only (2003)	28 Jun 2004
Kenya	23 Jan 1992	06 Oct 2010	25 Jul 2000
Rwanda	15 Jul 1983	25 Jun 2004	11 May 2001
South Sudan	23 Oct 2013	Signature only (2013)	Signature only (2013)
Tanzania	18 Feb 1984	03 Mar 2007	16 Mar 2003
Uganda	10 May 1986	22 Jul 2010	17 Aug 1994