

AFRICAN UNION

African Committee of Experts on the Rights and Welfare of the Child (ACERWC)



UNION AFRICAINE

Comité Africain d'Experts sur les Droits et le Bien-être de l'Enfant (CAEDBE)

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DECISION ON THE COMMUNICATION SUBMITTED BY THE AFRICAN CENTRE OF JUSTICE AND PEACE STUDIES (ACJPS) AND PEOPLE'S LEGAL AID CENTRE (PLACE) AGAINST THE GOVERNMENT OF REPUBLIC OF SUDAN THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD (ACERWC)

**COMMUNICATION NQ:005/Com/001/2015
DECISION NQ:002/2018**

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I. PROCEDURE OF CONSIDERATION OF THE COMMUNICATION

1. The Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (the Committee/ACERWC) received a Communication dated 19 August 2015 pursuant to Article 44(1) of the African Charter on the Rights and Welfare of the Child (the Charter/ACRWC). The Communication is submitted by the African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) (hereinafter "the Complainants") against the Government of the Sudan. According to Section IX (2) (I) of the Revised Guidelines on Consideration of Communications by the ACERWC (the Revised Communications Guidelines), the Committee transmitted a copy of the Communication to the respondent State Party. Upon receipt of the Communication, the State Party submitted its response on 09 November 2015. In accordance with Section IX (2) (vi) of Revised Communications Guidelines, the Committee forwarded the responses of the Respondent State to the Complainants who also submitted additional clarifications within the time limit. Following the deliberation on the required elements on admissibility, the Committee ruled that the Communication is admissible and forwarded its ruling to the parties on 16 January 2017.
2. The Committee, pursuant to Section XI of the Revised Guidelines on communications, deems it necessary to conduct a hearing on the Communication where the parties are invited to make oral submissions before it. Accordingly, the Committee conducted a hearing on the merits of the Communication on 11-12 December 2017 during its 30th Ordinary Session held in Khartoum, the Sudan, in the presence of the representatives of the Complainants and the Respondent State.
3. During the hearing on 11 December 2017, the Respondent State submitted a request for the matter to be settled amicably pursuant to Section XIII of the Revised Guidelines on Consideration of Communication. The Committee notes that, pursuant to provisions of the Revised Communications Guidelines, any of the parties, preceding the clear consent from the other party in the communication, can propose for the matter be settled through an amicable settlement. Following the request by the Respondent State, the Committee, guided by the provisions of the Charter, the Revised Communications Guidelines and the principle of the best interests of the child, availed its good offices to facilitate discussion for settlement between the Parties.
4. After consultations, the parties in the Communication informed the Committee that they could not reach an agreeable level of consensus which would help them settle the matter amicably. The Committee was specifically informed that the

Complainants could not agree with the offers that the Respondent State has tabled for the amicable settlement. The offers that the Respondent State placed before the Complainants include fast-tracking the process through which Ms Iman Hassan Benjamin can get her ID [within two month time]; and finalising the already started comprehensive legal reform process with a view to amend various laws to make them compatible with treaties that the Republic of the Sudan is a party to.

5. However; the Complainants were not satisfied with the offers that the Respondent State proposed. Particularly, the Complainants raised the following issues as a bone of contention:
 - i. The Complainants are of the opinion that two months is too long to provide an ID for MS Iman since such process, under normal circumstances, should not take more than 3 days. Hence, the Complainants proposed this to be done within weeks, and not months, which was not agreed to by the Respondent state;
 - ii. The Complainants have stated that Iman has paid school fees for 5 years because she did not hold Sudanese nationality, hence the Complainants have asked for the reimbursement of those fees, which the Respondent State did not agree with; and
 - iii. Regarding the legal reform, the Complainants requested that the reforms should remove the impediments under the 1994 Nationality Act as amended in 2011 which prescribes for the automatic withdrawal of someone's nationality. Though the Respondent State submits that it is undertaking general and comprehensive legal reforms, it is the view of the Complainants that the proposal on legal reform made by the Respondent State was vague.
6. Considering the above, the Committee notes that no agreement has been reached between the parties. Therefore according to Section XIII (2) (4) (b) of the Revised Communication Guidelines, the Committee terminated its facilitation of an amicable settlement as no agreement was reached.

II. **Summary of Alleged Facts**

- 10 The Complainants allege that Ms. Iman Hassan Benjamin, who currently resides in Sudan was born on 5 September 1994 in Sudan to Ms. Hawa Ibrahim Abd ai-Karim and Mr. Hassan Benjamin Daoud who were married on 5 April 1980. The marriage was conducted by the sharia ma'zoun [notary] of ai-Hasaheesa town, Al-Jazeera state, Sudan.

- 11 The Complainants further allege that Ms. Iman's mother, Ms. Hawa Ibrahim Abd ai-Karim belongs to the Daju tribe, a tribe in Western Sudan. She was born on 1 January 1962, in the village of Wad Kaamil, east of ai-Hasaheesa town, Al-Jazeera state, Sudan. According to the Complainants, the mother is a Sudanese national and holds a Sudanese Nationality certificate. She was also registered under the Civil Registration Act, 2011 and has a Civil Registration Certificate.
- 12 It was also the Complainants' submission that Ms. Iman's father, Mr. Hassan Benjamin Daoud, was born in Juba and is from the Baria tribe, Yei District in Equatorial State in what is now South Sudan. They further allege that he lived most of his life in Al-Hasaheesa town in Sudan and served in the Sudanese Police Force. On 9 July 2011, almost six months after the death of her father, South Sudan seceded from Sudan. Ms. Iman's father's death certificate states that, he died at the Khartoum Hospital on 29 January 2011. It was also recorded on his death certificate that he was a Sudanese national and a resident of ai-Hasaheesa.
- 13 The Complainants stated that Ms. Iman completed her primary and secondary school education in Al-Hasaheesa town in Sudan. After receiving her grades upon completing her secondary education, she decided to apply for a university education. According to the University's enrolment rules she could qualify to register as she scored 59%. While she was filling out the application form, she noticed a section on the form that required her to indicate her national identity details which she did not have.
- 14 The Complainants submitted that on 19 July 2011, the National Assembly of the Republic of Sudan adopted amendments to the Sudan Nationality Act of 1994. These amendments entered into force on 10 August 2011 following signature of the President of the Republic of Sudan. These amendments provide for, among others, the automatic revocation of Sudanese nationality of those who became citizens of the Republic of South Sudan. The amendments further provide that Sudanese nationality shall be revoked where the Sudanese nationality of the responsible parent is revoked because of de facto or de jure entitlement to South Sudanese nationality. According to the nationality laws of the Respondent State, dual nationality with South Sudan is not permitted.
- 15 The 2011 Sudanese Civil Registry Act introduced a new civil registration procedure which requires registration of all residents and citizens of Sudan. The registration body is placed under the supervision of the Ministry of Interior, and registers important events such as birth and marriage. According to the Act all Sudanese nationals are issued with a national identity number.

16 According to the Complainants, a person needs to have a national identity number in order to apply for a university education. By the time Ms. Iman was trying to register for her university education she only had a birth certificate, which is not sufficient as she is also required to have a national identity number which she could get only through presentation of a nationality certificate. When Ms. Iman submitted her application for a nationality certificate, it is submitted that the Civil Registration Department directed her to the Alien Persons Department to register her name, indicating that she has lost her Sudanese nationality since her father would have become South Sudanese upon the separation of Sudan and South Sudan. This in turn, according to the Complainants, resulted in Ms. Iman's loss of Sudanese nationality by application of Section 10 (3) of the Nationality Act (Amendment) 2011. The Complainants therefore submitted that apart from not being able to attend her university education such automatic loss of nationality left Ms. Iman Hassan Benjamin to be stateless.

17 In view of the above, the Complainants submitted that the Republic of Sudan has violated provisions of the African Children's Charter, specifically article 3 (The right not to be discriminated); article 4 (The protection of the best interest of the Child); article 6 (3) the right to acquire a nationality) and article 6 (4) the obligation to prevent statelessness recognised under the African Charter on the Rights and Welfare of the Child. Moreover, the Complainants also argued that the acts of the Respondent State consequentially violated the protections under the African Charter on Human and Peoples' Rights particularly, the right to equal protection of the law (Article 3 (2)), right to dignity and legal status (article 5), right to have cause heard (Article 7), right to education (article 11) and protection of the family (article 18 (1)).

The Committee's analysis on the allegations

23. After deliberation on the facts in the communications, the Committee bases its Decision on the following issues:

- i. Whether the Respondent State violated its obligations under the African Children's Charter as it relates to Article 3 on non-discrimination;
- ii. Whether the Respondent State violated the right to acquire a nationality and prevention of statelessness as protected under article 6 (3) and article 6 (4) of the African Children's Charter;

- iii. Whether the Government the Republic of Sudan is responsible for the alleged consequential violations under the African Charter on Human and Peoples' Rights in relation the right to equal protection of the law (Article 3 (2)), right to dignity and legal status (article 5), right to have cause heard (Article 7), right to education (article 11) and protection of the family (article 18 (1)).

I. Alleged violations of article 3 of the African Children's Charter on non-discrimination

24. The Committee takes note of the fact that in August 2011 the Republic of Sudan has adopted an amendment law to its 1994 Nationality Act. The Committee notes that following the separation of South Sudan from the Republic of Sudan, the formation of the new State, which is now called the Republic of South Sudan, and the amendment of the 1994 Sudanese Nationality Act resulted in challenges on the determination and withdrawal of the nationality of children and the prevention of statelessness of children, especially for those who were born to Sudanese mothers and South Sudanese fathers. Section 10 (2) of the 2011 Amendment Law states that 'Sudanese nationality shall automatically be revoked if the person has acquired, de jure or de facto, the nationality of South Sudan'. Section 10 (3) of the Amendment Act further prescribes that without prejudice to Section 15, Sudanese nationality shall be revoked where the Sudanese nationality of his responsible father is revoked. The 2011 Amendments further prohibit dual nationality with South Sudan despite the fact that dual nationality with any other country is permitted in the Sudan since 1994.

25. The Committee also notes that in prescribing the modes of acquisition of nationality, Section 4 of the 1994 recognises acquisition of Sudanese nationality by birth. Looking at the provisions, the Committee notes that Sudanese nationality can be acquired by birth either automatically or by application. Section 4 (1) of the 1994 Nationality Act provides the conditions which must be satisfied for a person to be Sudanese by birth. Section 4 (1) reads:

In respect of persons born before the coming into force of this Act, a person shall be Sudanese by birth if he satisfies the following conditions:

(a) if he has already acquired Sudanese nationality by birth;

(b) (i) if he was born in Sudan or his father was born in Sudan;

(ii) if he is residing in Sudan at the coming into force of this Act and he and his ancestors from the father's side were residing in Sudan since 11/1956.

(c) if neither the person nor his father were born in Sudan, he may, if he satisfies the requirements of para. (b)(ii), apply to the Minister to grant him Sudanese Nationality by birth.

26. With regard to a person born to Sudanese mother, who is Sudanese by birth, the law states that nationality by birth can be acquired only through application, and not automatic. Section 4 (3) states that 'a person born to a mother who is Sudanese by birth shall be entitled to Sudanese Nationality by birth whenever he applies for it'.
27. Furthermore, the Committee notes that as part of its definitions of terminology, the 1994 Nationality Act states that "Responsible Father" means the father or the mother if guardianship was transferred to her by order of a competent court or if the child was born as a result of an unlawful relationship.
28. It is based on these facts that the Complainants allege that the Sudanese nationality law discriminates on the ground of sex and country of origin in granting nationality at birth and deprives nationality on the basis of ethnical origin of the responsible father.
29. However, the Respondent State denies such allegations. The Respondent State submits that since the amendments made to the 1994 Sudanese Nationality Act 1994 in 2005, a child is entitled to acquire Sudanese nationality on the basis of his/her Sudanese mother, on an equal footing with Sudanese father. Regarding, the contents of Section 10 (2) of the Nationality Act, the Respondent States submits that the provision is the outcome of political and legal arrangements following the secession of South Sudan and evolution of a new sovereign and independent State. Such arrangements have been negotiated and agreed upon by the two countries in the Comprehensive Peace Agreement (CPA). The Respondent State argues that 'the wording of the said section does not provide that the Sudanese nationality shall be revoked in relation to a person whose ethnic origin is so or so, rather in relation to a person who, de jure or de facto, acquires the nationality of a region which had become a sovereign and independent State'. It is the opinion and submission of the Respondent State that Section 10 (2) of the Nationality Act (Amendment) specifically mentions the State of South Sudan on the premise that it was the State meant by the transitional provisions of the law entailed by the arrangements resulting from secession. Hence, the Respondent State argues that the law does not have any discriminatory purposes.
30. The Committee notes that as a Party to the African Children's Charter, the Government of the Respondent State is legally bound to comply with the requirement of non-discrimination as it is prescribed under article 3 of the African

Children's Charter. Article 3 of the African Children's Charter states that 'every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status'.

31. Taking into consideration Sudan's responsibility under the African Children's Charter, the Committee is of the view that determining whether the Republic of Sudan violated article 3 of the African Children's Charter requires a legal and conceptual analysis on the relationship between the right to non-discrimination and the right to acquire a nationality of a child.
32. From the onset, the Committee notes that the right to non-discrimination prescribed under article 3 is a non-derogable right as it does not allow trade-off decisions and practices. This entails that, the protection provided in the provision does not allow a State to deprive the child's right because of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status. The Committee takes the view that, if the drafters of the Charter had the intention of making the application of article 3 context-dependent, the article would have contained balancing elements in order to allow a State to engage in discriminatory practices subject to some sort of a balancing test.¹ Article 3 is therefore a general nondiscrimination clause which applies to all substantive rights enshrined in the African Children's Charter including Article 6, which provides protection for the right to nationality of the child.
33. The link between prohibition of discrimination and the right to nationality emanates from the very meaning and benefit of nationality. In defining what 'nationality' is, the Committee aligns itself with the International Court of Justice where it defines nationality as 'a legal bond having its basis a social fact of attachment, a genuine connection of existence, interests and sentiments'.² Many countries require the existence of such legal bond in order to allow individuals in general and children in particular claim and fully exercise their rights as they are guaranteed in various human rights instruments. Contrary to their obligations under international and regional laws, states sometimes fail to confer nationality to children who have the required social fact of attachment, a genuine connection of existence, interests and sentiments in the states concerned. Such

¹ A Bruce, A Commentary on the United Nations Convention on the Rights of the Child, Article 2 The Right to Non-Discrimination, 2008, Pp 35.

² Liechtenstein V Guatemala, The International Court of Justice, 1953, Pp 23.

lack of recognition is often based on arbitrary and discriminatory laws and motives such as exclusion of a particular race, ethnic origin and gender. The Committee notes that the existence of such discriminatory laws and practices in relation to nationality matters deprives the child's legal existence in a particular state which then exclude the child from enjoying a full range of his/her rights which are linked with the conferral of nationality. Because a child is unduly-based on discriminatory laws and practices- denied or revoked his/her nationality, he /she may not have his/her birth registered,³ be enrolled in schools or universities, have access to public health services, or obtain travel documents.⁴

34. Based on the above explanation the Committee approached the allegation from two angles
- i. Whether the nationality laws of the Republic of Sudan consist of discriminatory provisions as it relates to acquisition of nationality; and
 - ii. Whether the nationality laws of the Republic of Sudan consist of discriminatory provisions as it relates to deprivation of nationality.

1.1. Alleged violation of article 3 as it relates to the prohibition of non-discrimination on the ground of sex of a parent while transferring nationality to a child

35. The Committee recognises the fact that matters of nationality, particularly acquisition of nationality, falls under the domain of individual states, based on the principle of sovereignty and equality of states in international law.⁵ However, the Committee also recognises the instances where international law can feature into the domestic jurisdiction of states in matters of attribution of nationality. At the current stage of the development of international human rights law, the authority of States on matters of nationality is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law

³ Though the Committee takes the position that according to article 6 (2) of the African Children's Charter, State Parties are legally bound to register ALL children who are born on their territories regardless of their nationality.

⁴ It is because of the high prevalence of discrimination in nationality laws that international and regional laws include specific prohibition of discriminatory laws and practices in nationality laws. In this regard, the Committee particularly refers to Article 6 (g) & (h) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, Article 26 of the ICCPR, Article 5 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 2 of the 1989 Convention on the Rights of the Child (CRC) and Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination.

⁵ Laura van Waas, Nationality Matters: Statelessness under International Law, 2008, Pp. 36.

and, on the other hand, by their obligation to prevent, avoid and reduce statelessness.

36. In line with the current international and regional human rights instruments, the ACERWC has called on States to uphold the principle of non-discrimination as provided in article 3 of the Charter and specified that all criteria established by States relating to acquisition of nationality by children must not distinguish on the basis of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.⁶ The Committee further recommended that African States with discriminatory legal provisions on any of the mentioned grounds should review such provisions and replace them with non-discriminatory provisions.⁷

37. The Committee would also align itself with the Decision of the Inter American Court of Human Rights regarding the right to nationality, where it noted that '*the jus cogens principle of equal and effective protection of the law and non-discrimination requires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights. In addition, States must combat discriminatory practices at all their levels, especially in public entities...*'⁸

38. The prohibition of discrimination on the basis of gender including in transfer/conferral of nationality is one of the non-discrimination standards that puts limits on states under international and regional human rights instruments. The Committee particularly recognises article 9 (2) of CEDAW which states that 'State Parties shall grant women equal rights with men with respect to the nationality of their children.'⁹ In line with the current trend in international and regional human rights instruments on prohibition of gender discrimination in transfer of nationality, the Committee also aligns itself with the position of the ruling of the High Court of Botswana in the *Unity Dow* case where the Court highlighted how a range of rights of both the woman and her child can be

⁶ General comment No. 2 on article 6 of the African Charter, the African Committee of Experts on the Rights and Welfare of the Child, 2014, Para 94; and See also *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) V The Government of Kenya*, 2011, Par 56.

⁷ As above

⁸ *Expelled Dominicans and Haitians v. Dominican Republic*, The Inter-American Commission, 2014, Par 264.

⁹ The United Nations Convention on the Elimination of all Forms of Discrimination Against Women, Adopted by the Un General Assembly, 1979, Article 9 (2).

undermined when a woman holds a nationality but cannot transmit it to her child.¹⁰

39. Coming to the issue at hand, the Committee notes that the effective nationality law of Sudan, through which Ms Iman can obtain a nationality, is the Sudanese Nationality Act of 1994 as amended in 2005 and in 2011. Section 4 of the 1994 Act provides how Sudanese is acquired by birth.

40. From Section 4 of the Nationality Act, it is possible to deduce that the law provides automatic conferral of Sudanese nationality by birth on children born to Sudanese fathers as opposed to children born to a Sudanese mother as they are required to submit application to the competent authorities to obtain Sudanese nationality by birth. Unlike children born to a Sudanese father, children born to a Sudanese mother have to go through administrative process to be considered as Sudanese national by birth. The law treats differently these groups of children on the basis of the gender of their parents. In this regard, Article 3 of the African Children's Charter is clear in that it lists the child's or his/her parents' gender as a prohibited ground of discrimination. This law requires Ms Iman, born to a Sudanese mother, to apply for a Sudanese Nationality as opposed to other children who are born to Sudanese Fathers. This violates Ms Iman's right not to be discriminated based on the gender of her mother in obtaining her nationality.

41. The Committee notes that the Section 4 of the 1994 Act that requires a child of a Sudanese mother to apply for nationality (as opposed to automatic conferral of nationality by operation of the law for child of a Sudanese father) contradicts the provisions of the African Children's Charter and other international norms. Hence, the Committee finds the Respondent State in violation of Article 3 of the African Charter on the Right and Welfare of the Child as it discriminates against children born to a Sudanese mother in general and Ms. Iman in particular on the basis of gender.

1.2. Alleged violation of article 3 on prohibition of non-discrimination on the grounds of country of origin of parents as it relates to arbitrary deprivation of nationality

42. The Committee recognises the principle of international law which prohibits an arbitrary deprivation of nationality to be another limit to the sovereignty of states to decide the conferral, withdrawal and regulation of nationality. In particular, the

¹⁰ *Attorney General of Botswana case v Unity Dow*, The High Court of Botswana, 1991.

Committee aligns itself with Article 15 of the UDHR which prescribes that 'everyone has the right to a nationality and the no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.¹¹ The question which needs elaboration is therefore 'what does an arbitrary deprivation of nationality constitute?'

43. In explaining the elements of 'arbitrariness' the Committee draws inspiration from the approach adopted by the UN Human Rights Committee. The Human Rights Committee, in explaining the elements of an 'an arbitrary interference of states on the enjoyment of one's human rights', depicts that an interference would amount to arbitrary if it is incompatible with the provisions, aims and objectives of human rights, and not reasonable in particular circumstances.¹²

44. The Committee notes that the right to non-discrimination forms part of the main principle of all human rights instruments in general and the African Children's Charter in particular. Hence, on matters of nationality, the Committee notes that depriving one's nationality on the basis of one or more of the prohibited grounds of discrimination, such as national origin, race and ethnicity would amount to an arbitrary deprivation of nationality, which is prohibited under article 3 of the African Children's Charter and other international instruments.

45. In line with the above approach, the Inter-American Court of Human Right in the Case of *the Girls Yean and Bosico V. Republic of Dominican* noted that '[t]he State's failure to grant nationality for discriminatory reasons constitute an arbitrary deprivation of nationality and violates the right to nationality guaranteed by the American Convention'.¹³

46. In the Communication at hand, the Complainants submitted that the 2011 amendments provided for the automatic revocation of Sudanese nationality from persons who, *de facto or de jure*, acquired South Sudanese nationality. Section 10 of the 1994 Nationality Act as amended in 2011 reads:

(2) Sudanese nationality shall automatically be revoked if the person has acquired, *de jure or de facto*, the nationality of South Sudan.

¹¹ Universal Declaration of Human rights, Adopted by the United Nations General Assembly, 1948, Art 15.

¹² UN Human Rights Committee, General Comment No. 16: The Right to respect of privacy, family, home and correspondence, and protection of honor and reputation, article 17, Par 4.

¹³ Inter-American Court of Human Right, Case of *Girls Yean and Bosico V. Republic of Dominican*, Judgment of September 8, 2005 Para 140.

(3) Without prejudice to Section 15, Sudanese nationality shall be revoked where the Sudanese nationality of his responsible father is revoked in accordance to section 10(2) of this Act.

47. The Committee notes the above provision does not allow children to hold dual nationality with South Sudan, despite dual nationality with any other country has been permitted since 1994, hence, the Complainants submitted that the Respondent State's law discriminates children on the basis of their origin of nationality. The Complainants also indicated that Ms. Iman attempted to apply for Sudanese nationality in November 2016, considering her right to acquire Sudanese nationality through her mother, however, the authorities refused to receive her application documents citing orders from the Minister of Interior. On this basis, the complainants argued that the Respondent State has discriminated against Ms. Iman in particular and children with South Sudanese links in general.

48. Considering the Complainants' allegation, the Committee notes that the general principle regarding the status of Sudanese nationality of children in cases of is provided under Section 15 of the 1994 Sudanese Nationality Act, which reads:

If Sudanese nationality is revoked from the responsible father of a minor under the provisions of section 10 the minor shall not lose his Sudanese nationality save if he is or was the national of any country other than Sudan according to the laws of that country.

49. As it can be understood from Section 15 of the Respondent State's Nationality Act, in principle revocation of Sudanese nationality of a parent does not result in revocation of Sudanese nationality of the child. Revocation of Sudanese nationality happens only if it is proved that the child is or was the national of any country other than Sudan according to the laws of that country. However, under the Respondent State's nationality law, the case of children born to South Sudanese parents is treated separately under Section 10 of Sudanese Nationality Act (Amendment) 2011. Hence, the Committee notes that Section 15 of the 1994 Sudanese Nationality Act is not applicable to children born to South Sudanese parents or children of South Sudanese Father and Sudanese mother. By application of Section 10(3) of the Sudanese Nationality Act (Amendment) 2011, revocation of Sudanese nationality of South Sudanese responsible father results in automatic revocation of Sudanese nationality of his child. This entails, unlike other children in the Respondent State, children born to South Sudanese parents lose their Sudanese nationality on the basis that their responsible father lost their Sudanese nationality. It also entails that children born to South

Sudanese parents or children born to South Sudanese father and Sudanese mother do not get equal protection of the law in the Respondent State owing to discriminatory nationality law which revokes their Sudanese nationality on the ground of revocation of Sudanese nationality of their parents which is not the case for other children.

50. Due to the application of the Nationality Act, Ms Iman could not obtain Sudanese nationality as she is born to a South Sudanese father. The Respondent State hence automatically believed that Ms Iman has a South Sudanese Nationality and revoked her Sudanese nationality which she is entitled to on the basis of the nationality of her Mother. Ms Iman is deprived of Sudanese Nationality on the basis of the country of origin of her father.
51. Responding to the Complainants allegation, the Respondent State argued that its provisions on nationality, in particular on deprivation of nationality, do not aim to discriminate children of South Sudanese origin. Instead, the Respondent State submits, the provisions are very similar to the legislation in South Sudan and that the Republic of the Sudan is doing the same to South Sudanese nationals that the Government of South Sudan is treating Sudanese nationals with. The Committee does not find the Respondent State's argument tenable. This argument appears to suggest that because state Y is violating its child rights obligations in relation to children that are nationals of X, then State X can also do the same in relation to children that are nationals of State Y. This approach would be acceptable in some areas of laws in relation to bilateral treaties on trade, intellectual property, technology transfer etc; on matters that are outside of human rights, where the recognition of the right to retaliation can be justified under international law. However, in relation to human rights obligations, children's rights included, the Committee is of the view that, the responsibility of States is not dependent on the principle of reciprocity. As a result, the Committee does not subscribe to the argument of the Respondent State.
52. It is the view of the Committee that such differential treatment of Children born to South Sudanese fathers, including Ms Iman, from the rest of children in the Respondent State, is not in line with the very object and purpose of the African Children's Charter as it is prescribed under article 3 of the Charter, which the Committee considers as one of the cardinal principles of the Charter. In this regard, the Committee takes the view that Section 10 (2) & (3) of the 1994 Nationality Act as amended in 2011 arbitrarily deprives children a Sudanese nationality based on the country of origin of their parents. Pursuant to the above, determination to withdraw Sudanese nationality from children born to South

Sudanese father is made on the basis of the parent's national origin which is listed as one of the prohibited grounds of discrimination under Article 3 of the Children's Charter. Article 3 of the African Children's Charter prohibits discrimination on the expressly provided grounds, including on the basis of the status of the child's parents.

53. Hence, the Committee concludes that the Republic of the Sudan has violated its obligation under article 3 of the African Children's Charter, by introducing a legislation which arbitrarily deprives children of South Sudanese origin their Sudanese nationality on the basis of the national origin of their parents. The Respondent State, due to its discriminatory law, has violated Ms !man's right not to be discriminated on the ground of the country of origin of her father and as a result has arbitrarily deprived her Sudanese Nationality which otherwise she would have been entitled to.

II. **Alleged violation of Article 6(3) & (4) as it relates to the right to acquire a nationality & prevention of statelessness**

54. As stated above, the Committee recognises that the right to nationality of the child plays a central importance for the recognition and respect for other rights of the child. In duly recognising the importance of the right to nationality of the child, the African Children's Charter, under article 6, expressly protects the right to acquire nationality of the child. Specifically, article 6(3) of the Charter provides that 'Every child has the right to acquire a nationality.' Therefore, it is unquestionable that State Parties to the Charter are obliged to respect the right to acquire nationality of children who are born and live in their jurisdiction. The Committee also recognises article 7 of the UNCRC and article 24 (3) of the ICCPR which unequivocally ensure every child's right to acquire a nationality.

55. The Committee believes that questions such as, 'when does the right to acquire a nationality of the child has to be implemented'; 'which nationality a child may have a right to?', 'which State has the obligation to grant it?' should be elaborated to address the matter at hand. Hence the Committee would like to elaborate on the issues by making reference to and drawing inspiration from other norms, jurisprudence and soft laws.

56. Looking at the rights guaranteed under the Children's Charter, it is obvious that the Charter contains a group of rights that are enjoyed by the child from the time of his/her birth and other group of rights that are not necessarily exercised or enjoyed by the child from the time of his/her birth as a matter of practicality.

Regarding the right to acquire nationality, the ACERWC, in the Case of *Children of Nubian Descent in Kenya v. the Republic of Kenya* noted that: 'Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1), that "every child has the right from his birth to acquire a nationality". It only says that "every child has the right to acquire a nationality". Nonetheless, a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the African Children's Charter that requires "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".¹⁴

57. Despite this accepted approach under international law, the Committee notes that, some States make findings that a child is of "undetermined nationality". However, in situations where the child's nationality is undetermined and when the child finds herself/himself otherwise be stateless, countries should, as soon as possible, determine her/his nationality so as not to prolong a child's status of undetermined nationality. As the Committee in the *Nubian Descent case* stated "a year in the life of a child is almost six percent of his or her childhood... the implementation and realization of children's rights in Africa is not a matter to be relegated for tomorrow, but an issue that is in need of proactive immediate attention and action."¹⁵

58. Furthermore, as per Article 2 of the African Children's Charter, a child is a person below the age of 18.

59. In view of the above, the Committee also aligns itself with the Human Rights Committee where it states that '[s]tates are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born.'¹⁶ Moreover, the Committee also makes reference to the requirement of article 6(2) of the African Children's Charter, article 7(1) of the UNCRC and article 24 (2) which require children to be registered immediately after birth, which implies that States are obliged to facilitate early conferral of nationality to children.

60. On the issue of obligations of State Parties, the African Children's Charter, as in the case with the UNCRC, requires states parties to "undertake to ensure that their Constitutional legislation recognises the principles according to which a

¹⁴ The African Charter on the Rights and Welfare of the Child, Adopted by OAU in 1999, article 4.

¹⁵ *Nubian Descent case* (n 6 above) Par 33.

¹⁶ General Comment No. 17 on Article 24 of the ICCPR, Human Rights Committee, 1989 Par 8.

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."¹⁷As per the above provision of the Charter, the State where the child is born in is the primary bearer of the obligation to grant nationality to the child, particularly in a situation where the child becomes otherwise stateless.

61.1n determining the Respondent State's obligation to grant nationality to a child who would otherwise be stateless, the Committee would like to refer to Articles 1-4 of the 1961 Convention on Reduction of Statelessness (the 1961 Convention). The Committee recognises that article 1 of the 1961 Convention provides safeguarding principle which serve as the basis for the mechanisms that States should take to prevent statelessness among children. Article 1 gives a child who would otherwise be stateless the right to acquire the nationality of his or her State of birth through one of two means. A State may grant its nationality automatically, by operation of law to children born in its territory who would otherwise be stateless. Alternatively, a State may grant nationality to such individuals later upon application.

62. The Committee notes that while the obligation of granting nationality falls primarily on the State of birth of a child, it recognises other States with which a child has a relevant link are also under obligations to ensure that the child has acquired a nationality. Such relevant links could be established by looking at various factors but particularly through parentage or residence.

63. The Committee recognises the legal protections that specifically address nationality and state succession in Article 10(1) of the 1961 Statelessness Convention which requires any treaty contracted between States concerning the transfer of territory to include specific provisions addressing the nationality of the citizens of the territory at issue. In the absence of such provisions, a State is required to confer its nationality on residents of the transferred territory if they would otherwise become stateless.

64. The ACERWC would also like to recognize the most relevant document from International Law Commission (ILC) on Nationality of Natural Persons in Relation to the Succession of States. In addressing the issue of attribution of nationality, Part II of the ILC's Articles on Nationality prescribes elements for the purposes

¹⁷ The African Children's Charter (n 14 above), article 6(4)

of attribution of nationality; accordingly, the Articles list, i) habitual residence, ii) appropriate legal connection with one of the constituent units of the predecessor State, or iii) birth in the territory. In cases of absence of any of these criteria, the ILC further introduced a saving criterion of 'any other appropriate connection'.

65. The Committee notes that in cases where state succession happens, there is no way persons who had the nationality of the predecessor state should suddenly be left without any nationality. It is also the Committee's position that the process of acquisition of nationality in cases of state succession has to comply with human rights obligations including the prevention of statelessness.

66. In the current communication, the Authors claim that the Respondent State has violated article 6(3) & (4) of the African Children's Charter. They indicated that the Respondent State's legislation is not in line with the above stated provisions of the Charter due to the fact that the Republic of the Sudan has not introduced an implementing guidelines to the 1994 Nationality Act which left Sudanese authorities with the discretion to determine whether or not to withdraw Sudanese nationality without procedural safeguards that ensure an individual has acquired South Sudanese nationality. The Complainants submitted that the Government has just relied on the definition of South Sudanese nationals under the Referendum Act to argue that a person has acquired South Sudanese nationality.

67. According to the Complainants, the challenges that Ms Iman Benjamin has faced can clearly demonstrate the above alleged violations. It is submitted that Sudanese nationality of Ms. Iman Hassan Benjamin's has been revoked on the ground that the Sudanese nationality of her father has been revoked because of his entitlement to South Sudanese nationality. This indicates, according to the Complainants, that the Respondent State failed to prevent Ms Iman Benjamin from being statelessness by depriving her Sudanese nationality given the fact that she did not obtain South Sudanese or any other states' nationality.

68. Moreover, the Complainants submitted that the internal administrative procedures of Sudan failed in ensuring that Ms Iman obtains a national ID.,

69. Replying to the Complainants allegation, the Respondent State submitted that the allegations are groundless. It is the view of the Respondent State that the 1994 Nationality Act together with the Interim Sudanese Constitution is very clear in determining to whom Sudanese nationality should be granted or

withdrawn from. According to the Respondent State, a person who acquires South Sudanese nationality is one who fulfilled the conditions to vote in the Referendum on self-determination of South Sudan in accordance with sections 25 and 26 of South Sudan Referendum Act of 2009. Therefore, it is the view of the Respondent State that there is no ambiguity or vagueness affecting the 1994 Nationality Act in respect with identifying a person who, *de jure or de facto*, acquires the nationality of South Sudan. Particularly, the Respondent State argued that the constitutional right to citizenship, as it is prescribed under article 7 of the 2005 Interim Constitution, each person born of Sudanese father or mother has the right to enjoy Sudanese citizenship. Besides, the Interim Constitution states that it is also valid to permit any Sudanese to acquire the nationality of another country in accordance with the provisions of the applicable law, and this, as per the Respondent State, is consistent with the international principle of dual nationality.

70. With regard to children, the Respondent State particularly submitted that according article 15 of the 1994 Nationality Act states that 'if Sudanese nationality is revoked from the responsible father of a minor under the provisions of section 10, the minor shall not lose his Sudanese nationality save if he is or was the national of any country other than Sudan according to the laws of that country'. Article 4(3) of the 1994 Nationality Act increases this restriction in paragraph 3 of the article, which states that 'a person born to a mother who is Sudanese by birth shall be entitled to Sudanese Nationality by birth whenever he applies for it'. Hence it is the view of the Respondent State that Sudanese Nationality Laws are in line with the requirements of the African Children's Charter, and other international instruments as they provide mechanisms to prevent childhood statelessness. In fact, the Respondent State submitted that the Republic of the Sudan decided to amend the 1994 Nationality Act to recognize and address the effects of the secession of South Sudan and the resulting statelessness.

71. With regard to Ms Iman, the Respondent State submitted that the Republic of the Sudan has not violated Ms Iman Benjamin's right to acquire a nationality, as alleged by the Complainants. The Respondent State presented two different arguments to prove that Ms Iman is not stateless. On the one hand, the Respondent State submitted that Ms Iman Benjamin is entitled to Sudanese nationality through application as she was born to a Sudanese mother in accordance with article 4(3) of the 1994 Nationality Act. She is not considered as Sudanese due to her failure to exhaustively pursue the required administrative procedures which are available at different levels in the Republic of the Sudan.

The Respondent State indeed admitted that there has been a misapplication of the law which has resulted in the current communication before the Committee. proceeding. However, it was alluded by the Respondent State that Ms Iman is in a position of obtaining nationality through her mother.

72. On the other hand, the Respondent State, while presenting its oral arguments during the hearing, produced a travel document that was issued in 2012 by Republic of South Sudan Ministry of Interior Department of Immigration, which mentions that Ms Iman Benjamin is South Sudanese by nationality; hence it is the Respondent State's submission that she is not stateless.

73. On the question of Ms Iman Benjamin's ID, the Respondent State indicates that the constitutional court directed Iman to seek administrative means. The Ministry of Interior does not directly issue IDs. It is up to Ms Iman to seek the legal process; the Government of the Republic of the Sudan will then provide her an ID as soon as possible depending on the procedure of issuing ID card.

74. Replying to the Respondent State's submissions, the Complainants also presented their disagreement with the Republic of the Sudan's analysis of the issues.

75. Considering the arguments from both sides, the Committee identifies and analyses the issues as described below.

76. As stated above, the Committee notes that the father of Ms Iman Benjamin died on 29 January 2011 before secession of South Sudan and amendments to Sudan's nationality law were adopted. Section 10(3) of the Nationality Act (amendments) of 2011 provides that Sudanese nationality shall be revoked where the Sudanese nationality of the responsible father is revoked because of entitlement to South Sudanese nationality.¹⁸

?? Applying Section 10 (3) of Nationality Act requires at least to identify whether the child has responsible father or not and determine whether such father is entitled to South Sudanese nationality or not. As a matter of fact, a deceased father cannot be considered to be a 'responsible father' as he cannot be responsible

¹⁸ Section 10 (3) of the Nationality Act (Amendment) 2011 states that, 'without prejudice to section 15, Sudanese nationality shall be revoked where the Sudanese nationality of his responsible father is revoked in accordance to section 10 (2) of this Act.

for the child's long-term or day-to-day care, welfare and development. Hence, Iman did not have a responsible father at the time of revocation of her Sudanese nationality. Rather, it was the mother of the complainant who was discharging her parental responsibility. It has not been contested that the mother of Ms Iman has a Sudanese nationality; and her Sudanese nationality has not been revoked. From this, it follows that her Sudanese nationality should not have been revoked since Iman's responsible parent (the complainant's mother) has not been affected by Section 10 (2) of the Nationality Act (Amendment) 2011. Furthermore, it cannot be said that her father is entitled to South Sudanese nationality *de jure or de facto* since at the time of his death there was no concept of South Sudanese nationality and the conferral of the South Sudanese nationality started after secession of South Sudan which happened after the death of Ms Iman's father. Moreover, as it has been recorded on his death certificate Iman's father was a Sudanese national and a resident of ai-Hasaheesa.¹⁹ As aforementioned, amendment of nationality law of the Respondent State took place at least six months after death of the Iman's father. Retroactive application of Section 10(2) of the Nationality Act (Amendment) has not been provided in the text of the amendments or elsewhere in the nationality law of the Respondent State. Given such circumstance, it is the Committee's view that revocation of Sudanese nationality of Ms Iman Benjamin on the ground that the nationality of the deceased father has been revoked is ill-founded and absurd.

78. In the presence of the above facts, revocation of Sudanese nationality of Ms. Iman Hassan Benjamin amounts to arbitrary deprivation of nationality. In the Case of Children of *Nubian Descent V. the Republic of Kenya*, this Committee noted that 'States Parties need to make sure that all necessary measures are taken to prevent the child from having no nationality.'²⁰ In the Case *Modise v. Botswana*, the African Commission on Human and Peoples' Rights held that failure or refusal of States to grant nationality on grounds that individuals had obtained another nationality or had accepted it without showing any proof is a violation of the right to nationality which is basic component of the right to recognition of legal status guaranteed under Article 5 of the African Charter on Human and Peoples' Rights.²¹

¹⁹ The death certificate of the Complainant's father, Annex 1, p. 4-5.

²⁰ ACERWC, Communication: No. Com/002/2009, Institute for Human Rights and Development in Africa (IHRDA) and the Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v. Kenya para 52.

²¹ African Commission, *Modise v. Botswana* Communication 97/93, ACHPR 2000, par 88-89.

79. The Committee also notes that Ms Iman Benjamin may be entitled to South Sudanese nationality but she is not pursuing it. The facts in the Communication clearly entail that she is entitled to Sudanese nationality and she has been pursuing it with no success. Hence, it is the view of the Committee that Ms Iman Benjamin has become stateless as she is not formally recognized as a national of neither South Sudan nor Sudan.

80. Moreover, the Committee notes that international law allows and recognizes some of the rules upon which loss/deprivation/ withdrawal of nationality can take place. Any loss/deprivation/withdrawal of nationality will need to comply with primarily three criteria- it should be aimed at achieving a legitimate purpose; it should take the least intrusive method; and finally it has to be proportional to the right or interest that it aims to protect. In line with this approach, the African Court on Human and Peoples' Right noted that 'International Law does not allow, save under very exceptional situations, the loss of nationality.'²² The said conditions are: i) they must be founded on clear legal basis; ii) must serve a legitimate purpose that conforms with International Law; iii) must be proportionate to the interest protected; iv) must install procedural guaranties which must be respected, allowing the concerned to defend himself before an independent body.'²³ As a result, the Committee is of the view that the application of Section 10(3) leaves a child to be stateless, even if it is for a limited period of time; hence it is not complying with the provisions of the African Children's Charter as they are stated in Article 6(3) & (4).

81. In the particular case, in a situation whereby Ms Iman would effectively be rendered stateless, it would be difficult, if not impossible, to argue that Article 10(3) is proportional to the interest that the legislation is aimed to protect. The Committee does not find the measure taken by the Respondent State in automatically changing nationality requirements without giving due regard to the impact it is having on individuals, to the effect that people like Ms Iman can also be at the risk of statelessness, proportional to the interest of the state it is trying to keep. Even if the nationality of the responsible parent is revoked, that cannot justify revocation of nationality of the child. In this regard, the Committee in its General Comment explicated that 'where a parent loses or is deprived of nationality, that loss or deprivation should not affect the child and in no case, may a child lose or deprived of his or her nationality if he or she would be left stateless.'²⁴

²² *Anudo Ochieng Anudo V. United Republic of Tanzania*, The AfCHPR (2018) para 79.

²³ As above

²⁴ General Comment (n 6 above), Par. 98.

82. Also, there are no implementing regulations for the 2011 Nationality Act amendments or the Civil Registration Act 2011. There should have been regulation that instructs civil servants on how to determine whether Sudanese nationality of someone should be revoked or not. The protection against statelessness for children provided by section 15 of the 1994 Nationality Act is not effective, because the law does not establish any requirement that nationality of South Sudan has in fact been acquired before Sudanese nationality is automatically revoked, including for a child. In the absence of such regulation, the Sudanese authorities decide for themselves whether person has acquired South Sudanese nationality or not without taking in to consideration the fact that the person has managed to acquire South Sudanese nationality or is really entitled to South Sudanese nationality.

83. During the hearing, the Respondent State argued that it is not obliged to grant nationality to Ms Iman as she is entitled to acquire a South Sudanese nationality. The issue which needs clarification in this regard would then be 'when does a country must accept that a person is not a national of a particular State, hence he/she is stateless?' In addressing this issue, the Committee makes reference to the explanation provided by UNHCR in its Guidelines on Statelessness No 4, where it states the 'the country must accept that a person is stateless if the authorities of that State refuse to recognize that person as a national. A state can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national'.²⁵ The Committee notes that the Respondent State should have established an adequate procedural safeguard to ensure that no individual will be deprived of their Sudanese nationality unless they have acquired South Sudanese nationality. The Committee was not informed whether Ms Iman has approached the Government of South Sudan and if the same government pronounced itself on the matter. However, it is the Committee's view that a country cannot solely interpret and apply another country's nationality laws as it relates to determination of someone's nationality in the former's territory. This could result in not only a factual error on the side of such country but also it goes against the general prerogatives given to states in determining who would be considered as a national in their own territory. Indeed, the Committee recognises the difficulty around determination of whether someone holds the nationality of another country. Looking at the practice in most legal systems, countries put the

²⁵ 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, UNHCR, (2012), Par. 19.

initial responsibility of substantiating his or her claim on the claimant. However, the Committee believes that in cases where a child who claims to be at the risk of statelessness is requested to bear the sole responsibility to prove that the child does not hold a nationality of another country, it would put the child in a more precarious situation. In this regard, the Committee recognises the approach to a shared burden of proof between the claimant or his/her parents/guardians and the concerned government to obtain evidence and establish the facts. In cases where there is no sufficient evidence which support that the claimant holds another nationality, the country concerned should grant the child a nationality automatically without putting the child in a situation of prolonged statelessness.

84. The nationality Act of the Respondent State has also failed to put in place procedural guaranties which should be respected and allow persons whose nationality has been revoked to defend themselves before an independent body. Given the above facts, revocation of Ms Iman's Sudanese nationality constitutes arbitrary deprivation of nationality which is in violation of Article 6 (3) & (4) of the Children's Charter.

2.1. Alleged violations against article 6 (3) and (4) as it relates to proof of nationality

85. Furthermore, in line with the Complainants allegation on violations of article 6 (3) and (4) of the Charter, the Committee considered matters related to proof of nationality and how that relates to acquisition of nationality and prevention of statelessness. In their submission, the Complainants submitted that acquisition of a Sudanese birth certificate does not proof nationality. Children are, therefore; left in an ambiguous situation. Children who are born to Sudanese mothers and South Sudanese fathers, in particular, are left in more ambiguous situation compared to others as they are left to grow up with the expectation that they are Sudanese nationals without confirmation. Their expectations of acquiring Sudanese nationality are further hindered upon reaching the age of 16 by application of the Nationality Act. Children born to Sudanese mothers and South Sudanese fathers have a more difficult task to prove their nationality through their Sudanese parent and their desire to retain Sudanese nationality. The complainants further submitted that determining and documenting citizenship at birth provides the best protection for children and there is no justification for leaving the determination of citizenship until age 16 for everyone, especially given the serious consequence for children of mixed, Sudanese-South

Sudanese, parentage who are at a risk of statelessness by virtue of the nationality law.

86. From the facts presented before the Committee, it is clear that acquisition of a Sudanese birth certificate does not confer Sudanese nationality. Sudanese nationality is proved by nationality certificate that can be obtained by applying to the relevant body. The Respondent State's nationality law recognizes both nationality by birth as well as nationality by naturalization.²⁶ Since issue of nationality by naturalization has not been raised under this communication, the Committee will not deal with this issue. Regarding nationality by birth, Section 4(2) of the 1994 Sudanese Nationality Act provides that 'A person born after the coming into force of this Act shall be Sudanese by birth if his father is Sudanese by birth at the time of his birth.' Section 6 of the Respondent State's Nationality Act provides that the Minister of Interior shall grant a certificate of nationality by birth to any Sudanese national by birth upon payment of the prescribed fees. The law does not provide specific age upon which nationality certificate can be obtained. In their submission, the Complainants indicated that Ms. Iman only possessed a birth certificate until she applied for nationality certificate and her application was rejected. The Complainants have not showed that documents proving nationality, such as nationality certificate, are not available for all children under the age of 16 owing to application of the Respondent State's nationality law. As it can be seen from Section 27.1 of the Respondent State's Civil Registration Act of 2011, age of 16 is provided as a precondition to obtain identity card which is not a proof of nationality.²⁷ Section 27.8 of the same Act provides that after obtaining the identity card and registration certificates, the citizenship certificate shall be cancelled and replaced with the identity card. From this provision, it can be deduced that citizenship certificate is issued before an identity card. If the law provides 16 as the age where someone is entitled to get identity card and obtaining identity card results in cancellation of citizenship certificate, it is logical to conclude that children who have not attained age of 16 could be entitled to obtain citizenship certificate under the Respondent State's law.

87.1 In the Committee's view, a mere fact that birth certificate does not prove nationality cannot leave children in an ambiguous situation. Children are left in

²⁶ See Section 4 and Section 7 of the 1994 Sudanese Nationality Act.

²⁷ Section 27.1 of 2011 Sudanese Civil Registration Act provides that 'Every Sudanese who reached the age of sixteen must obtain an identity card, from the office of the Civil Registry in which area of jurisdiction he lives, after payment of the prescribed fee. Identity cards may be issued for those who are less than that age, if necessary.'

an ambiguous situation if states do not put in place a mechanism by which nationality can be proved or if children are obliged to wait for some time to utilize mechanisms put in place by states to prove their nationality. Although birth certificate does not prove nationality under the Respondent State's nationality law, the law has provided possession of nationality certificate as a mechanism to prove Sudanese nationality. Hence, it is the view of the Committee that there is a procedure where nationality certificate can be obtained by children irrespective of their age as per Section 6 of the 1994 Sudanese Nationality Act, as the law contains no age restriction, and the Complainants did not adduce any evidence which refutes this fact.

88. The Committee, however; shares the concern of the Complainants in relation to children who are born to Sudanese mothers and South Sudanese fathers, as they are left to grow up with the expectation that they are Sudanese nationals without confirmation. The Committee also notes that children born to Sudanese mothers and South Sudanese fathers have difficult task to prove their nationality through their Sudanese mother and their desire to retain Sudanese nationality. However, considering the facts presented before it, the Committee is of the view that all these challenges faced by children born to South Sudanese father and Sudanese mother have nothing to do with acquiring documents to prove Sudanese nationality. Rather, these challenges resulted from Section 10(3) of Sudanese Nationality Act (Amendment) which introduced automatic revocation of Sudanese nationality of these children. As the facts submitted to the Committee indicate, Ms Iman was born on 5 September 1994 from Sudanese father and Sudanese mother after the 1994 Nationality Act came in to force. Consequently, as per Section 4(2) of the 1994 Sudanese Nationality Act, she is entitled to Sudanese nationality by birth. Had Section 10(3) of Nationality Act (Amendment) not come in to force in 2011, MS Iman's Sudanese nationality would not have been revoked and she could have been provided with nationality certificate. Given this fact, it is not possible to conclude that children in Sudan have to wait until age of 16 to acquire a nationality or to obtain documents proving nationality. Denial of nationality of children born to a South Sudanese father and Sudanese mother cannot negate the general rule provided under Sudanese Nationality Act regarding acquisition of Sudanese nationality and documents proving nationality since issue of these children is a specific issue governed separately by special rule provided under Section 10(3) of Sudanese Nationality Act (Amendment) 2011.

89. Finally, the Committee also notes that the Respondent State, during the dialogue, submitted that Ms Iman is not stateless by producing a document issued as an Emergency Travel Document which stated that she is South Sudanese. Though the document was introduced only on the floor without an adequate amount of time for the Committee and the Complainants to review and respond to the contents and value of the document; the Committee notes that it would be important to reflect on its content and implications on proof of nationality. From the onset, the Committee recognises that an Emergency Travel Document could be considered as a *prime facie* recognition of nationality. In the current Communication, as far as the investigation of the Committee goes, the document was issued by the Nationality, Passports and Immigration (DNPI) of South Sudan in Khartoum for those who claim entitlement to South Sudan nationality but do not possess all required supporting/evidentiary documents to supplement their claims. The document is issued to them to enable them to respond to some protection needs, such as, collection of pensions, and using it to sit for secondary school exams. In this regard, it is the view of the Committee that the document is not a substitute to the nationality document and DNPI sometimes issued it to individuals whose applications for nationality in Khartoum is rejected to facilitate their travel to Juba to further follow up on their application in the DNPI Head Quarters in Juba. The disclaimer indicated in the document also highlights the very purpose why this document is issued; i.e., for mere emergency travel. Besides, the Committee notes that there is evidence that South Sudanese nationality is proven through a nationality certificate and not through an Emergency Travel Document. Hence, upon closer scrutiny, the Committee takes the view that the Emergency Travel Document should not be considered as proof of nationality.

III. **Alleged Consequential Violations**

90. In their submission to the Committee, the Complainants argued that Ms Iman's arbitrary deprivation of Sudanese Nationality has consequentially violated her numerous human rights. The Complainants mainly argued that the arbitrary deprivation of nationality resulted in the violation of Ms Iman's right enshrined in the African Charter on Human and Peoples' Rights on the right to equal protection of the law, right to dignity and legal status, right to fair trial, right to education, and protection of the family. However, the Committee believes that it does not have the mandate to pronounce violations on other instruments apart from the African Children's Charter in principle. The Committee is of the view that its mandate as it relates to other international and regional human rights instruments and jurisprudence is only to draw inspiration from such instruments

and decisions as provided in article 46 of its founding Charter. Therefore, the Committee is not in a position to find the alleged consequential violations of rights of Ms Iman enshrined under African Charter on Human and Peoples' Right (African Charter) as it has been claimed by the Complainants.

91. However, it is noted that in reference to Article 44 of the Children's Charter, the Committee may receive communication relating to any matter covered by Children's Charter. The Committee also notes that Section IX of the Revised Communication Guidelines requires the applicants to identify the provision of the African Children's Charter allegedly violated only where possible. In the current communication, the Committee discerns that the Complainants based their argument of alleged consequential violations on provisions of African Charter. The Committee also notes that some of the alleged consequential violations of rights such as the right to education and protection of the family have been explicitly covered by the Children's Charter. The Committee is of the view that though the Complainants did not mention the provisions of Children's Charter dealing with the right to education and protection of the family, this should not hinder the Committee from addressing the alleged violation pursuant to the above provisions of the Charter and the Revised Guidelines. The Committee would like to underscore that material requirement of compatibility should not be understood to mean that a communication should allege a violation of the provision of the Charter; hence it would be for the best interest of the child to address all alleged violations of any of the protected rights under the African Children's Charter. In this regard, the Committee believes that it would be for the best interest of the child to consider the allegations on consequential violations as they relate to the right to education and protection of the family.

i. Alleged Violation of the Right to Education (Article 11)

92. With regard to violation of the right to education of the Complainants submit that the revocation of the Complainant's Sudanese nationality cost her, the opportunity to join university. Without proof of nationality, the Complainant could not have completed her university application and this hindered her access to higher education.

93. The Committee notes that the fact that Ms Iman's nationality has been revoked has not been contested by the Respondent State. It also notes that having a national identity number is one of requirements to apply for a university education in the Respondent State and this number can be obtained only upon presentation of nationality certificate which the complainant was denied on the

ground that her Sudanese nationality has been revoked by application of the Respondent State's Nationality Law.

94. In one of its reports to the UN Human Rights Council, the UN Secretary-General noted that 'the loss or deprivation of nationality renders the person concerned an alien with respect to their former State of nationality, causing them to forfeit the rights they held as nationals'.²⁸

95. Similarly, this Committee noted in its General Comment on Article 6 of the Children's Charter that children may have their rights restricted if they are not regarded as nationals, in particular in relation to their access to education, health care and other social services.²⁹ Therefore, it is unquestionable that a number of children's rights may be violated as a result of a child's loss of nationality.

96. Article 11(1) of the ACRWC provides that 'Every child shall have the right to an education'. The Committee would like to accentuate that the right to education should be understood to entail the right to access to school/higher education institutions. With regard to higher education, Article 11(3) (C) further provides that State Parties are required to make higher education accessible to all on the basis of capacity and ability by every appropriate means. In one of its general comments, the Committee on Economic, Social and Cultural Rights noted that 'In realizing the right to education, the State must ensure, *inter alia*, the availability, accessibility and acceptability of the education provided to children. Availability is assessed in terms of quality; accessibility is determined in terms of equal opportunity, economic and physical accessibility and acceptability is inferred from the quality of education provided'.³⁰

97. The African Commission on Human and Peoples' Rights has also in its decision emphasised that the failure to provide access to institutions of learning would amount to a violation of the right to education under the African Charter on Human and Peoples' Rights.³¹

98. As aforementioned, having a national identity number is one of the requirements to apply for a university education in the Respondent State and this number can

²⁸ See Report of UN Secretary-General to Human Rights Council 'Human rights and arbitrary deprivation', para 23. Available at <http://www.refworld.org/pdfid/52f8d19a4.pdf> (accessed on 29 June 2018).

²⁹ ACRWC's General Comment on Article 6 of Children's Charter, Para 85.

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 13, Article 13: The Right to Education, 1999, para 6.

³¹ *Free Legal Assistance Group and Others v Zaire*, Communications No 25/89, 47/90, 56/91, 100/93, para 11.

be obtained only upon presentation of nationality certificate which is provided only to Sudanese nationals and serves as proof of Sudanese nationality. This indicates that higher education can be accessed in the Respondent State only by Sudanese nationals. As facts presented before the Committee indicate, Ms Iman has been Sudanese national until her Sudanese nationality was revoked by application of Section 10(3) of Sudanese Nationality Act (amendment 2011). As safely concluded by the Committee elsewhere in this decision, the Respondent State arbitrarily deprived the Complainant's nationality by introducing a legislation (mentioned above) which arbitrarily deprives children of South Sudanese origin their Sudanese Nationality based on the national origin of their parents. Had Sudanese nationality of Ms Iman not been revoked, she could have obtained nationality certificate and national identity number which is required to access higher education in the Respondent State. In other words, the Complainant was denied access to higher education as a result of arbitrary deprivation of her Sudanese nationality.

99. For the above reasons, the Committee concurs with submission of the Complainants and concludes that revocation of the Complainant's Sudanese nationality cost her the opportunity to access higher education institution and the Complainants right to education guaranteed under Article 11 of the Children's Charter has been consequentially violated as a result of arbitrary deprivation of the Complainants nationality.

ii. Alleged Violation of the Right to Protection of the Family

100. Article 18(1) of the Children's Charter provides that 'The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development'. Article 19(1) of the Children's Charter further provides that 'Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child'. Violation of the right to protection of the family at least presupposes, among others, existence of unlawful interference in family either by the state actors or non-state actors, dissolution of family because of interference of state or non-state actors, unjustified separation of child from his/her family without considering the best interest of the child and etc.

101. With regard to the right to protection of the family, the complainants submitted that though Ms Iman has not faced deportation, she remains stateless and at risk of deportation. If deported, this would separate the Complainant from her mother, her only surviving parent and would deprive them from each other's support.

102. From submission of the Complainants, it can easily be understood that there is no actual violation (a violation which actually materialized). The Complainants are just arguing on conditional basis by anticipating separation of Ms Iman from her family. If it was a request for a provisional measure/intermediate decision, their submission would have made sense. From the facts presented before it, the Committee was able to discern only that there is risk of deportation of the Complainant which if materialized causes her separation from her family and that in turn actually violates her right to protection of the family. The Committee is of the view that risk of violation of certain right cannot be equated with the actual violation of the right and the Committee is mandated to find actual violation of children's rights enshrined under the ACRWC as opposed to risk of violation of these rights. Although the Complainant has been arbitrarily deprived Sudanese nationality, her right to protection of the family has not been affected by loss of Sudanese nationality.

103. Therefore, the Committee did not find the Respondent State in violation of Ms Iman's right to protection of the family as alleged by the Complainants. For the above reasons, the Committee concludes that there was no consequential violation of Ms Iman's right to protection of the family as a result of deprivation of her Sudanese nationality.

IV. Decision of the Committee

104. For the forgoing reasons, the Committee finds that the Respondent State is in violation of its obligation under article 3 of the Charter on non-discrimination and article 6(3) and (4) of the Charter on right to nationality and prevention of statelessness as well as consequential violation of Article 11 on the right to education of the Children's Charter. The Committee notes that the Complainants requested the Committee to recommend that that the Government of Sudan pay compensation to the Complainant and remedy her legal status. Regarding compensation, the Committee is of the view that no pronouncement is to be made on compensation on material damage on the ground that no specific request is made and no evidence showing actual damage is adduced before it.

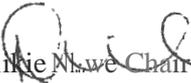
105. Regarding remedying the legal status of the Complainant, the Committee recommends to the Respondent State, in accordance with its obligation under the Children's Charter, to take all necessary measures:

- A. To urgently grant nationality to Ms Iman as she has a Sudanese Mother and as she would otherwise be stateless. In this regard, the Committee also recommends that the Respondent State confers its nationality to children in its territory who are either stateless without taking prolonged procedure to prove their link with other State;
- B. To revise its Nationality Act with a view to:
 - i. Ensure that children born to Sudanese mothers automatically obtain Sudanese nationality same as children born to Sudanese fathers;
 - ii. Ensure that children born to South Sudanese parents are not discriminated against in obtaining Sudanese nationality where the child demonstrates clear link with the Respondent State;
 - iii. Ensure that its nationality law does not leave children born in the territory of the Respondent State stateless and are provided with Sudanese Nationality without mere assumption that they have acquired South Sudanese Nationality;
 - iv. Ensure that Sudanese nationality is not revoked from a child unless there is sufficient and admissible evidence that the child has acquired other nationality. In doing so, the proof of other nationality should be based on the laws on the acceptable proof of nationality of the State which is assumed to have conferred its nationality to that child; and
 - v. Ensure that revocation of Sudanese nationality of child's parent does not result in revocation of Sudanese nationality of the child. In particular, ensure that children born to South Sudanese parents or children born to South Sudanese father and Sudanese mother get equal protection of the law in this regard.
- C. To adopt a law or regulation in line with acceptable international standards that regulate the manner in which Sudanese Nationality is revoked; and limit the discretion given to officials by providing factors needed to be considered in detail before effecting revocation of Sudanese nationality;
- D. To ensure that there are procedural safeguards in determining, conferring, and revoking Sudanese Nationality. Such procedural safeguard should follow due process of law and the right of the child to fair

trial, to be heard and participate in the process and also the right to challenge the decision of authorities in this regard in a court of law;

- E. To ensure that the grant of certificate of nationality is done in a legally prescribed timeline once application is submitted to obtain such document in order to avoid uncertainty in relation to entitlement of nationality and situation where statelessness is prolonged. Moreover, the Respondent State should ensure that its organs and officials respect the said timeline without making any discrimination on any ground whatsoever in granting certificate of nationality to children; and
- F. To ensure that children are not deprived of their basic rights in the Charter such as the right to education, health, birth registration, justice, and other basic necessities until their nationality is determined or even when they are found to be stateless or at the risk of being stateless.

Done at the 31st Ordinary Session of the ACERWC
Bamako, Mali
May 2018


Mrs Goitseone Nankie Nkwe Chairperson of the
African Committee of Experts on the Rights and
Welfare of the Child