

# The child's right to a nationality in Kenya under the Children Act of 2022

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## Abstract

*Every child's right to a nationality is well entrenched in the international human rights legal framework. The Children Act of 2022 safeguards the right of a child to a name and nationality and adopts preventive measures protecting children from statelessness. This paper examines first, the extent to which the Act's provisions on the child's right to a name and nationality aligns with the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. It later assesses whether the Act has sufficient safeguards against the deprivation of a child's nationality as provided for under international law.*

**Keywords:** name and nationality, birth registration, Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, deprivation of nationality

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## Introduction

Nationality is the legal bond between a state and its nationals, which enables the national to enjoy their rights and is bound by the obligations set by the state.<sup>1</sup> Each sovereign state has the right to determine its own citizens through its domestic laws in accordance with international law.<sup>2</sup> Consequently, every state has the discretion to determine its nationals in accordance with its citizenship laws. States codify nationality laws, which individuals need to satisfy in order to become citizens. Once one becomes a citizen, this status enables them to enjoy the privileges associated with citizenship. While states have the right to decide their nationals in accordance with their nationality laws, states need to comply with international law principles on acquisition, loss and deprivation of nationality.

Nationality is a fundamental right which unlocks the enjoyment of other rights. However, not every person possesses nationality. In reality, millions of adults and children around the world are stateless. The Constitution of Kenya, 2010 and the Kenya Citizenship and Immigration Act (No 12 of 2011) govern the acquisition and revocation of Kenyan citizenship. The repealed Children Act of 2001<sup>3</sup> stipulated on all matters affecting children in Kenya. Presently, the Children Act of 2001 has been amended and replaced with the Children Act of 2022 (Children Act), which provides for the child's right to a name and nationality at Section 7.

United Nations human rights instruments recognise every individual's right to a nationality.<sup>4</sup> Since 1961, a child's right to acquire a nationality has been guaranteed in the following six treaties: the

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<sup>1</sup> *Nottebohm case (Liechtenstein v Guatemala)* (Judgement of 6 April 1955) ICJ Reports 20.

<sup>2</sup> *Nottebohm case (Liechtenstein v Guatemala)* 20.

<sup>3</sup> Children Act (No. 8 of 2001) (Repealed).

<sup>4</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 15; Convention on the Nationality of Married Women, 29 January 1957, A/RES/1040, Articles 1 and 2; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, Article 5(iii); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13, Article 9; Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106, Article 18.

1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention),<sup>5</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>6</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>7</sup> Convention of the Rights of the Child (CRC),<sup>8</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>9</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>10</sup> the International Convention on the Protection of All Migrant Workers and their Families,<sup>11</sup> the Covenant on the Rights of Persons with Disabilities.<sup>12</sup> In addition, Article 8 of the 1961 Statelessness Convention prohibits the deprivation of one's nationality.<sup>13</sup>

The African Charter on the Rights and Welfare of the Child (ACRWC) affirms every child's right to a name and nationality and to be registered immediately after birth.<sup>14</sup> This right is reaffirmed in the European Convention on Nationality,<sup>15</sup> the American Convention on Human Rights<sup>16</sup> and the Covenant on the Rights of the Child in Islam.<sup>17</sup>

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<sup>5</sup> Convention on the Reduction of Statelessness, 30 August 1961, 989 UNTS 175, Articles 1-4.

<sup>6</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 24.

<sup>7</sup> Convention on the Elimination of All Forms of Discrimination against Women, Article 9.

<sup>8</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Article 7.

<sup>9</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 24.

<sup>10</sup> Convention on the Elimination of All Forms of Discrimination against Women, Article 9.

<sup>11</sup> International Convention on the Protection of All Migrant Workers and their Families, A/RES/45/158, 18 December 1990, Article 29.

<sup>12</sup> Convention on the Rights of Persons with Disabilities, Article 18.

<sup>13</sup> Convention on the Reduction of Statelessness, Article 8.

<sup>14</sup> African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49, Article 6.

<sup>15</sup> European Convention on Nationality, 6 November 1997, ETS 166, Article 7.

<sup>16</sup> American Convention on Human Rights, Pact of San Jose, Costa Rica (B-32), 22 January 1969, Article 20.

<sup>17</sup> Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep. Final, Article 7.

Statelessness is a global concern because it occurs in all the continents of the world and affects adults and children alike.<sup>18</sup> This can be attributed to the dissolution of states, unfair administrative practices, discrimination and arbitrary deprivation of nationality among others.<sup>19</sup> In Africa, statelessness may be attributed to its colonial history, migration, discrimination and pastoralism.<sup>20</sup>

Childhood statelessness is caused by a number of factors, including inherited statelessness from a parent to a child, nationality laws that discriminate on gender,<sup>21</sup> and a lack of proper safeguards to grant nationality to foundlings in countries where nationality is granted through descent.<sup>22</sup>

In addition, foreign children born in exile may face challenges accessing any form of identification.<sup>23</sup> In *Yean and Bosico Children v Dominican Republic*, the Inter-American Court of Human Rights held that statelessness deprives an individual from fully enjoying civil and political rights and puts them in a place of vulnerability.<sup>24</sup> Additionally, statelessness results in marginalisation, discrimination and exclusion; the lack of documentation impedes the access to education and health

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<sup>18</sup> United Nations High Commissioner for Refugees, 'About statelessness' -<<https://www.unhcr.org/ibelong/about-statelessness/>> on 1 February 2024.

<sup>19</sup> Hélène Lambert, 'Comparative perspectives on arbitrary deprivation of nationality and refugee status' 64(1) *International and Comparative Law Quarterly* (2015) 3. See also Carol Batchelor, 'Statelessness and the problem of resolving of nationality status' 10(1) *International Journal of Refugee Law* (1998) 156.

<sup>20</sup> African Commission on Human and Peoples' Rights, 'The right to nationality in Africa' 2015, 7.

<sup>21</sup> Julie Lugulu, 'Gender discriminatory nationality laws and childhood statelessness in Africa: A reflection on legislative interpretations' in Aderomola Adeola and Makau Mutua (eds) *The Palgrave handbook of democracy, governance and justice in Africa*, Springer Nature, 2022, 110.

<sup>22</sup> Institute of Statelessness and Inclusion, 'Statelessness and human rights: The Convention on the Rights of the Child', 2018. This article uses the words nationality and citizenship interchangeably to mean the legal bond between an individual and a state, which requires results in obligations from both parties.

<sup>23</sup> Luquerna Ana 'The children of ISIS: Statelessness and eligibility for asylum under international law' 21(1) *Chicago Journal of International Law* (2020) 169.

<sup>24</sup> *Case of the girls Yean and Bosico v Dominican Republic* (Preliminary objections, merits, reparations and costs) IACtHR (2007), para 142.

care and predisposes children to trafficking, early marriage, sexual exploitation and poverty.<sup>25</sup>

Childhood statelessness hinders a child from enjoying socio-economic rights and if left unresolved contributes towards intergenerational statelessness. In the *Children of Nubian descent v Kenya*, the African Committee of Experts on the Rights and Welfare of the Child asserted that statelessness is antithetical to the best interests of the child.<sup>26</sup>

The purpose of this paper is to, first, examine the extent to which the provisions on the child's right to a nationality in the Children Act align with the CRC and the ACRWC. Secondly, this paper discusses the deprivation of nationality under international law and examines whether the Children Act has sufficient safeguards against the deprivation of a child's nationality.

This article advances as follows. Section I discusses the acquisition and revocation of citizenship in Kenya. Section II examines the child's right to be registered immediately after birth and to acquire a nationality under the CRC and the ACRWC. Section III discusses deprivation of nationality under the 1961 Statelessness Convention, the CRC and domestic law. Section IV examines the extent to which the Children Act complies with the ARWC in upholding the child's right to a nationality. Finally, this paper concludes that the Children Act is silent on the deprivation of a child's nationality, therefore does not comply with international law standards.

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<sup>25</sup> Bridget Wooding 'Contesting Dominican discrimination and statelessness' 20(3) *Peace Review, A Journal of Social Justice* (2008) 366. See also Brad K Blitz, 'Neither seen nor heard: Compound deprivation among stateless children' in Jacqueline Bhabha (ed) *Children without a state: the scope of child statelessness in the 21<sup>st</sup> Century*, MIT Press (2011) 44.

<sup>26</sup> *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011. See also Julie Ingrid Lugulu 'Update on Kenya's implementation of the decision in the Nubian Minors' case' 6 *Kabarak Journal of Law and Ethics* (2022) 208.

## Acquisition and revocation of a child's citizenship in Kenya

As previously discussed, each sovereign state has the discretion to determine its nationals under its domestic laws. Similarly, most nationality laws provide for the acquisition of nationality and the conditions for loss or deprivation of nationality.<sup>27</sup> This section highlights how children may acquire Kenyan citizenship and the instances in which their Kenyan citizenship may be revoked in accordance with the citizenship laws in Kenya.

Kenyan citizenship may be acquired through descent (*jus sanguinis*). The 2010 Constitution provides for the acquisition of Kenyan citizenship through birth or registration.<sup>28</sup> A child may acquire Kenyan citizenship through birth if he or she is born in Kenya or abroad to a Kenyan mother or father.<sup>29</sup> Kenyan citizenship may also be acquired through registration. If a person is married to a Kenyan citizen for at least seven years, they may register for Kenyan citizenship.<sup>30</sup> Secondly, an applicant may register for Kenyan citizenship if they have lawfully resided in Kenya for at least seven years.<sup>31</sup> A child born to an applicant before the application for Kenyan citizenship through lawful residence is eligible to apply for citizenship through registration as a dependant of the applicant, as long as the child lawfully resides in Kenya. Children born to a parent or parents who have attained Kenyan citizenship through registration, after the attainment of registration, acquire Kenyan citizenship through birth.

Thirdly, a foreign child who is adopted by a Kenyan citizen, may acquire Kenyan citizenship through registration.<sup>32</sup> In addition, a

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<sup>27</sup> Laura Van Waas, 'Foreign fighters and the deprivation of nationality: National practices and international law implications' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds) *Foreign fighters under international law and beyond*, TMC Asser Press (2016) 471.

<sup>28</sup> Constitution of Kenya (2010), Article 13(2).

<sup>29</sup> Constitution of Kenya (2010), Article 14(1).

<sup>30</sup> Constitution of Kenya (2010), Article 15(1).

<sup>31</sup> Constitution of Kenya (2010), Article 15(2).

<sup>32</sup> Constitution of Kenya (2010), Article 15(3). See also, Kenyan Citizenship and Immigration Act (Chapter 172), Section 14.

child found in Kenya who appears to be less than eight years old, of unknown parentage and whose nationality is unknown (also referred to as foundlings) is presumed as a Kenyan citizen by birth.<sup>33</sup>

Kenya citizenship laws also provide for instances when a child's citizenship can be revoked. Section 21 of the Kenyan Citizenship and Immigration Act provides for the revocation of Kenyan citizenship acquired through registration. A foundling's citizenship may be revoked if acquired through fraud, false representation, or concealment of a material fact.<sup>34</sup> It may also be revoked if the nationality or the parentage of the child becomes known, and the parentage reveals that child is a citizen of another country, or if the age of the child becomes known and it reveals that the child was older than eight years old.<sup>35</sup>

### **The child's right to be registered immediately after birth and to acquire a nationality**

The child's right to be registered immediately after birth and to acquire a nationality is extensively provided for under United Nations and African human rights legal framework. While the child has a right to a nationality, the only effective way of implementing this right is through allowing the child to be registered immediately after birth.<sup>36</sup> The next part discusses the child's right to be registered immediately after birth and to acquire a nationality under international and domestic law.

#### **Under the international framework**

The CRC provides the child with the right to be registered immediately after birth, the right to a name and to acquire a nationality.

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<sup>33</sup> Constitution of Kenya (2010), Article 17(2).

<sup>34</sup> Constitution of Kenya (2010), Article 17(2)(c).

<sup>35</sup> Constitution of Kenya (2010), Article 17(2)(b) and (c).

<sup>36</sup> Jaap Doek, 'The CRC and the right to acquire and preserve a nationality' 2(3) *Refugee Survey Quarterly* (2006) 27.

Article 7 (1) of the CRC states, 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality...'. While Article 7 of the CRC upholds the child's right to a nationality and to be registered immediately after birth, this provision does not strongly guarantee against childhood statelessness.<sup>37</sup>

During the drafting of this provision, proposals were made to allow a child to acquire nationality based on where they were born.<sup>38</sup> This proposal was rejected in favour of the provision to allow a child to acquire a nationality through descent or through birth based on the domestic laws.<sup>39</sup> Therefore, Article 7 of the CRC confers a child with the right to acquire a nationality and not the right to a nationality. Moreover, during the drafting of the provision, states declined the unqualified obligation to grant nationality to all children born on their territory irrespective of the circumstances.<sup>40</sup>

Article 7 of the CRC aims to recognise the child's enjoyment of their nationality from birth through establishing the right to a nationality and through preventing statelessness. Registering a child at birth is important because it is an enabling right which is vital to access education, health care and social security.<sup>41</sup> Kenya is a state party to the CRC, therefore has an obligation to register the birth of every child immediately after birth.

Article 6 of the ACRWC provides for the child's right to a name, to be registered immediately after birth and to acquire a nationality whose

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<sup>37</sup> Adem Arkadem-Thibert and Gerison Lansdown, 'Article 7; The right to a name, nationality and to know and be cared for by parents' in Vaghri Ziba, Zermatten Jean, Lansdown Gerison, Ruffiero Roberta (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child, children's well-being: An analysis of attributes*, Springer Nature (2022) 52.

<sup>38</sup> Thibert and Lansdown, 'Article 7: The right to a name, nationality and to know and be cared for by parents', 52.

<sup>39</sup> Thibert and Lansdown, 'Article 8; The right to a name, nationality and to know and be cared for by parents', 52.

<sup>40</sup> Doek 'The CRC and the right to acquire and preserve a nationality', 26.

<sup>41</sup> Adem and Lansdown, 'Article 8; The right to preservation of identity' 55.



main aim is to prevent statelessness<sup>42</sup> and childhood statelessness.<sup>43</sup> State parties should ensure that their constitutional legislation accords children born in their territory a nationality.<sup>44</sup> Ensuring that a child has nationality from birth is in their best interests and promotes their full participation in the political and social life within the territory where they are born.<sup>45</sup>

Therefore, state parties to the ACRWC have an obligation to ensure that they grant nationality to children born in their territory if the children do not have any other nationality and would otherwise be stateless.<sup>46</sup> Kenya being a state party has obligations to ensure that its domestic laws provide for children to be registered immediately after birth. Another obligation is to grant nationality to children in their territory who lack any other nationality to prevent statelessness.

### Under domestic law

All children born in Kenya to Kenyan citizens or to asylum seekers or refugees are entitled to be registered at birth and be issued with a birth certificate used to apply for Kenyan citizenship upon attaining adulthood. A birth certificate is not proof of Kenyan citizenship. Nonetheless, registering the birth of a child provides the child with proof of a legal identity establishing a genuine link between the child and the state, hence reducing the risk of childhood statelessness. In addition, birth registration provides the official evidence of a child's parentage and birthplace without which the child may face difficulties

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<sup>42</sup> African Charter on the Rights and Welfare of the Child, Article 6(4).

<sup>43</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, 16 April 2014, ACERWC/GC/02 (2014) para 83.

<sup>44</sup> African Charter on the Rights and Welfare of the Child, Article 6(4).

<sup>45</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC*, para 89.

<sup>46</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC*, para 87.

in proving their nationality under the law and might become stateless.<sup>47</sup> The ownership of a birth certificate unlocks the enjoyment of a child's right to education and health.<sup>48</sup>

Article 14(4) of the 2010 Constitution states: 'A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.'<sup>49</sup> Therefore, the 2010 Constitution, Section 7(4) of the Children Act and Section 9 of the Kenyan Citizenship and Immigration of 2011 set a presumption for foundlings to be recognised as Kenyan citizens.<sup>50</sup> As already mentioned, Kenya mainly grants citizenship through descent. These presumptions safeguard against child statelessness due to the inability of proving their existing legal links with Kenya. Hence, the presumptions comply with the best interests of the child in protecting a child against statelessness.

## Deprivation of nationality

Deprivation of nationality is not a new concept in international law. For example, it has been used as a counter-terrorism measure in jurisdictions around the world.<sup>51</sup> Deprivation or revocation of nationality refers to the withdrawal of nationality or the denial of conferral of nationality. International law allows for the deprivation of nationality when the deprivation conforms to domestic law, complies with proportionality, serves a legitimate aim and complies with non-

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<sup>47</sup> Institute of Statelessness and Inclusion, 'Statelessness and human rights: The Convention on the Rights of the Child' Institute of Statelessness and Inclusion (2018), 6.

<sup>48</sup> Lindsey N Kingston, Elizabeth F Cohen and Christopher P Morley, 'Debate: Limitations on universality: the "right to health" and the necessity of legal nationality' 10(11) *BMC International Health and Human Rights* (2010) 12.

<sup>49</sup> Kenyan Citizenship and Immigration Act (Cap 172), Section 9.

<sup>50</sup> Kenyan Citizenship and Immigration Act (Cap 172), Section 9.

<sup>51</sup> Tom Boekestein, 'Deprivation of nationality as a counter-terrorism tool: A comparative analysis of Canadian and Dutch legislation' 5 *Transnational Human Rights Review* (2018) 24.

discrimination, equality and due process.<sup>52</sup> While states have the discretion to grant nationality to its citizens, this discretion should be exercised in compliance with international law, which prohibits arbitrary deprivation of nationality and upholds the state duty to prevent statelessness and discrimination.<sup>53</sup>

## International law

The 1954 Statelessness Convention and the 1961 Statelessness Convention make for the international legal framework for the protection of stateless persons. Article 8 of the 1961 Statelessness Convention stipulates:

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless. Therefore, state parties to the 1961 Convention have an obligation not to deprive a person of their nationality if this act would result in statelessness, the aim of this provision was to avoid creating new forms of statelessness through deprivation.
2. Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State: (a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality; (b) where the nationality has been obtained by misrepresentation or fraud.

Article 8 of the 1961 Statelessness Convention prohibits depriving a person of their nationality where the result of such action would be the person becoming stateless. Clauses 2 and 3 of the Article contain exceptions to this prohibition, which include obtaining nationality of the Contracting State by fraud or misrepresentation, conduct that is

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<sup>52</sup> Lambert, 'Comparative perspectives on arbitrary deprivation of nationality and refugee status,' 11.

<sup>53</sup> Van Waas, 'Foreign fighters and the deprivation of nationality: national practises and international law implications' 476. See also, Lambert, 'Comparative perspectives on arbitrary deprivation of nationality and refugee status,' 13.

seriously prejudicial to the vital interests of the state. State parties to the 1961 Statelessness Convention have an obligation to avoid depriving an individual of their nationality if it would render the person stateless, however, it allows the deprivation if the nationality was acquired through fraud.<sup>54</sup>

States may deprive their nationals of their citizenship as long as the deprivation is rational and follows a fair procedure. States can also deprive nationality if it was acquired through fraud, or if the applicant served in a foreign military service, or if the citizen acquires another nationality. Only in the most extreme circumstances can a state deprive a national of their nationality if it would result in statelessness.

Regarding deprivation, Article 8(1) of the CRC demands states to respect the right of the child to preserve their identity including nationality, name and family relations without unlawful interference. The intention of this provision is to preserve a child's identity which is important in order to allow a child to exercise and enjoy other rights.<sup>55</sup> Preserving a child's identity is in the best interests of a child.<sup>56</sup> Therefore, no child should be deprived of their nationality or lose their nationality for any reason.<sup>57</sup> Article 8(1) of the CRC mentions nationality as an element of a child's identity. Therefore, state parties have to respect the child's right to preserve their identity which includes nationality and name.<sup>58</sup>

Article 8 (2) of the CRC obligates state parties to offer appropriate assistance and protection, with a view to re-establishing speedily his or her identity, where a child is illegally deprived of some or all of the elements of his or her identity. This provision protects the child's right to a nationality from arbitrary deprivation and against statelessness.<sup>59</sup> In

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<sup>54</sup> Mónika Ganczer, 'The right to a nationality as a human right?' 1 *Hungarian Yearbook of International Law and European Law* (2014) 19.

<sup>55</sup> Adem and Lansdown, 'Article 8: The right to preservation of identity' 60.

<sup>56</sup> Adem and Lansdown, 'Article 8: The right to preservation of identity' 58.

<sup>57</sup> Institute of Statelessness and Inclusion, 'Statelessness and human rights' 9.

<sup>58</sup> Doek 'The CRC and the right to acquire and preserve a nationality' 29.

<sup>59</sup> Mónika Ganczer, 'The right to a nationality as a human right?' 1.

light of the above, state parties to the CRC have an obligation to ensure that where an aspect of a child's identity has been taken away, then the state must make efforts to remedy this and help them to re-establish their identity. In doing this, the state upholds and protects the child's right to a nationality in accordance with Article 2 (non-discrimination), Article 3 (best interests of the child) and Article 12 (life survival and development) of the CRC.<sup>60</sup>

While the ACRWC recognises the child's right to a nationality, it does not explicitly address deprivation of nationality of a child.

### Domestic law

It is important to note that Kenya is not a state party to the 1961 Statelessness Convention. As earlier discussed, Kenyan law provides for instances in which one may be deprived of their citizenship through revocation. Kenyan law uses the term revocation, as opposed to deprivation. In this article, deprivation carries a similar meaning with revocation, which means the cancellation of power, authority or thing initially granted.<sup>61</sup>

Revocation is the official cancellation of a decree. Therefore, citizenship acquired through registration may be revoked by the Kenyan government if acquired through fraud, false representation or concealment of a material fact.<sup>62</sup> Another ground involves assisting Kenya's enemy during a war.<sup>63</sup> Citizenship acquired through registration may also be revoked if, first, the Kenyan citizen is convicted within five years of registration of committing an offence and is sentenced to imprisonment of three years or longer.<sup>64</sup> Secondly, citizens by registration may have their citizenship revoked if convicted of treason.<sup>65</sup> These

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<sup>60</sup> Institute of Statelessness and Inclusion, 'Statelessness and human rights' 7.

<sup>61</sup> *Black's Law Dictionary*, Ninth Edition, Thomson Reuters, 2009, 1435.

<sup>62</sup> Constitution of Kenya (2010), Article 17(1)(a).

<sup>63</sup> Constitution of Kenya (2010), Article 17(1)(b).

<sup>64</sup> Constitution of Kenya (2010), Article 17(1)(c).

<sup>65</sup> Constitution of Kenya (2010), Article 17(1)(d).

provisions are in compliance with the 1961 Statelessness Convention, which recognises that one can legally be deprived of their nationality in the above circumstances.

A child who has acquired their Kenyan citizenship through a presumption of birth, may lose their Kenyan citizenship if it was acquired through fraud, false representation, or concealment of a material fact.<sup>66</sup> This provision complies with international law which allows citizenship to be revoked if acquired through fraud. Citizenship through presumption of birth may also be revoked if the nationality or the parentage of the person becomes known and reveals that they are citizens of another country, or if the age of the person becomes known and reveals that he or she was older than eight years old.

Section 21 of the Kenyan Citizenship and Immigration Act provides for the revocation of Kenyan citizenship acquired through registration. Section 11 of the repealed Children Act, 2001 stated, '[e]very child shall have a right to a name and nationality and where a child is deprived of his identity, the Government shall provide appropriate assistance and protection, with a view to establishing his identity.'

### **Compliance of the Children Act with the CRC and ACRWC in upholding the child's right to nationality**

This paper has examined in detail the acquisition and revocation of a child's citizenship in Kenya, the child's right to be registered immediately after birth and to acquire a nationality and the deprivation of a nationality under international law. This part examines the extent to which the Children Act aligns with international human rights law obligations on the child's right to a nationality and the protection from unlawful deprivation of nationality.

Kenyan law recognises the importance of registering every child immediately birth. For instance, the Births and Deaths Registration Act,

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<sup>66</sup> Constitution of Kenya (2010), Article 17(2).

stipulates the compulsory registration of births of children both born in Kenya<sup>67</sup> and abroad,<sup>68</sup> and compulsory registration of abandoned children.<sup>69</sup> Similarly, Section 7(2) of the Children Act addresses the importance of registering the birth of a child immediately after birth.<sup>70</sup> Consequently, the Children Act complies with the CRC and the ACRWC to ensure that children are registered immediately after birth and acquire a nationality, thereby preventing childhood statelessness at birth.

Kenyan citizenship may be acquired through descent and foundlings may be presumed (legally) to be Kenyan citizens. Therefore, the Children Act aligns with the ACRWC in preventing childhood statelessness through granting Kenyan citizenship to foundlings who would otherwise be stateless.

It is noteworthy that Section 7 of the Children Act is silent on the state's obligation to help the child to re-establish their identity after being deprived of their nationality. Section 11 of the repealed Children Act of 2001 obligated the government to help a child regain their lost identity, hence, protecting a child from deprivation of nationality. This omission may create new causes of childhood statelessness in situations where a foundling's nationality is revoked under the domestic laws or where one does not possess a dual nationality.<sup>71</sup>

Deprivation of a child's nationality leaves them prone to human rights violations and is a cause of childhood statelessness especially when a child does not have another nationality. If a foundling, without dual citizenship is deprived of their nationality, under Article 17 of the 2010 Constitution, this child would be rendered stateless. This contravenes Article 8 of the 1961 Statelessness Convention, which

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<sup>67</sup> Births and Deaths Registration Act (Cap 149), Section 9.

<sup>68</sup> Births and Deaths Registration Act (Cap 149), Section 10.

<sup>69</sup> Births and Deaths Registration Act (Cap 149), Section 13.

<sup>70</sup> It is important to note that, the Children Act, 2001 was silent about the registration of children immediately after birth; the Children Act, 2022 provides for children to be registered immediately after birth.

<sup>71</sup> The Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, *The right to nationality in Africa*, African Commission on Human and Peoples' Rights (ACHPR), 2015, 35.

prohibits the deprivation of nationality if it would make someone stateless. In addition, Article 8(1) of the CRC obliges state parties to respect the right of the child to preserve their identity, which includes nationality. Also, Article 8(2) of the CRC requires state parties to assist and protect children whose identity is illegally deprived.

Therefore, the Children Act does not fully uphold the child's right to a nationality because it does not have a provision on deprivation of nationality. Omitting to safeguard the child's nationality against deprivation may increase the number of stateless persons particularly among children who do not possess any other nationality. Moreover, the Inter-American Court of Human Rights observed that states have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons.<sup>72</sup>

## Conclusion

The Children Act has made commendable efforts in providing, protecting and safeguarding the child's right to nationality through providing every child with a right to a nationality and through providing children with the right to be registered immediately after birth. Secondly, while Kenya mainly grants nationality through descent, the Children Act prevents childhood statelessness by granting children of unknown parentage with Kenyan citizenship.

However, the Children Act is silent on the deprivation of a child's nationality, although the repealed Children Act of 2001 covered it. To this extent, the Children Act fails to fully comply with international law, which prohibits the revocation of one's nationality if it would render the person stateless, as well as the CRC, which obliges the Government of Kenya to assist children whose nationality has been illegally deprived.

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<sup>72</sup> *Case of the girls Yean and Bosico v Dominican Republic*, para 142.