Statelessness and Rights: Protecting the Rights of Nubian Children in Kenya through the African Children’s Committee

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Abstract

The question of statelessness is an incessant challenge in Africa. Stateless persons are often denied basic human rights due to lack of a nationality. The situation of children in Kenya – that are of Nubian descent – is illustrative of the plight faced by stateless persons. The African Committee of Experts on the Rights and Welfare of the Child has attempted to address this challenge in its first decision, made public in 2011. This article considers this decision, analysing its strengths and weaknesses as well as the potential impact of the decision.

Keywords

Children's rights; statelessness; education; health; African Committee of Experts on the Rights and Welfare of the Child (ACRWC); birth registration; nationality

1. Introduction

In 2009, a communication was brought before the African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee or ACERWC) on behalf of children of Nubian descent in Kenya, by the Institute for Human Rights and Development in Africa (IHRDA) a Gambian based Non-Governmental Organisation (NGO) and Open Society Initiative (OSI) a New York-based NGO.\textsuperscript{1} This communication avowed the Kenyan governments’ refusal to grant Kenyan nationality to children of Nubian descent resulting in gross violations of their rights guaranteed in the African Charter on the Rights and Welfare of the Child.

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In particular, the communication alleged violations of the following provisions: Article 3, which protects a child against discrimination based on her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status; Article 6(2), (3) and (4), on a child’s right to be registered after birth and to a nationality; Article 11(3), requiring State parties to take all appropriate measures with a view to achieving the full realisation of children’s right to education; and Article 14 on equal access to health care.

Following two failed attempts to get the respondent State to make its argument, the African Children’s Committee reasoned, during its seventeenth ordinary session that the best interest of the child demanded that it considered the communication. This consideration was also guided by the fact that the guidelines for the considerations of communications of the African Children’s Committee allows for the consideration of a communication in the absence of a party.

The Committee subsequently handed down what can be regarded as a groundbreaking decision in March 2011.

The decision is significant as it is the first decision handed down by the Committee. This decision is also significant in that it develops a trailblazing interpretation of children’s right to a nationality that propels its justiciability in tandem with their economic, social and cultural rights (ESCRs). Furthermore, the decision represents the most comprehensive decision on children’s right to nationality issued to date by an organ of the African Union (AU). An analysis of this decision, including a consideration of its strengths, weaknesses and potential is thus relevant. It is also important to understand the decision in context. Accordingly, in the subsequent section, we briefly consider the contextual background – first, by looking at the question of statelessness and rights, and second, the situation of Nubian children in Kenya that necessitated the current case.

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3) Subsection 4 of Article 6 calls on State parties to ‘ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws’.

4) Article 14(2)(b),(c) and (g) calls on State parties to undertake to pursue the full implementation of children’s right to health and health services and in particular; ‘to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care’; ‘ensure the provision of adequate nutrition and safe drinking water’; ‘integrate basic health service programmes in national development plans’.

5) The first note verbale was referenced DSA/ACE/64/1000.10 (2010) and the second DSA/ACE/64/256.11 (2011).

6) **Guidelines for the Consideration of Communications Provided for in Article 44 of the African Charter on the Rights and Welfare of the Child**, ACERWC/8/4 (2005) (see chapter 2, Article 2(v)(3)).
2. Contextual Background

2.1. Statelessness and Rights

The issue of statelessness was seen as central to the communication before the African Children’s Committee. Accordingly, it is important to understand what statelessness means and to understand the case within the broader context of statelessness and rights in Africa. It is within this context that one can appropriately appreciate the plight of the Nubian children and the Committee’s decision. This section does not aim to deal comprehensively with the question of statelessness and rights but to provide a brief overview of the issue.

The Convention relating to the Status of Stateless Persons defines a stateless person as ‘a person who is not considered as a national by any State under the operation of its law’. Put differently, a person without a nationality or citizenship would be seen as stateless. According to the International Law Commission, this definition has become customary international law. Based on this definition, the African Children’s Committee defines a stateless child as ‘a child who is not considered as a national by any State under the operation of its laws’. The object and purpose of the Convention is to secure for stateless persons ‘the widest possible enjoyment of their human rights’ as well as regulate their status. Accordingly, the Convention recognises that stateless persons have rights and duties. It should be noted that persons can either be de jure or de facto stateless. The international regime for de jure stateless persons comprises the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, complemented by international human rights law standards. A de facto stateless person is one that is outside his or her country of nationality, is unable or unwilling, based on valid reasons, to avail himself or herself of the protection of that country.

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7) Nubian case (note 1) (44).
9) Ibid., Article 1(1).
11) Nubian case (note 1), (44).
13) Convention relating to the Status of Stateless Persons (see, for example, Articles 2–5).
The causes of statelessness vary and are multifaceted and complex.\(^{16}\) They include amongst others: exclusionary policies; the inability to establish nationality for various reasons (such as lack of a birth certificate or identity document); inequality in nationality rights between men and women, resulting in the inability of women to pass on nationality to their children; conflict of nationality laws;\(^ {17}\) war and expulsion.\(^ {18}\) In the African context specifically, failure to implement nationality laws, restriction of nationality on racial and ethnic bases, discriminatory nationality laws on the basis of gender and ‘the failure by many African states to provide effective naturalisation procedures, especially for refugees’ are among the identified causes of statelessness.\(^ {19}\) Failure to register children at birth is also a contributing factor to statelessness as seen from the Nubian case.

While it is difficult to measure the enormity of statelessness, it is important that such persons be identified so as to be able to address the issue. 2011 estimates by the United Nations Refugee Agency (UNHCR) place the figure at 12 million stateless persons worldwide but that the actual government data only captured 3.5 million stateless persons in 64 countries.\(^ {20}\) The UNHCR further notes that stateless persons ‘often live in precarious situations on the margin of society, frequently lacking identity documentation, and subject to discrimination’.\(^ {21}\) Despite this, few countries have put in place measures to facilitate ‘the identification, registration and documentation of stateless persons’.\(^ {22}\) In Africa, it is acknowledged that much still needs to be done in order to ensure that stateless persons ‘enjoy the rights and protection that come with having a nationality’.\(^ {23}\)

The above statistics imply that millions of people do not enjoy the right to nationality, which is guaranteed to all in various human rights instruments, including the Universal Declaration of Human Rights.\(^ {24}\) This is because statelessness is the flip side of having a nationality – that is, without a nationality, an individual will become stateless. This would in turn result in other implications, as it

\(^{16}\) In the Nubian case, the African Children’s Committee observed that ‘the root causes of statelessness are complex and multifaceted including state succession, decolonization, conflicting laws between States, domestic changes to nationality laws, and discrimination’ (45).

\(^{17}\) D.J. Walker, ‘Statelessness: Violation or Conduit for Violation of Human Rights?’, 3 Human Rights Quarterly (1981), 106–123. Walker observes that ‘(t)he ultimate cause of statelessness is grounded in the principle of sovereignty and arises out of conflict of nationality laws’ (at 106) and considers situations that give rise to statelessness, particularly birth and loss of nationality (at 110–114).

\(^{18}\) For example, war and expulsion has resulted in statelessness in the Horn of Africa (see generally J.R. Campbell, ‘The Enduring Problem of Statelessness in the Horn of Africa: How Nation-States and Western Courts (Re)Define Nationality’, 23 International Journal of Refugee Law (2011), 656–679).

\(^{19}\) B. Manby, Citizenship Law in Africa: A Comparative Study (Open Society Foundations 2010) 1.


\(^{21}\) Ibid., 29.

\(^{22}\) Ibid.


\(^{24}\) Universal Declaration of Human Rights, Article 15, G.A. res. 217A (III), A/810 at 71 (1948).
is unquestionable that nationality is the basis for the exercise of other rights. As Dorothy Walker puts it – ‘nationality is the linkage of the individual to rights’. Nationality in itself is a basic right and has been described as the right to have rights. This is because nationality provides the link between an individual and a state, which is the basis for the exercise of other rights. Lack of nationality can therefore have negative impact on ‘the right to vote, to own property, to have health care, to send one’s children to school, to work, and to travel to and from one’s country of residence’. Stateless persons are thus vulnerable to the violation of their basic rights.

2.2. The Plight of Nubian Children in Kenya

Laws following independence or state succession also contribute to statelessness. The case of the Nubians in Kenya is a good example of this, as Kenya’s citizenship laws following independence have resulted in the Nubians becoming stateless. The Kenyan government has, for a long time, treated Nubians in Kenya as ‘aliens’, and were thus not granted nationality. The Nubians in Kenya are therefore seen as stateless persons due to the lack of nationality. They experience ‘institutionalised discrimination in issuance of documents . . . [and] are subjected to a vetting process of ethnic determination in order to acquire an identity card or passports’. It is worth noting that in its recent concluding observation, the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) expressed concern over the discrimination against Nubians in the recognition of nationality and accessing documentation.

Nubian children end up inheriting the consequence of this discrimination and lack of relevant documentation; for example, the difficulty in registering their birth that ensues. Thus Nubian children are deprived of their right to nationality, as they have no proof of it. Furthermore, despite having a legitimate expectation that their nationality will be recognised when they reach eighteen years of age, Nubian children remain stateless after this age due to lack of valid identity documents. The plight of Nubian children can also be seen from the fact that

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25 Walker (note 17) 123. See also I. Goris, J. Harrington and S. Kohn, ‘Statelessness: What it is and Why it Matters’, 32 Forced Migration Review (2009), 4–6, at 4, which also identifies rights that are linked to nationality, including ‘education, health care, employment, and equality before the law’.
27 Ibid.
28 Ibid.
29 Nubian case (note 1), (3).
32 Nubian case (note 1), (4).
33 Ibid. (5).
Nubians in general are, technically speaking, squatters – they ‘live in temporary structures’ that are ‘often on contested lands'; their settlements have no title deeds as they occupy the settlements on a Temporary Occupational Licence.\(^{34}\)

Despite the adoption of a Children’s Act in 2001 that guaranteed the right to nationality for children in Kenya, the plight of Nubian children continued. This was largely because the government failed to amend its laws, such as the Kenyan Citizenship Act, to ensure consistency with the Children’s Act.\(^{35}\) Also, despite adopting a new Constitution in 2010, the situation of Nubian children remained an issue as the Constitution did not address the question of the granting of nationality to stateless persons.

Consequently, Nubian children face violation of not just their right to nationality but other human rights such as education, health care and the right not to be discriminated against.\(^{36}\) The African Children’s Committee acknowledged this by observing that ‘[s]tatelessness is particularly devastating to children in the realisation of their socio-economic rights’.\(^{37}\) Recently, the CERD Committee called on the Kenyan government to make ‘the necessary amendments to its legislation and administrative procedures’ so as to ensure that ‘all citizens are treated equally and without any discrimination and receive identity documents’.\(^{38}\)

3. Addressing the Plight of Nubian Children: The Decision of the African Children’s Committee

3.1. The Question of Exhaustion of Local Remedies

The African Children’s Committee, in dealing with admissibility, focused on the question of exhaustion of local (or domestic) remedies, which is part of admissibility requirements, not just under the African system but other human rights systems at the United Nations and other regional levels. The Committee’s focus on this issue was necessitated by the fact that the Kenyan government would have likely challenged this issue. Also, proceedings in relation to the case were instituted in the High Court of Kenya in 2003 but had been stalled. Linked to this requirement is the question – whether the communication was submitted within a reasonable period.\(^{39}\)

The Committee commenced its analysis by defining a ‘local remedy’ and elaborating on the rationale for this requirement – which is to give the state an

\(^{34}\) Adam (note 30) 19.
\(^{35}\) Manby (note 19) 35.
\(^{36}\) Nubian case (note 1) (7).
\(^{37}\) Ibid. (46).
\(^{38}\) Committee on the Elimination of Racial Discrimination (note 31) para. 21.
\(^{39}\) Nubian case (note 1), (24).
opportunity to address the violations. The Committee relied on the definition of a local remedy developed by the African Commission on Human and Peoples’ Rights (African Commission), the supervisory body of the African Charter – ‘any domestic legal action that may lead to the resolution of the complaint at the local or national level’ is a local remedy. Note here the emphasis on ‘legal’ action. While the definition seems to limit local remedies to judicial remedies, it should be noted that other human rights bodies have seen local remedies to go beyond judicial remedies. The United Nations Human Rights Committee, for example, has held that all available domestic remedies ‘not only refers to judicial but also to administrative remedies’. The Committee on Economic, Social and Cultural Rights has also held a similar view.

The rationale for the exhaustion of local remedies requirement is not only based on the principle of state sovereignty but also based on the consensual nature of international law and the subsidiary nature of international protection of rights. Thus, taking the latter into consideration, accessible and effective domestic remedies are the primary means of protecting rights. Since proceedings had been instituted at the domestic level since 2003, the Committee was of the view that the Kenyan government had more than sufficient time and opportunities to provide a local solution in the case but failed to do so. In fact, six years lapsed without any consideration of the case.

There are exceptions to the requirement to exhaust domestic remedies under various complaints mechanisms, for instance where local remedies are unduly prolonged or unavailable. Hence, though the African Commission has declined to consider a communication, rightly so, because the matter had not been settled by local courts, the Committee felt that the Nubian case was different. First, the government was aware of the violations yet failed to address them for a long period, as the High Court case was still pending with no indication on when it will be addressed. The Committee thus held that ‘an unduly prolonged domestic remedy cannot be considered to fall within the ambit of available, effective, and sufficient local remedy’. Second, the Nubian case is different if looked at through the lens of the principle of the best interest of the child. The principle is recognised in Article 4 of the African Children’s Charter and requires a “child first” approach.
with some sense of urgency’. 48 The *Nubian* case thus required ‘proactive immediate attention and action’, 49 which the Kenyan government apparently has failed to provide. The unjustifiably tardy court process in this communication was seen not to be in the best interest of the child. 50 The Committee noted that the government is ‘an upper guardian of children’, requiring it to take proactive measures to address violations of the rights of Nubian children. 51 Based on the above, the Committee held that an exemption from the exhaustion of local remedies is applicable in the *Nubian* case. 52 The Committee was also of the view that the communication has been brought within reasonable time since a sufficient period of time had lapsed without any prospect of success in relation to local remedies. 53

Like the African Commission, the Committee adopted a flexible approach, taking into consideration the facts and circumstances of the case. This approach is in line with the approach of other international bodies, requiring the particular circumstances of individual cases to be taken into consideration in determining the question of local remedies. In this regard, the European Court of Human Rights has, for instance, emphasised that the requirement is not absolute and cannot be applied automatically, thus general context and personal circumstances have to be taken into account. 54

3.2. Registration at Birth and Nationality

These rights are guaranteed in Article 6 of the African Children’s Charter. The relevant subsections are: Article 6(2) – right to be registered immediately after birth; Article 6(3) – right to acquire a nationality, and Article 6(4) – obligation on States to ensure that children born within their territory and have not been granted nationality by another State, acquire nationality. The main purpose of Article 6, particularly Article 6(4), as pointed out by the Committee, is ‘to prevent and/or reduce statelessness’. 55 Accordingly, the African Children’s Committee laid fervent emphasis on the importance of State parties to ensure that the ‘first official acknowledgement of a child’s existence’ is registration at birth. In the absence of such registration, the Committee cautions, ‘a child . . . is in danger of being shut out of society-denied the right to an official identity, a recognised name and nationality’. 56

48) Ibid. (33).
49) Ibid.
50) Ibid. (29).
51) Ibid.
52) Ibid. (31) and (34).
53) Ibid. (34).
54) See *Isayeva v Russia*, Application 57950/00 92005) (153); and *Van Oosterwijck v Belgium*, Application 7654/76 (1980) (35).
55) *Nubian* case (note 1), (44).
56) Ibid. (38).
The right of a child to be registered at birth creates a legal tool that enables the child to access other fundamental rights, such as nationality related rights, socio-economic rights, and in some instances, minority rights.57 Accordingly, the Committee accentuated the significance of a child’s right to registration at birth and to nationality as a deep-rooted starting point to a child’s realisation and enjoyment of other socio-economic rights. Although it could be argued that birth registration alone cannot guarantee a child’s ‘full’ access and enjoyment of their socio-economic rights, it should be noted that its absence exposes a child to considerably greater peril of an array of human rights violations as explained above.58 Hence, the Committee’s assertion that there is a strong link between the right of a child to registration at birth and to a nationality.59 This link is also affirmed by the fact that both rights are provided for in the same Article in the African Children’s Charter as well as in the Convention on the Rights of the Child (CRC).60 In the Nubian case, births were not registered; and where registered, did not confer nationality as birth registration certificates explicitly stated that it was not proof of nationality.61 In both instances, the right to acquire nationality of children is limited thus reinforcing statelessness, as opposed to preventing and/or reducing it as required by international (human rights) law and standards. Accordingly, the Committee’s decision takes a firm stance in relation to rendering a child stateless, which it found to be contrary to a state’s obligation to promote and protect children’s right and to ensure that the best interest of the child is paramount. Since the state of affairs was partly because of various obstacles in the implementation of relevant policies and laws, the Committee clarified the State’s obligation, which is not limited to the enactment of laws and policies but extends to their effective implementation and addressing any obstacles or limitations to birth registration.62

The Committee adopted a purposive reading of the right to acquire nationality in Article 6 of the African Children’s Charter, which also takes into consideration the best interest of the child principle, holding that the right implies a right to a nationality beginning from birth.63 Accordingly, the Committee held that the practice of allowing children to reach the age of 18 before applying for nationality was not in line with the spirit and purpose of Article 6 of the children’s Charter

61) Nubian case (note 1) (40), (41) and (43).
62) Ibid. (40).
63) Nubian case (note 1) (42).
and fails to promote the best interest of the child. The legitimate expectation that Nubian children would acquire a nationality when they turn eighteen was further shrouded in uncertainty as Nubian children did not have identity cards that are necessary to proof nationality.

The Committee found the discretion of States in relation to setting the standards or rules for acquisition of nationality to be limited by international human rights law and standards. It thus saw the African Children's Charter, customary international law and general principles of law protecting individuals against state actions that are arbitrary, as standards that limit this discretion. In the view of the Committee, the obligations on States to ensure 'equal protection and to prevent, avoid, and reduce statelessness', limits their discretion in relation to setting the rules that govern acquisition of nationality. In exercising this discretion, the Kenyan government limited the acquisition of nationality through four ways – 'birth, descent, registration, and naturalisation' – which the Committee found to be 'fairly restrictive'. Despite this, children of Nubian descent were still left stateless. The Committee therefore reiterated the Kenyan government's obligation to ensure that these children acquire nationality, as the intent of Article 6(4) of the African Children's Charter is that a child born within the territory of a State should be allowed to acquire nationality where another State has not granted that child nationality.

The Committee further emphasised that the obligation under Article 6(4) is not one of conduct but of result. It should be noted that obligations of conduct, on the one hand, require States to take or refrain from taking certain legislative, executive, judicial or other measures. Obligations of result, on the other hand, require a State to achieve a specified result or target to satisfy a substantive standard. The African Children's Committee's holding therefore implies that the acquisition of nationality should be the outcome. The Committee also found provisions protecting children's rights in the 2010 Constitution of the Republic of Kenya to be insufficient to prevent statelessness, particularly because it fails to address the question of 'children born in Kenya of stateless parent(s) or who would otherwise be stateless, to acquire nationality by birth'.
Based on the aforementioned, the Committee found a violation of Article 6(2), (3) and (4). The joint interpretation and enforcement of a child’s right to registration at birth and to a nationality has the great potential to not only drastically shape a child’s future life but to also protect it and ensure the child’s enjoyment of other rights. The decision of the Committee reinforces the view of other human rights bodies. The United Nations Committee on the Rights of the Child (CRC Committee), for instance, has recurrently recommended that States should take all necessary measures to ensure that children are registered at birth; and has raised concern about non-registration of certain categories of persons.73

3.3. Discrimination

The acceptable benchmark of a democratic and just society can only be ascertained when a society or State pulls out all the stops in ‘protecting and guaranteeing basic rights to all its citizens, regardless of gender, caste, creed or religious affiliation’.74 The human rights principle of non-discrimination can easily be conceived as a cord that runs through the African Children’s Charter. This principle is at the very core of every provision of children’s rights. Article 3 of the Charter provides that every child is entitled to the enjoyment of the rights and freedoms enshrined in it, irrespective of his/her parents or legal guardians’ condition and/or situation. It was alleged in the Nubian case that children of Nubian decent are treated differently from other children in Kenya without any reasonable justification.75 This is because they are ‘expected to go through a lengthy and arduous process of vetting (including [amongst others] requiring them to demonstrate the nationality of their grandparents, as well as the need to seek and gain the approval of Nubian elders and governmental officials, etc.).’76 In this regard, the African Children’s Committee found a violation of children’s right to non-discrimination and the failure of the Kenyan government to meet the minimum conduct expected of State parties to the African Children’s Charter in terms of Article 3. The Committee held that the inability of Kenyan authorities and the stringent laws in Kenya that prohibit the recognition of children of Nubian decent as Kenyans, and consequently rendering them stateless, is discriminatory and violates the principle of equal treatment.77

The Committee confirmed the character of racial and ethnic discrimination, as jus cogens norms,78 implying that States cannot derogate from them. Furthermore,

75) Nubian case (note 1) (55).
76) Ibid.
77) Ibid. (56) and (57).
78) Ibid. (56).
since the facts in the case indicated a *prima facie* violation of the prohibition of discrimination, the question of whether the discrimination was fair or justifiable arises. There was a challenge in this case in relation to considering the question – the government of Kenya failed to respond to the communication. However, the Committee went ahead to consider the question, finding the discrimination to be unfair.\(^{79}\) The Committee relied on jurisprudence from the Inter-American Court of Human Rights, which dealt with a similar case, finding a policy that made children stateless to be racially discriminatory.\(^{80}\) The African Children’s Committee thus found the practice applied to Nubian children as not only amounting to unfair discrimination but also constituting ‘an affront to their dignity and best interest’.\(^{81}\) The Committee, drawing from the African Commission’s jurisprudence, employing a proportionality analysis in relation to assessing the justifiability of a discriminatory practice, held that the practice in the Nubian case cannot be seen to be proportional with a legitimate State interest or absolutely necessary to meet such an interest.\(^{82}\) The Committee also grounded its position on the fact that the State’s obligation requires it to prevent statelessness and not to perpetuate it.\(^{83}\)

It should be noted that discrimination is one of the problems that negatively affects the right of a child to acquire a nationality – this is not only limited to discrimination directed at the child but also discrimination direct at the child’s parents could limit the child’s right to acquire a nationality.\(^{84}\) Also, based on the principle of interdependence and indivisibility of rights, discrimination results in violation of other rights; a position that the Committee also underscores in its decision.\(^{85}\)

### 3.4. Health and Health Services

Health is seen as a ‘fundamental human right indispensable for the exercise of other human rights’.\(^{86}\) The crux of the *Nubian* case did not include children’s right to health and health services, provided for in Article 14 of the African Children’s Charter. However, the complainants creatively argued, and the African Children’s Committee considered, this right as a consequential violation of the denial of the right to nationality and denial of Kenyan identity document. The specific subsections of Article 14 were: Article 14(2)(b) – the obligation of States parties to ensure that children have the necessary medical assistance and health care, particularly

\(^{79}\) *Ibid.*

\(^{80}\) *Ibid.*

\(^{81}\) *Ibid.* (57).

\(^{82}\) *Ibid.*

\(^{83}\) *Ibid.*

\(^{84}\) Doek (note 73) 27.

\(^{85}\) *Nubian* case (note 1) (58).

primary health care; and Article 14(2)(c) – the obligations of State parties to ensure that children have adequate nutrition and safe drinking water. The Committee also considered Article 14(2)(g), which places a duty on States parties ‘to integrate basic health service programmes in national development plans’.

The Committee began by elaborating on what the right of a child to the highest attainable standard of health care entailed. It does this by pointing out what would be inconsistent with this right – ‘[m]inimal access to health facilities, a lower level of contact with health promoting measures and medical assistance, and a lack of provision of primary and therapeutic health resources and programmes’.87 This right therefore requires a State to go beyond ensuring that children are healthy, to ensuring adequate health care services and facilities as well as ensuring that other rights such as food and water necessary for the enjoyment of the right to health care are guaranteed. In the Nubian case, the Committee found that the children of Nubian descent ‘had less access to health care services’, compared to other children in Kenya.88 The Committee therefore found de facto inequality in Nubian children’s ‘access to available health care resources’.89 Nubian communities were provided with fewer health care facilities and the share of available resources provided to them was found to be disproportionately lower.90 The Committee attributed this inequality to the lack of nationality.91 Accordingly, the Committee found a violation of Article 14.

Though the Committee did not refer to the best interest of the child principle in relation to Article 14, it should be noted, as pointed out by the Committee on Economic, Social and Cultural Rights, that ‘all policies and programmes aimed at guaranteeing the right to health of children . . . their best interests shall be a primary consideration’.92

3.5. Education

In the same vein as the right to health and health services, the African Children’s Committee also found a violation of Nubian children’s right to education without it forming the crux of the communication. This right is guaranteed in Article 11 of the African Children’s Charter. The focus of the Committee was specifically on Article 11(3), on Kenya’s obligation to take all appropriate measures to achieve the full realisation of this right, particularly the provision of free and compulsory primary education contained in Article 11(3)(a). The Committee noted that

87) Ibid. (59).
88) Ibid. (61).
89) Ibid. (62).
90) Ibid.
91) Ibid.
92) Committee on Economic, Social and Cultural Rights (note 86) para. 24.
Article 11(3)(a) requires the provision of ‘schools, qualified teachers, equipment’ amongst others. Failure to do this amounts to a violation of the right.

In the present case, the Committee found *de facto* inequality in access to educational services and resources, on the basis that *Nubian* children had ‘less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not comprised of children of Nubian descent’. Similar to the scanty health facilities and resources provided by the government of Kenya in communities where children of Nubian decent lived, these children also had ‘fewer schools’ and ‘disproportionately lower share of available resources’. The Committee therefore held that the right to education of children of Nubian decent ‘has not been effectively recognised and adequately provided for, even in the context of the resources available for the fulfilment of this right’.

### 3.6. Responsibilities of Children

The Committee also delved into the duties of children, one of the ‘African’ or unique features of the African Children’s Charter. The Committee’s analysis of the responsibilities of children is however quite scanty. Referring to Article 31 of the African Children’s Charter, which deals with the responsibilities of a child, the Committee held that ‘[c]hildren of Nubian descent who have been born in Kenya are subject to the requirement of serving their national community by placing their physical and intellectual abilities at the service of the nation, as well as preserving and strengthening social and national solidarity and the independence and integrity of his[/her] country’. It should be noted that Article 31 subjects the duties to age, ability and other limitations in the African Children’s Charter. The Committee went on to hold that though the fulfilment of these
duties is not contingent upon the recognition of their status as nationals and their identity as children of Kenyans, ‘the fulfilment of Article 31 responsibilities highlights the reciprocal nature of rights and responsibilities, which reciprocity is not fulfilled when Article 6 rights are not respected by the State concerned’.100

It should be noted that despite the inclusion of responsibilities of children, this is difficult to enforce since human rights complaints mechanisms do not allow for cases to be brought against individuals. This is because of the recognition of States as having enforceable obligations in various human rights treaties.

3.7. The Recommendations

In its recommendations, the African Children’s Committee appealed to the Kenyan government to: take all necessary measures to ensure that ‘all children of Nubian decent acquire a Kenyan nationality and the proof of such a nationality at birth’;101 ‘implement its birth registration system in a non-discriminatory manner’ and ‘ensure that children of Nubian decent are registered immediately after birth’;102 in consultation with the affected communities, ‘adopt a short term, medium term and long term plan . . . to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education’.103 The Committee does not, however, elaborate on how the consultation is to be carried out. Notwithstanding this, the Committee thus follows the current trend attaching importance to participative decision-making in the fulfilment of rights, particularly the participation of beneficiaries in the planning and implementation of measures that affect them. Furthermore, the Committee urged the Kenyan government to ‘report on the implementation of these recommendations within six months from the date of notification of this decision’.104 The benefit of a reporting obligation is to enable monitoring of enforcement of the decision. However, implementation is still largely dependent on political will of the Kenyan government. And considering its failure to make any submissions in relation to the communication, there are doubts as to the extent of implementation of the Committee’s recommendations. Accordingly, the CERD Committee has called upon the Kenyan government to ‘implement the decision of the African Committee of Experts on the Rights and Welfare of the Child in respect of the right of Nubian children to acquire national identity papers’.105

100) Ibid.
101) Ibid. (69(1), (2)).
102) Ibid. (69(3)).
103) Ibid. (69(4)).
104) Ibid. (69(5)).
4. Concluding Remarks

Generally, basic human rights should be available to every human being irrespective of their age, caste, sex and gender. Protecting the rights of children is quite relevant in the African context because it is seen as ‘an investment in the future’ and ‘an imperative of the present’, considering that a huge amount of Africa’s population comprises of children.\(^{106}\) The decision of the African Children’s Committee reinforces the notion that the rights of ‘all’ must be protected, and particularly, the right of children must be protected, irrespective of their race or ethnicity. The decision also reiterates the Committee’s elevation of the best interest of the child principle to a general/cross-cutting principle.

It is important to note key elements in this decision that have made the case revolutionary. The reasoning of the Committee appears to have ensued on the foundation of the recognition that there is a genuine threat of children not being able, first as children and at a later stage of their lives, to enjoy the fullness of life as human beings. This limitation is predominantly based on States stereotyping and discriminating against a particular community of people. Clearly, in the Committee’s view, such threats are not to be tolerated. Accordingly, fair discrimination requirements will, in the Committee’s view, only suffice as justifiable against the children of Nubian decent where there is sincere, convincing and indisputable evidence indicating with certainty that granting them Kenyan nationality will be incompatible with the best interest of the child principle enshrined in the African Children’s Charter and founded on legitimate State interest. Through its decision, the Committee has elucidated on the provisions of Article 6 of the African Children’s Charter. It has in this regard introduced into African child law in general and Kenyan law in particular, a burden of proof that would arguably be difficult to meet by State parties to the African Children’s Charter. Particularly, State parties that refuse to grant nationality to any child (especially those born within its territory), who could be stateless if such nationality is not granted. As demonstrated throughout the decision, the main focus of the Committee’s thinking is that primacy must be given to the goal of protecting children from unfairness and stereotyping and ensuring that their fundamental rights are judged on their merits. In the context of Kenya specifically, the decision has the potential of resulting in a revision of its Citizenship Act in order to grant citizenship to individuals that are born to stateless parents in Kenya, of course subject to the government’s willingness to implement the decision. This impact could also stretch to other States parties to the African Children’s Charter that have similar laws.

Furthermore, though the decision is laudable for adding value to the basic rights of children, particularly their right to registration at birth and to a nationality, it is not without blemish. For instance, while the Committee refers to the

\(^{106}\) Viljoen (note 45) 260.
responsibilities of children, it’s consideration of this is very scanty and lacks a proper substantive analysis. Also, while the recommendations are generally clear and targeted, some are quite open ended. It is problematic that the Committee fails to expound on the kind of consultation that is envisaged, so as to provide some guidance to the State and claimants in terms of the consultation. The inclusion of a follow-up mechanism (the reporting obligation placed on the Kenyan government in relation to implementation of the recommendations and appointing a Committee member to follow up on implementation) is crucial to ensure effective implementation, as it will provide the Committee with an opportunity to become aware of and address problems encountered by the State when implementing the recommendations.

An ensuing question is – what happens if the Kenyan government does not respond within six months or fails to comply with the decision? Will the Committee forward the case to the African Court on Human and Peoples’ Rights (African Court)? This is a possible route if one considers the African Commission's position in this regard. In the case of the African Commission, where there is non-compliance with its decision, the Commission has the option of bringing the case to the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union\textsuperscript{107} or refer the case to the African Court.\textsuperscript{108}

\textsuperscript{107} Rules of Procedure of the African Commission on Human and Peoples’ Rights (2010), Rule 112(8).

\textsuperscript{108} Ibid., Rule 118(2).